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**WHEN:** Tuesday, September 17, 2013  
9 a.m.-12:30 p.m.

**WHERE:** Office of the Federal Register  
Conference Room, Suite 700  
800 North Capitol Street, NW.  
Washington, DC 20002

**RESERVATIONS:** (202) 741-6008



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Federal Register

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## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

#### 7 CFR Part 319

[Docket No. APHIS–2011–0060]

RIN 0579–AD59

#### Importation of Fresh Citrus Fruit From Uruguay, Including *Citrus* Hybrids and *Fortunella* spp., Into the Continental United States

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

**ACTION:** Final rule.

**SUMMARY:** We are amending the fruits and vegetables regulations to allow the importation of several varieties of fresh citrus fruit, as well as *Citrus* hybrids and the *Citrus*-related genus *Fortunella*, from Uruguay into the continental United States. As a condition of entry, the fruit will have to be produced in accordance with a systems approach that includes requirements for importation in commercial consignments, pest monitoring and pest control practices, grove sanitation and packinghouse procedures designed to exclude the quarantine pests, and treatment. The fruit also will have to be accompanied by a phytosanitary certificate issued by the national plant protection organization of Uruguay with an additional declaration confirming that the fruit is free from all pests of quarantine concern and has been produced in accordance with the systems approach. These actions will allow for the importation of fresh citrus fruit, including *Citrus* hybrids and the *Citrus*-related genus *Fortunella*, from Uruguay while continuing to protect the United States against the introduction of plant pests.

**DATES:** *Effective Date:* August 9, 2013.

**FOR FURTHER INFORMATION CONTACT:** Ms. Meredith C. Jones, Senior Regulatory Coordination Specialist, Regulatory Coordination and Compliance, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737; (301) 851–2289.

#### SUPPLEMENTARY INFORMATION:

##### Background

The regulations in “Subpart–Fruits and Vegetables” (7 CFR 319.56–1 through 319.56–58, referred to below as the regulations) prohibit or restrict the importation of fruits and vegetables into the United States from certain parts of the world to prevent the introduction and dissemination of plant pests that are new to or not widely distributed within the United States.

On February 6, 2013, we published in the **Federal Register** (78 FR 8435–8441, Docket No. APHIS–2011–0060) a proposal<sup>1</sup> to amend the regulations concerning the importation of fruits and vegetables to allow the importation of several species of fresh *Citrus* and *Fortunella* fruit<sup>2</sup> (“citrus fruit”) from Uruguay into the continental United States. We also prepared a pest risk assessment (PRA)<sup>3</sup> that evaluated the risks associated with the importation of these species of fresh citrus fruit from Uruguay into the continental United States and identified six pests of quarantine significance in Uruguay that could be introduced into the United States through the importation of citrus fruit. These included two fruit flies, *Anastrepha fraterculus* (South American fruit fly) and *Ceratitis capitata* (Mediterranean fruit fly, or Medfly); two moths, *Cryptoblabes gnidiella* (the honeydew moth) and

<sup>1</sup> To view the proposed rule, supporting and related documents, including the economic analysis, and comments we received, go to <http://www.regulations.gov/#!docketDetail;D=APHIS-2011-0060-0001>.

<sup>2</sup> Included are sweet oranges (*Citrus sinensis* (L.) Osbeck), lemons (*C. limon* (L.) Burm. f.), four species of mandarins (*C. reticulata* Blanco, *C. clementina* Hort. ex Tanaka, *C. deliciosa* Ten., and *C. unshiu* Marcow, *Citrus* hybrids), and two species of the *Citrus*-related genus *Fortunella* (*F. japonica* Thunb. Swingle and *F. margarita* (Lour.) Swingle).

<sup>3</sup> “Importation of Fresh Citrus Fruit, including Sweet Orange (*Citrus sinensis* (L.) Osbeck), lemons (*C. limon* (L.) Burm. f.), four species of mandarins (*C. reticulata* Blanco, *C. clementina* Hort. ex Tanaka, *C. deliciosa* Ten., and *C. unshiu* Marcow, *Citrus* hybrids, and two species of the *Citrus*-related genus *Fortunella* (*F. japonica* Thunb. Swingle and *F. margarita* (Lour.) Swingle), concerning the importation of fresh citrus from Uruguay into the Continental United States” (Dec. 16, 2012). To view this document, see footnote 1.

*Gymnandrosoma aurantianum* (citrus fruit borer); one fungus (*Elsinoë australis*, causal agent of sweet orange scab, or SOS); and a pathogen (*Xanthomonas citri* subsp. *citri*, or Xcc, causal agent of citrus canker).

In order to provide an appropriate level of phytosanitary protection against the pests of quarantine concern associated with the importation of fresh citrus fruit from Uruguay into the continental United States, we proposed requirements in a risk management document (RMD) for fresh citrus fruit from Uruguay to be produced in accordance with a systems approach that included the following requirements: Fruit must be imported only in commercial consignments; the Uruguayan national plant protection organization (NPPO) must provide a workplan to the Animal and Plant Health Inspection Service (APHIS) that details the activities that the Uruguayan NPPO will, subject to APHIS’ approval of the workplan, carry out to meet the proposed requirements; pest monitoring and control practices must be conducted; grove sanitation and packinghouse procedures must be designed to exclude quarantine pests; and the fruit must be treated in accordance with 7 CFR part 305 and the Plant Protection and Quarantine (PPQ) Treatment Manual.<sup>4</sup> We also proposed to require consignments of citrus fruit from Uruguay to be accompanied by a phytosanitary certificate with an additional declaration stating that the fruit in the consignment is free of all pests of quarantine concern and has been produced in accordance with the requirements of the systems approach.

We solicited comments on our proposal for 60 days ending April 8, 2013. We received 55 comments by that date. They were from U.S. and Uruguayan fruit growers, packers, shippers, and importers/exporters; scientific, trade, and economic development organizations; two U.S. Senators; a State department of agriculture; an association of State departments of agriculture; a Uruguayan school of agronomy; U.S. port storage, drayage, and general logistics providers; municipal governments, and members of the public. Forty-three commenters supported the action we proposed. The

<sup>4</sup> [http://www.aphis.usda.gov/import\\_export/plants/manuals/ports/downloads/treatment.pdf](http://www.aphis.usda.gov/import_export/plants/manuals/ports/downloads/treatment.pdf).

remaining comments are discussed below by topic.

#### General Comments

Two commenters asked why APHIS is assuming the risk of introducing plant pests from Uruguay when sufficient fresh citrus fruit is already available in the United States.

Under the Plant Protection Act (7 U.S.C. 7701 *et seq.*), we have the authority to prohibit or restrict the importation of plants and plant products only when necessary to prevent the introduction into or dissemination of plant pests or noxious weeds within the United States. We have determined that fresh citrus fruit from Uruguay may be safely imported into the continental United States under the conditions we are adding to the regulations.

One commenter stated that the rule provided no specific information about how the proposed systems approach would be implemented and therefore opposed importation of fresh citrus fruit from Uruguay until its effectiveness could be validated. The commenter recommended that, in the future, APHIS engage key stakeholders in similar rulemakings much earlier in the process and provide them with more information.

We are making no changes based on the comment. The systems approach requirements we proposed include practices that have effectively mitigated the risk of identical and similar citrus pests in other countries. We provided several occasions for stakeholders to provide input into this rulemaking, including sharing the draft pest risk assessment and holding teleconference meetings with key industry stakeholders in September 2010 and November 2011.

Several commenters stated that shipments of fresh citrus fruit from Uruguay could pose a pest risk to Hawaii if imported into the continental United States and subsequently shipped from the mainland into Hawaii.

We are making no changes in response to this comment. We proposed that fresh citrus fruit from Uruguay would only be eligible for importation into the continental United States, which excludes Hawaii. Our permitting process will allow us to effectively implement the distribution limitation, as it currently does for many other commodities that are not allowed to be imported into Hawaii.

#### Comments on the PRA

One commenter stated that the PRA prepared for this rule dismisses *Guignardia citricarpa*, the causal agent of citrus black spot (CBS), as a disease

of concern. The commenter also stated that a 2010 risk analysis, in which APHIS assessed citrus fruit as a pathway for the introduction of CBS,<sup>5</sup> provides incomplete knowledge of how the disease develops and spreads. As support, the commenter cited detections of CBS in Florida beyond the original 2010 occurrence and the apparent ineffectiveness of mitigation efforts to prevent the disease's spread. The commenter stated that the latency of lesions on fruit moving from CBS-contaminated areas in Florida to processing facilities could be one reason for its continued spread, and concluded from this that applying the mitigations for fresh citrus fruit from Florida to fresh citrus fruit imported from Uruguay may not be adequate.

We noted in the proposed rule that a previous version of the PRA listed CBS as a quarantine pathogen present in Uruguay and likely to follow the pathway, but that we subsequently removed this pathogen from the list because, as we determined in the 2010 peer-reviewed risk analysis, fresh citrus fruit is not epidemiologically significant as a pathway for the introduction of CBS. Since the publication of the 2010 risk analysis, we have found no research that challenges that conclusion.

The risk analysis identified the importation and movement of propagative material and shipments containing leaves and plant debris from infected areas as the most likely means by which CBS is transmitted. However, because APHIS regulations restrict the importation and domestic movement of propagative material and leaves, it is unlikely that CBS would enter the United States via these articles in commercial shipments.

The risk analysis also identified fruit as a possible means by which CBS could be spread, although for successful transmission of CBS from fruit with lesions to susceptible hosts, several events must occur: Infected fruit must arrive in an area with hosts available and conducive for infection and disease development; the host needs to be in a susceptible physiological stage for infection to occur; spores of the causal organism must be produced on the fruit; fruit with lesions containing the causal organism must be released from the lesions in a stage that can cause infection leading to disease; water

contaminated with pycnidiospores must be brought into contact with susceptible host tissue in a susceptible stage for infection; and finally, specific weather conditions conducive for infection to occur must coincide with these events and persist for a sufficient period of time. The risk assessment determined the overall likelihood to be low that the pathogen would find a suitable host with susceptible tissue and incite disease even if infected fruit were to arrive in an area with available hosts and climatic conditions were favorable for disease development.

With regard to the commenter's concern over detections of CBS beyond where it originally occurred in Florida, we have not determined the cause of these occurrences. They could be the result of the fungus spreading via wind or plant debris from the original infection site. They could also have escaped detection while delimiting the first infection, or from new infections arising independently of the first infection. Regardless of the cause of these infections, results from targeted CBS surveys and multi-pest surveys conducted by APHIS and the State of Florida as part of the Citrus Health Response Program indicate that current mitigations have slowed the spread of CBS in the affected areas. We maintain that the evidence and conclusions of the 2010 risk analysis with respect to transmission of CBS via the movement of fruit from infected areas are not invalidated by the occurrence of CBS in Florida, nor does its occurrence there change our understanding or management of CBS development or spread. For these reasons, we believe that it is extremely unlikely that the cause of CBS spread in Florida could be fruit moving from CBS-affected areas in that State to processing facilities.

The same commenter also challenged our finding in the 2010 risk analysis that conditions required for conidia to survive on post-harvest fruit and introduce CBS into domestic growing areas do not normally exist in California. The commenter stated that several coastal production areas in California maintain viable climates for the introduction and spread of CBS and noted that the North Carolina State University-APHIS Plant Pest Forecast System (NAPFFAST) indicates that, over a 10-year period, enough days had appropriate climatic conditions to allow CBS to be introduced. The commenter specifically questioned the statement in the CBS risk analysis that low rainfall in the western United States is not conducive to CBS development, noting that summer thunderstorms in southern California can provide an ideal

<sup>5</sup> Risk assessment of *Citrus* spp. fruit as a pathway for the introduction of *Guignardia citricarpa* Kiely, the organism that causes Citrus Black Spot disease. United States Department of Agriculture (USDA), Animal and Plant Health Inspection Service (APHIS), Plant Protection and Quarantine (PPQ), Center for Plant Health Science and Technology (CPHST), December 2010.

environment for a short period of time for CBS to occur and become established there. The commenter added that if CBS were to be introduced into citrus production areas in the United States, it could not be effectively managed because the Environmental Protection Agency prohibits use of the necessary fungicides.

Based on our analysis of data from NAPPFAST, we concluded in the CBS risk analysis that, unlike Florida, California has a climate generally unsuitable for CBS disease development. Moreover, ideal climatic conditions are only one of many factors necessary for CBS to be transmitted via the movement or importation of commercial shipments of fresh fruit. As we have noted above, several specific biological, environmental, and physiological conditions have to occur in conjunction with infected fruit coming into direct proximity to a susceptible host, a confluence of events unlikely to occur simultaneously, particularly in California.

Finally, the same commenter stated that the role of conidia in survival and spread of CBS is poorly understood and that if asexual propagules such as conidia are being produced at high numbers, different environmental conditions may play a critical role in the survival of the organism. The commenter stated that these propagules should not be ignored as part of the disease cycle and that the CBS risk analysis did not consider the unknown.

We disagree with the commenter. The disease lifecycle of CBS is well studied, and the literature informs our understanding of both the sexual and asexual forms of this fungus and the roles they play in disease spread, as described in the 2010 risk analysis. The number of conidia or asexual spores produced is mediated by the environment and host tissue, and the amount of inoculum associated with the fruit does not change our understanding of how the inoculum spreads from fruit imported for consumption to the natural environment and establishes itself. As we have noted above, disease occurrence requires several biological, environmental, and physiological conditions to occur at the precise time that an infected citrus fruit is placed in direct proximity to a susceptible host.

We conclude that the combination of conditions necessary for introduction and spread of *G. citricarpa* via the regulated pathway of commercially produced fruit imported from Uruguay is unlikely to occur. For this reason, we conclude that citrus fruit is not epidemiologically significant as a

pathway for the introduction of *G. citricarpa*.

#### *Grove Monitoring and Pest Control*

One commenter stated that the proposed systems approach requirement to monitor traps at 2-week intervals for *A. fraterculus* and *C. capitata* is inadequate. The commenter added that this interval is inconsistent with other systems approach methodologies required for these or similar pests.

We disagree with the commenter that the trap monitoring intervals indicated in the proposed systems approach are inadequate or inconsistent with those used in other systems approaches to mitigate *A. fraterculus*, *C. capitata*, and similar pests. In accordance with North American Plant Protection Organization (NAPPO) standards,<sup>6</sup> trap servicing and monitoring intervals are either 1 week or 2 weeks depending on the bait and type of trap used. Traps baited for *C. capitata* are normally monitored at 2-week intervals. Accordingly, we noted in the proposed rule that APHIS-approved fruit fly traps baited with APHIS-approved plugs would have to be used and serviced at least once every 2 weeks. If circumstances changed and more frequent monitoring were necessary, revised monitoring arrangements could be agreed to between APHIS and the NPPO of Uruguay and added to the bilateral workplan.

Two commenters stated that the use of a minimum of two traps per square mile within citrus production areas in Uruguay is inadequate for detecting localized fruit fly infestations. Another commenter stated that two traps per square kilometer is inadequate and jeopardizes the integrity of the systems approach.

We consider the trap density specified in the proposed systems approach to be adequate for pest detection. In the proposed rule, we stated that the systems approach would actually require at least two traps per square kilometer, not per square mile as stated by two commenters. We note that one square mile is equivalent to approximately 2.5 square kilometers, so five traps per square mile would be roughly equivalent to two traps per square kilometer. This arrangement in the systems approach is consistent with the trap density of five Jackson traps per square mile recommended in the APHIS

<sup>6</sup> NAPPO Regional Standards for Phytosanitary Measures, RSPM 17: Guidelines for the Establishment, Maintenance and Verification of Fruit Fly Pest Free Areas in North America (October 18, 2010): <http://www.nappo.org/en/data/files/download/PDF/RSPM17-Rev05-10-10-e.pdf>.

Mediterranean Fruit Fly Action Plan.<sup>7</sup> Moreover, the International Atomic Energy Agency fruit fly trapping manual,<sup>8</sup> a widely used international reference, specifies two to four traps per square kilometer, and the NAPPO standard on fruit fly trapping indicates that three traps per square mile (equivalent to fewer than two traps per kilometer) is adequate in commercial fruit production areas. If circumstances changed so that adjustments to trap density were necessary, such adjustments could be agreed to between APHIS and the NPPO of Uruguay and added to the bilateral workplan.

#### *Orchard Sanitation*

A commenter stated that the proposed requirements for disposal of plant debris and fallen fruit in Uruguayan groves are not as stringent as our domestic requirements. To support this statement, the commenter referred to requirements in Federal Order No. DA-2012-30 that include specific requirements for disposal of bagged plant debris from an area in Texas quarantined for citrus greening.<sup>9</sup>

The requirements in the Federal Order cited by the commenter pertain to a domestic quarantine intended to control an outbreak of citrus greening. Disposal of plant debris in an area where citrus greening is present can spread the disease if not done properly. The systems approach we proposed for importation of fresh citrus fruit from groves in Uruguay does not require identical sanitation measures for plant debris as those indicated in the Federal Order because citrus greening does not occur in Uruguay.

The systems approach for citrus fruit from Uruguay does require that places of production in Uruguay be kept free of fallen fruit and plant debris, in order to reduce potential pest pressure in the orchards.

#### *Packinghouse Procedures*

A commenter stated that the fruit handling requirements regarding crop diseases in the proposed systems approach are not as stringent as our domestic requirements. As an example, the commenter stated that safeguarding during transportation to the packinghouse in Uruguay only requires the fruit to be packed in insect-proof

<sup>7</sup> [http://www.aphis.usda.gov/import\\_export/plants/manuals/domestic/downloads/medfly\\_action\\_plan.pdf](http://www.aphis.usda.gov/import_export/plants/manuals/domestic/downloads/medfly_action_plan.pdf).

<sup>8</sup> Trapping Guidelines for Area-Wide Fruit Fly Programmes (IAEA, Vienna, 2003): [http://www-pub.iaea.org/MTCD/publications/PDF/TG-FFP\\_web.pdf](http://www-pub.iaea.org/MTCD/publications/PDF/TG-FFP_web.pdf).

<sup>9</sup> Issued August 9, 2012: [http://nationalplantboard.org/docs/spro/spro\\_citrus\\_greening\\_2012\\_08\\_09.pdf](http://nationalplantboard.org/docs/spro/spro_citrus_greening_2012_08_09.pdf).

cartons or containers, or covered with insect proof mesh or a plastic tarpaulin, while some States have developed detailed standards for cargo areas within transport vehicles.

We are making no changes based on this comment. While the safeguarding requirements noted in the comment are actually intended to protect citrus fruit against fruit flies and not crop diseases, the safeguarding requirements proposed for citrus fruit grown in Uruguay are equivalent to those in the regulations for interstate movement of citrus from quarantined areas in the United States. They also include requirements that the fruit will have to be safeguarded by an insect-proof mesh, screen, or plastic tarpaulin while in transit from the production site to the packinghouse and while awaiting packing. Our domestic citrus disease quarantine programs do not require any post-harvest safeguarding enroute to the packinghouse.

One commenter stated that, with regard to the proposed packinghouse requirement for washing, brushing, and surface disinfection of the citrus fruit in accordance with 7 CFR part 305, we provide no indication of whether these mitigations will rid fruit of citrus greening.

We noted above that citrus greening does not occur in Uruguay; additionally, commercially shipped fruit free of leaves and other plant parts is not a pathway for the introduction of citrus greening.

#### *Port-of-Entry Inspection*

Three commenters stated that APHIS port-of-entry inspections are insufficient to detect infestations of fruit flies in fruits and vegetables from countries with inadequate detection protocols and recommended that citrus fruit from Uruguay not be granted entry until the proposed systems approach can be validated or adjusted to address the accidental or incidental introduction of fruit flies.

APHIS maintains adequate port-of-entry inspection capabilities as one of several mitigation measures to reduce the risk of introducing fruit flies and other plant pests into the United States. The mitigation measures in the systems approach for *A. fraterculus* and *C. capitata*, which include grove trapping, safeguarding of fruit while in transit and during packing, and treatment in accordance with 7 CFR part 305, have been shown to effectively reduce the risks presented by these pests on citrus fruit and other commodities from other countries.

With respect to detection protocols, beyond the measures required in the

systems approach, the NPPO of Uruguay continually surveys for quarantine pests of concern for importing countries through pre-harvest inspection of export fruit. These pre-harvest surveys are conducted on 100 percent of plants in all the places of production registered for export. We therefore consider the NPPO of Uruguay to have sufficient detection protocols, and we are confident that it will perform them in accordance with the systems approach produced by Uruguay and agreed to by APHIS.

#### *Economic Considerations*

One commenter asked how much it will cost to implement the systems approach measures and who will pay for them.

The costs for implementing the systems approach will be borne by citrus producers in Uruguay and the NPPO of Uruguay. Section 319.56–6 of the regulations sets forth provisions for establishing trust fund agreements with NPPOs to cover costs incurred by APHIS when APHIS personnel must be physically present in an exporting country or region to facilitate exports. Costs will depend on the services required. The systems approach may require APHIS personnel to monitor treatments if they are conducted in Uruguay. Port-of-entry inspections conducted by APHIS or U.S. Customs and Border Protection staff are typically supported by user fees.

Another commenter stated that APHIS has argued in previous import proposals that domestic production would be unaffected because the majority of domestic tonnage is harvested in the fall, winter, and spring months and would be unaffected by so-called “counter-seasonal” imports. The commenter stated that this argument is invalid due to the year-round marketing of citrus harvested domestically.

We made no mention of counter-seasonal effects in the initial economic analysis for this rule, or in the final economic analysis.

Uruguay did not provide APHIS with projections of the quantities of fresh citrus varieties it expects to export to the United States under this rule. Our basis for estimating quantities that may be exported is Uruguay’s recent history of exports to other countries, assuming that some percentage of those exports will be diverted to the newly opened U.S. market. In the longer term, there may also be an overall increase in Uruguay’s fresh citrus exports to all countries, including the United States, depending on costs and profitability.

Uruguay’s citrus exports are equivalent to a small fraction of U.S.

citrus production. Imports from Uruguay will compete against U.S. imports from other countries as well as domestic production. Most likely, there will be some relatively small net increase in the U.S. supply of fresh citrus varieties, as well as some displacement of the quantity of citrus imported from other countries and produced domestically. The economic analysis does consider possible changes in net supply; the potential impact of the rule on U.S. producers is described in greater detail in the economic analysis supporting the rule.

The same commenter disagreed with our statement in the economic analysis that “any product displacement that may occur because of the proposed rule would be largely borne by other foreign suppliers of fresh citrus.” The commenter stated that because foreign suppliers will not abandon their market share when Uruguayan citrus fruit is imported into the United States, citrus supply will exceed demand, prices will fall, and domestic producers will suffer greater economic losses due to higher production cost requirements.

We acknowledge that the statement in the economic analysis for the proposed rule may have overstated possible reductions in market share (product displacement) for current foreign suppliers of fresh citrus to the United States. U.S. producers may also lose some portion of their market shares. However, product displacement that may occur as a result of fresh citrus imports from Uruguay can be expected to be borne in proportion to domestic and foreign suppliers’ existing market shares because all suppliers, foreign and domestic, are price-takers. In addition, non-price factors may ultimately determine a consumer’s preference for foreign or domestically grown fresh citrus. We do not have information to determine whether foreign or domestic fruit is more likely to be displaced by imports from Uruguay, so we take the position that product displacement would be proportional to market share.

Product displacement, if any, will vary by citrus variety and will be moderated by expanding U.S. demand. During the same period, per capita consumption of fresh orange, mandarin, and lemon varieties increased by an average of 0.21 percent, 3.42 percent, and 5.25 percent, respectively. The entry of fresh citrus from a new source may displace citrus production in the United States, as well as fresh citrus imports from foreign sources like Mexico, Chile, Spain, and others. However, a sizeable displacement of fresh citrus from any source with an

existing market share is unlikely given the increase in domestic consumption.

The same commenter disagreed with our determination that adoption of the rule would not result in any significant economic effect on a substantial number of small entities.

We find it unlikely that the rule will have a significant economic impact on U.S. fresh citrus markets, given Uruguay's recent history of citrus production and exports. While Uruguay ranks in the top 20 to 25 of the world's exporters of fresh citrus, Uruguay accounted for 1 percent or less of fresh citrus exports by variety. Total citrus production in Uruguay in 2011 was 270,367 metric tons, which is less than 3 percent of U.S. production. Uruguay's total fresh orange and lemon exports in 2011 were 66,007 and 13,885 metric tons, respectively, which is less than 3.2 percent of U.S. production and 1 percent of total world exports of those same fresh varieties. Uruguay exported 37,542 metric tons of fresh mandarin varieties in 2011, which is approximately 8 percent of U.S. production and less than 1 percent of total world exports of fresh tangerine varieties. Only a fraction of Uruguay's fresh citrus exports are likely to be diverted from established markets to the United States, particularly in the near term, given the advantages of maintaining and expanding its existing market linkages. Given these considerations, we do not anticipate a significant economic impact associated with fresh citrus from Uruguay.

Therefore, for the reasons given in the proposed rule and in this document, we are adopting the proposed rule as a final rule, without change.

**Note:** In our February 2013 proposed rule, we proposed to add the conditions governing the importation of citrus from Uruguay as § 319.56–58. In this final rule, those conditions are added as § 319.56–59.

#### *Executive Order 12866 and Regulatory Flexibility Act*

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

In accordance with the Regulatory Flexibility Act, we have analyzed the potential economic effects of this action on small entities. The analysis is summarized below. Copies of the full analysis are available on the Regulations.gov Web site (see footnote 1 in this document for a link to Regulations.gov) or by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**.

APHIS responded to a request from the NPPO of Uruguay for USDA authorization to allow the importation of specified fresh citrus varieties into the continental United States. U.S. entities that may be impacted by imports of fresh citrus from Uruguay are producers and packers of fresh oranges, lemons, tangerines, and mandarin varieties. Fresh oranges (including Navel, Valencia, Temple and other varieties) are produced in California (87 percent), Florida (11 percent), and Texas (2 percent). Lemons are produced in California (97 percent) and Arizona (3 percent). Tangerines and mandarins (including tangelos and tangors) are produced in California (76 percent), Florida (23 percent), and Arizona (less than 1 percent). Louisiana commercially produces a variety of Satsuma that is mostly sold locally.

Impacts of this rule on U.S. entities will be dependent upon the quantity of fresh citrus imported from Uruguay and the substitutability of these fresh citrus varieties for U.S.-grown citrus varieties. Historically, Uruguay has produced less than 3 percent of total U.S. citrus production, including processed citrus. Uruguay's total fresh orange and lemon exports in 2011 were 66,007 and 13,885 metric tons, respectively, which is less than 3.2 percent of U.S. production of those same fresh varieties. Uruguay exported 37,542 metric tons of fresh mandarin varieties in 2011, which is approximately 8 percent of U.S. production of fresh tangerine varieties. We anticipate that exports directed to the U.S. domestic market would be a small fraction of Uruguay's total exports of these fresh citrus fruits based on availability and currently established export markets in Europe and Russia. Given the small quantity expected to be imported from Uruguay, it is very unlikely that there will be a significant impact on the U.S. markets for fresh oranges, lemons, tangerines and mandarin varieties. Given the sizable amounts of fresh lemons and mandarins, for example, imported by the United States and the fact that the time of year that citrus is produced in Uruguay is the same as that for current South American sources, we expect that any product displacement that may occur because of this rule will be largely borne by other foreign suppliers of fresh citrus.

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

#### *Executive Order 12988*

This final rule allows fresh citrus fruit to be imported into the continental United States from Uruguay. State and local laws and regulations regarding fresh citrus imported under this rule will be preempted while the fruit is in foreign commerce. Fresh fruits are generally imported for immediate distribution and sale to the consuming public, and remain in foreign commerce until sold to the ultimate consumer. The question of when foreign commerce ceases in other cases must be addressed on a case-by-case basis. No retroactive effect will be given to this rule, and this rule will not require administrative proceedings before parties may file suit in court challenging this rule.

#### *Paperwork Reduction Act*

In accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this final rule, which were filed under 0579–0401, have been submitted for approval to the Office of Management and Budget (OMB). When OMB notifies us of its decision, if approval is denied, we will publish a document in the **Federal Register** providing notice of what action we plan to take.

#### *E-Government Act Compliance*

The Animal and Plant Health Inspection Service is committed to compliance with the E-Government Act to promote the use of the Internet and other information technologies, to provide increased opportunities for citizen access to Government information and services, and for other purposes. For information pertinent to E-Government Act compliance related to this rule, please contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

#### **List of Subjects in 7 CFR Part 319**

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

Accordingly, we are amending 7 CFR part 319 as follows:

#### **PART 319—FOREIGN QUARANTINE NOTICES**

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

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

**Subpart—Citrus Fruit [Amended]**

■ 2. In Subpart—Citrus Fruit, in the note below the subpart heading, remove the words “fruit and vegetable quarantine No. 56 (§§ 319.56 to 319.56–8)” and add the words “Subpart—Fruits and Vegetables of this part” in their place.

■ 3. Section 319.28 is amended as follows:

■ a. By redesignating paragraphs (d) through (j) as paragraphs (e) through (k), respectively, and adding a new paragraph (d).

■ b. By revising newly redesignated paragraph (g).

The addition and revision read as follows:

**§ 319.28 Notice of quarantine.**

\* \* \* \* \*

(d) The prohibition does not apply to sweet oranges (*Citrus sinensis* (L.) Osbeck), lemons (*C. limon* (L.) Burm. f.), mandarins (*C. reticulata* Blanco, *C. clementina* Hort. ex Tanaka, *C. deliciosa* Ten., and *C. unshiu* Marcow), *Citrus* hybrids, *Fortunella japonica* (Thunb.) Swingle, and *F. margarita* (Lour.) Swingle, from Uruguay that meet the requirements of 7 CFR 319.56–59.

\* \* \* \* \*

(g) Importations allowed under paragraphs (b) through (e) of this section shall be subject to the permit and other requirements under the regulations in Subpart—Fruits and Vegetables of this part.

\* \* \* \* \*

■ 4. A new § 319.56–59 is added to read as follows:

**§ 319.56–59 Fresh citrus fruit from Uruguay.**

Sweet oranges (*Citrus sinensis* (L.) Osbeck), lemons (*C. limon* (L.) Burm. f.), mandarins (*C. reticulata* Blanco, *C. clementina* Hort. ex Tanaka, *C. deliciosa* Ten., and *C. unshiu* Marcow), *Citrus* hybrids, *Fortunella japonica* (Thunb.) Swingle, and *F. margarita* (Lour.) Swingle may be imported into the continental United States from Uruguay only under the conditions described in this section. These species are referred to collectively in this section as “citrus fruit.” These conditions are designed to prevent the introduction of the following quarantine pests: *Anastrepha fraterculus*, *Ceratitidis capitata*, *Cryptoblabes gnidiella*, *Elsinoë australis*, *Gymnandrosoma aurantianum*, and *Xanthomonas citri* subsp. *citri*.

(a) *Commercial consignments.* Citrus fruit from Uruguay may be imported in commercial consignments only.

(b) *General requirements.* (1) The national plant protection organization

(NPPO) of Uruguay must provide a bilateral workplan to APHIS that details the activities that the Uruguayan NPPO will, subject to APHIS’ approval of the workplan, carry out to meet the requirements of this section. APHIS will be directly involved with the Uruguayan NPPO in monitoring and auditing implementation of the systems approach.

(2) All places of production and packinghouses that participate in the export program must be registered with the Uruguayan NPPO.

(3) The fruit must be grown at places of production that meet the requirements of paragraphs (d) and (e) of this section.

(4) The fruit must be packed for export to the United States in a packinghouse that meets the requirements of paragraph (f) of this section. The place of production where the fruit was grown must remain identifiable when the fruit leaves the grove, at the packinghouse, and throughout the export process. Boxes containing fruit must be marked with the identity and origin of the fruit. Safeguarding in accordance with paragraph (f)(3) of this section must be maintained at all times during the movement of the fruit to the United States and must be intact upon arrival of the fruit in the United States.

(c) *Monitoring and oversight.* (1) The Uruguayan NPPO must visit and inspect registered places of production monthly, starting at least 30 days before harvest and continuing until the end of the shipping season, to verify that the growers are complying with the requirements of paragraphs (d) and (e) of this section.

(2) In addition to conducting fruit inspections at the packinghouses, the Uruguayan NPPO must monitor packinghouse operations to verify that the packinghouses are complying with the requirements of paragraph (f) of this section.

(3) If the Uruguayan NPPO finds that a place of production or packinghouse is not complying with the relevant requirements of this section, no fruit from the place of production or packinghouse will be eligible for export to the United States until APHIS and the Uruguayan NPPO conduct an investigation and appropriate remedial actions have been implemented.

(d) *Grove monitoring and pest control.* Trapping must be conducted in the places of production to demonstrate that the places of production have a low prevalence of *A. fraterculus* and *C. capitata*. If the prevalence rises above levels specified in the bilateral workplan, remedial measures must be

implemented. The Uruguayan NPPO must keep records of fruit fly detections for each trap and make the records available to APHIS upon request. The records must be maintained for at least 1 year.

(e) *Orchard sanitation.* Places of production must be maintained free of fallen fruit and plant debris. Fallen fruit may not be included in field containers of fruit brought to the packinghouse to be packed for export.

(f) *Packinghouse procedures.* (1) The packinghouse must be equipped with double self-closing doors at the entrance to the packinghouse and at the interior entrance to the area where fruit is packed.

(2) Any vents or openings (other than the double self-closing doors) must be covered with 1.6 mm or smaller screening in order to prevent the entry of pests into the packinghouse.

(3) Fruit must be packed within 24 hours of harvest in a pest-exclusionary packinghouse or stored in a degreening chamber in a pest-exclusionary packinghouse. The fruit must be safeguarded by an insect-proof screen or plastic tarpaulin while in transit to the packinghouse and while awaiting packing. Fruit must be packed in insect-proof cartons or containers, or covered with insect-proof mesh or a plastic tarpaulin, for transport to the United States. These safeguards must remain intact until the arrival of the fruit in the continental United States or the consignment will not be allowed to enter the United States.

(4) During the time the packinghouse is in use for exporting citrus fruit to the continental United States, the packinghouse may only accept fruit from registered places of production.

(5) Culling must be performed in the packinghouse to remove any symptomatic or damaged fruit. Fruit must be practically free of leaves, twigs, and other plant parts, except for stems that are less than 1 inch long and attached to the fruit.

(6) Fruit must be washed, brushed, surface disinfected in accordance with part 305 of this chapter, treated with an APHIS-approved fungicide in accordance with labeled instructions, and waxed.

(g) *Treatment.* (1) Citrus fruit other than lemons may be imported into the continental United States only if it is treated in accordance with part 305 of this chapter for *A. fraterculus* and *C. capitata*.

(2)(i) Lemons may be shipped without a treatment if harvested green and if the phytosanitary certificate accompanying the lemons contains an additional declaration stating that the lemons were

harvested green between May 15 and August 31.

(ii) If the lemons are harvested between September 1 and May 14, or if the fruit is harvested yellow, the lemons must be treated in accordance with part 305 of this chapter for *C. capitata*.

(h) *Phytosanitary certificate*. Each consignment of citrus fruit must be accompanied by a phytosanitary certificate of inspection issued by the Uruguayan NPPO stating that the fruit in the consignment is free of all pests of quarantine concern and has been produced in accordance with the requirements of the systems approach in 7 CFR 319.56–59.

(Approved by the Office of Management and Budget under control number 0579–0401)

Done in Washington, DC, this 28th day of June, 2013.

**Kevin Shea,**

*Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2013–16548 Filed 7–9–13; 8:45 am]

**BILLING CODE 3410–34–P**

## DEPARTMENT OF ENERGY

### 10 CFR Part 430

[Docket No. EERE–2013–BT–TP–0008]

RIN 1904–AC96

#### Energy Conservation Program for Consumer Products: Test Procedures for Residential Furnaces and Boilers

**AGENCY:** Office of Energy Efficiency and Renewable Energy, Department of Energy.

**ACTION:** Final rule.

**SUMMARY:** On February 4, 2013, the U.S. Department of Energy (DOE) issued a notice of proposed rulemaking (NPR) to amend its test procedure for residential furnaces and boilers, which serves as the basis for today's action. This final rule amends that test procedure by adopting new equations to facilitate calculation of the annual fuel utilization efficiency (AFUE) for certain classes of products when omitting specified heat-up and cool-down tests, as allowed under the test procedure if applicable criteria are met. The relevant industry test procedure, which is incorporated by reference in the current DOE test procedure, lacks equations necessary for the calculation of the heating seasonal efficiency (which contributes to the ultimate calculation of AFUE) of two-stage and modulating condensing furnaces or boilers when the option to omit the heat-up and cool-down tests is employed. This final rule

revises the DOE test procedure to rectify this omission by adopting additional equations for the calculation of the part-load efficiencies at the maximum input rate and reduced input rates for two-stage and modulating condensing furnaces and boilers when the manufacturer chooses to omit the heat-up and cool-down tests under the test procedure.

**DATES:** The effective date of this rule is August 9, 2013. The compliance date for use of the amended test procedure for purposes of compliance with energy conservation standards, as well as representations of energy efficiency or energy use, is January 6, 2014. Voluntary early compliance is permitted.

**ADDRESSES:** The docket for this rulemaking is available for review at [www.regulations.gov](http://www.regulations.gov), including **Federal Register** notices, public meeting attendee lists and transcripts, comments, and other supporting documents/materials. All documents in the docket are listed in the [www.regulations.gov](http://www.regulations.gov) index. However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure.

A link to the docket Web page can be found at: <http://www.regulations.gov/#docketDetail;D=EERE-2013-BT-TP-0008>. This Web page contains a link to the docket for this final rule on the [www.regulations.gov](http://www.regulations.gov) Web page contains simple instructions on how to access all documents, including public comments, in the docket.

For further information on how to review the docket, contact Ms. Brenda Edwards at (202) 586–2945 or by email: [Brenda.Edwards@ee.doe.gov](mailto:Brenda.Edwards@ee.doe.gov).

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#### I. Authority and Background

Title III, Part B<sup>1</sup> of the Energy Policy and Conservation Act of 1975 (“EPCA” or “the Act”), Public Law 94–163 (42 U.S.C. 6291–6309, as codified) set forth a variety of provisions designed to improve energy efficiency and established the Energy Conservation Program for Consumer Products Other Than Automobiles.<sup>2</sup> These include residential furnaces and boilers, the subject of today's rulemaking. (42 U.S.C. 6292(a)(5))<sup>3</sup>

Under EPCA, the energy conservation program consists essentially of four parts: (1) Testing; (2) labeling; (3) Federal energy conservation standards; and (4) certification and enforcement procedures. The testing requirements consist of test procedures that manufacturers of covered products must use as the basis for: (1) certifying to DOE that their products comply with the applicable energy conservation standards adopted pursuant to EPCA, and (2) making representations about the efficiency of those products. (42

<sup>1</sup> For editorial reasons, upon codification in the U.S. Code, Part B was redesignated Part A.

<sup>2</sup> All references to EPCA in this document refer to the statute as amended through the American Energy Manufacturing Technical Corrections Act (AEMTCA), Public Law 112–210 (Dec. 18, 2012).

<sup>3</sup> Under 42 U.S.C. 6292(a)(5), the statute establishes “furnaces” as covered products. Originally, boilers were considered a class of furnaces. However, amendments to EPCA in the Energy Independence and Security Act of 2007 (EISA 2007), Public Law 110–140 (Dec. 19, 2007), distinguished between furnaces and boilers in 42 U.S.C. 6295(f) by adding the text “and boilers” to the title of that section and by prescribing standards for boiler products. Although EISA 2007 did not similarly update 42 U.S.C. 6292(a)(5), it is implicit that this coverage continues to include boilers.

U.S.C. 6293(c); 42 U.S.C. 6295(s) Similarly, DOE must use these test procedures to determine whether the products comply with any relevant standards promulgated under EPCA. (42 U.S.C. 6295(s))

Under 42 U.S.C. 6293, EPCA sets forth the criteria and procedures DOE must follow when prescribing or amending test procedures for covered products. EPCA provides, in relevant part, that any test procedures prescribed or amended under this section must be reasonably designed to produce test results which measure energy efficiency, energy use, or estimated annual operating cost of a covered product during a representative average use cycle or period of use, and must not be unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) In addition, if DOE determines that a test procedure amendment is warranted, it must publish proposed test procedures and offer the public an opportunity to present oral and written comments on them. (42 U.S.C. 6293(b)(2))

DOE's current energy conservation standards for residential furnaces and boilers are expressed as minimum AFUE. AFUE is an annualized fuel efficiency metric that fully accounts for fuel consumption in active, standby, and off modes. The existing DOE test procedure for determining the AFUE of residential furnaces and boilers is located at 10 CFR part 430, subpart B, Appendix N, *Uniform Test Method for Measuring the Energy Consumption of Furnaces and Boilers*. The current DOE test procedure for residential furnaces and boilers was originally established by a final rule published in the **Federal Register** on May 12, 1997, and it incorporates by reference the American National Standards Institute (ANSI)/ American Society of Heating, Refrigerating, and Air-conditioning Engineers (ASHRAE) Standard 103–1993, *Method of Testing for Annual Fuel Utilization Efficiency of Residential Central Furnaces and Boilers* (ASHRAE 103–1993). 62 FR 26140, 26157 (incorporated by reference at 10 CFR 430.3(f)(9)). On October 14, 1997, DOE published an interim final rule in the **Federal Register** to revise a provision concerning the insulation of the flue collector box in order to ensure the updated test procedure would not affect the measured AFUE of existing furnaces and boilers. 62 FR 53508. This interim final rule was subsequently adopted without change in a final rule published in the **Federal Register** on February 24, 1998. 63 FR 9390.

On October 20, 2010, DOE amended its test procedure for furnaces and boilers to establish a method for

measuring the electrical energy use in standby mode and off mode for gas and oil-fired furnaces and boilers pursuant to requirements established by EISA 2007. 75 FR 64621. These test procedure amendments were primarily based on and incorporated by reference provisions of the International Electrotechnical Commission (IEC) Standard 62301 (First Edition), *Household electrical appliances—Measurement of standby power*. On December 31, 2012, DOE published a final rule in the **Federal Register** that updated the incorporation by reference of the standby mode and off mode test procedure provisions to refer to the latest edition of IEC Standard 62301 (Second Edition). 77 FR 76831.

On January 4, 2013, DOE published a request for information (RFI) in the **Federal Register** seeking comment and information on a variety of issues relating to the residential furnace and boiler AFUE test method. 78 FR 675. Key issues discussed in the RFI include avenues for reducing test burden and the addition of a performance test for automatic means of adjusting water temperature in hot water boilers. The RFI began the process of fulfilling DOE's obligation to periodically review its test procedures under 42 U.S.C. 6293(b)(1)(A) by initiating a rulemaking to examine all aspects of the DOE test procedure. The RFI is broader in scope than today's final rule, which is limited to adding omitted equations to the residential furnace and boiler test procedure.

On February 4, 2013, DOE published a NOPR in the **Federal Register** (hereinafter the "February 2013 NOPR") regarding the test procedure for residential furnaces and boilers. The February 2013 NOPR was focused on an issue with the test procedure where equations were missing that would be needed to calculate the efficiency of two-stage and modulating condensing furnaces and boilers tested using an option to omit the heat-up and cool-down portions of the test. 78 FR 7681. The NOPR proposed the adoption of two new test procedure equations that would remedy the issue and allow for the calculation of the efficiency of two-stage and modulating condensing furnaces and boilers that were tested using the option to omit the heat-up and cool-down tests. On March 13, 2013 DOE held a public meeting to discuss the test procedure proposals outlined in the February 2013 NOPR. Today's final rule is the culmination of the rulemaking process that began with the February 2013 NOPR.

## II. Summary of the Final Rule

Today's final rule amends DOE's test procedure for residential furnaces and boilers by incorporating additional equations to account for the use of section 9.10 (Optional Test Procedure for Condensing Furnaces and Boilers That Have No Off-Period Flue Losses) of ASHRAE 103–1993, which is incorporated by reference into the DOE test procedure for two-stage and modulating condensing furnaces and boilers at Appendix N to subpart B of 10 CFR part 430. Section 9.10 of ASHRAE 103–1993 allows certain condensing furnaces and boilers to omit the heat-up and cool-down tests provided that the model: (1) has no measurable airflow through the combustion chamber and heat exchanger during the burner off-period; and (2) has post-purge periods of less than 5 seconds.

Prior to issuance of this final rule, DOE's test procedure for residential furnaces and boilers lacked the equations necessary to calculate the heating seasonal efficiency (which contributes to the ultimate calculation of AFUE) if the option in section 9.10 is selected and the heat-up and cool-down tests are omitted when testing two-stage and modulating condensing furnaces and boilers. Omission of these equations causes erroneous results for AFUE when calculated using the DOE test method. (This situation is in contrast to that of single-stage condensing furnaces and boilers, where the requisite equations were already present in the DOE test procedure.)

To correct this issue, DOE proposed to adopt two new equations in the February 2013 NOPR. These new equations would allow for the calculation of the part-load efficiencies at the maximum input rate and reduced input rates (and ultimately AFUE) of two-stage and modulating condensing furnaces and boilers when omitting the heat-up and cool-down tests, as provided under section 9.10 of ASHRAE 103–1993. Today's final rule adopts the equations proposed in the February 2013 NOPR, as described in more detail in section III.

DOE has concluded that any test procedure changes resulting from this rulemaking should not impact the existing energy conservation standards for residential furnaces and boilers, because such changes simply allow for the generation of accurate information reflecting the efficiency of affected basic models, which typically test above the existing minimum standard level. The current minimum energy conservation standards are based on AFUE ratings

that correspond to non-condensing furnaces and boilers, and those values will not change as a result of today's final rule to remedy the omission of necessary equations pertaining to condensing models. DOE does not foresee that a model that would need to be re-rated using the equations adopted in today's final rule would have a resulting AFUE below the minimum required efficiency.

### III. Discussion

#### A. Statement of the Issue and the NOPR's Proposed Corrective Action

As discussed briefly above, this final rule addresses an omission in the current DOE test procedure by adopting a new set of equations to accurately calculate the AFUE for two-stage and modulating condensing furnaces and boilers when tested pursuant to the optional procedure to skip the heat-up and cool-down tests, as described in section 9.10 of ASHRAE 103–1993. Section 9.10 of ASHRAE 103–1993, which is incorporated by reference into the DOE test procedure for use at Appendix N to subpart B of 10 CFR part 430 allows omission of the heat-up and cool-down tests for certain condensing furnaces and boilers provided the model (1) has no measurable airflow through the heat exchanger during the burner off period; and (2) has post purge period(s) of less than 5 seconds.

For single-stage condensing furnaces and boilers, section 11.3.11.3 of ASHRAE 103–1993 provides equations necessary to accurately calculate the heating seasonal efficiency (which contributes to the ultimate calculation

of AFUE). One equation is based on the results of the heat-up and cool-down tests described in sections 9.5 and 9.6 of ASHRAE 103–1993 and is to be used if these tests were conducted, and the other equation is based on the results of the steady-state test described in section 9.1 of ASHRAE 103–1993 and is to be used if heat-up and cool-down tests were not conducted and the option in section 9.10 was employed instead.

For two-stage and modulating condensing furnaces and boilers there are no equations provided in ASHRAE 103–1993 to calculate the heating seasonal efficiency if the option in section 9.10 is selected. The only equation provided in the test procedure to calculate the heating seasonal efficiency for two-stage and modulating condensing furnaces and boilers requires values for the part-load efficiencies, which are based on the results of the heat-up and cool-down tests. If two-stage and modulating condensing furnaces or boilers were tested and the heat-up and cool-down tests were omitted in accordance with section 9.10, the part-load efficiencies, heating seasonal efficiency, and resulting AFUE would not be able to be calculated using the equations provided in the DOE test method.

DOE is aware that many boiler manufacturers have utilized the optional section 9.10 provisions for two-stage and modulating condensing boilers, regardless of the fact that no equations exist in section 11.5.11 that would provide for the calculation of the part-load efficiencies for such equipment. In calculating the AFUE, DOE believes manufacturers that opted

to omit the heat-up and cool-down portions of the test have erroneously used "0" for the temperatures that would be taken during the heat-up and cool-down tests. Research into this issue conducted by the furnace and boiler industry trade association (*i.e.*, the Air-conditioning, Heating, and Refrigeration Institute (AHRI)) revealed that AFUE values calculated for boilers using this approach could be inflated from one to four percent above their true values. (AHRI, No. 1 at p. 6)

In the February 2013 NOPR, DOE proposed to amend the test procedure to include equations for calculating part-load efficiencies at the maximum input rate and at reduced input rates and, ultimately, the AFUE of two-stage and modulating condensing furnaces and boilers when utilizing the option to omit the heat-up and cool-down tests, as provided under section 9.10 of ASHRAE 103–1993. DOE developed these equations in the February 2013 NOPR by following the concept of replacing cyclic infiltration and sensible heat losses with steady-state infiltration and sensible heat losses. This concept is already used in ASHRAE 103–1993 for single-stage units and can be applied to two-stage and modulating units as well. DOE proposed to add the following equations to Appendix N in the February 2013 NOPR for calculating the part-load efficiency at reduced and maximum fuel input rates for two-stage and modulating units that are tested according to section 9.10 of ASHRAE 103–1993:

Part-Load Efficiency at Reduced Fuel Input Rate

$$Effy_{U,R} = 100 - L_{L,A} + L_G - L_C - C_J L_J - \left[ \frac{t_{ON}}{t_{ON} + \left( \frac{Q_P}{Q_{IN}} \right) t_{OFF}} \right] (C_S)(L_{S,SS})$$

Where:

$L_{S,SS}$  = value as defined in section 11.5.6 at reduced input rate

$C_S$  = value as defined in section 11.5.10.1 at reduced input rate

Part-Load Efficiency at Maximum Fuel Input Rate

$$Effy_{U,H} = 100 - L_{L,A} + L_G - L_C - C_J L_J - \left[ \frac{t_{ON}}{t_{ON} + \left( \frac{Q_P}{Q_{IN}} \right) t_{OFF}} \right] (C_S)(L_{S,SS})$$

Where:

$L_{S,SS}$  = value as defined in section 11.5.6 at maximum input rate

$C_S$  = value as defined in section 11.5.10.1 at maximum input rate

78 FR 7681, 7694–95 (Feb. 4, 2013).

DOE conducted testing on two modulating condensing residential

boilers to validate the equations shown above. The test results verified that AFUE values determined by omitting the heat-up and cool-down tests and using the new equations were consistent with the AFUE values determined using the heat-up and cool-down tests. As the results presented in the February 2013

NOPR demonstrate, there was no more than a 0.04 percent variance in AFUE determined under the new equations, as compared to the AFUE determined using the results of the heat-up and cool-down tests. 78 FR 7681, 7686–89 (Feb. 4, 2013). In DOE's view, the difference between the two calculation

methods is small enough that the AFUE values using the new equations are representative of the actual performance of the models. Thus, the resulting values are an accurate representation of the product's energy efficiency for consumer information purposes. Further, the adoption of the new equations would result in minimal additional test burden for manufacturers that need to recalculate efficiency ratings, or would reduce test burden for manufacturers in comparison to performing heat-up and cool-down tests.

#### *B. Discussion of Comments*

In addition to input at the March 2013 public meeting, DOE received five written comment submissions in response to the February 2013 NOPR, including comments from Lochinvar, AHRI, Heat Transfer Products (HTP), the American Public Gas Association (APGA), and the National Propane Gas Association (NPGA). These comments, along with DOE's response, are summarized immediately below.

In general, Lochinvar, AHRI, and HTP were supportive of the proposed amendments to the residential furnace and boiler test procedure as outlined in the February 2013 NOPR. (Lochinvar, No. 6 at p. 1; AHRI, No. 9 at p. 1; HTP, No. 10 at p. 1) However, AHRI recommended that DOE further simplify the equations by setting the input rate of the pilot light to zero, noting that continuous pilot lights are no longer allowed on gas boilers, and, therefore, there is no reason to account for them in the new equation. (AHRI, Public Meeting Transcript, p. 21) In addition, Lochinvar stated that 10 CFR part 430, subpart B, Appendix N contains internal references in need of appropriate renumbering. (Lochinvar, No. 8 at p. 2)

DOE agrees that Appendix N contains internal references in need of renumbering—a matter which DOE has addressed in today's final rule.

DOE considered AHRI's point regarding further simplification of the equations, but declines to set the input rate of the pilot light to zero. DOE notes that the equations proposed for addition to the test procedure would be utilized not just for boilers, but also potentially for furnaces, if furnace manufacturers wish to avail themselves of the option provided in section 9.10 of ASHRAE 103–1993. Although a standing pilot is uncommon on furnaces on the market today, this feature is not specifically prohibited for furnaces, leaving open the possibility that a furnace may have a standing pilot light. Additionally, DOE believes that the burden of setting the pilot energy to zero in the equation is insignificant and does not warrant the

removal of this term altogether, and that doing so could cause confusion and render the equations useless for a product equipped with a standing pilot.

HTP stated that the tracer gas test in Appendix D of ASHRAE 103–1993 used to determine the off-cycle airflow is cumbersome and difficult to understand. HTP recommended that the Department consider the presence of any type of damper mechanism in the combustion product path (upstream or downstream) to serve as proof that there is no off-cycle losses associated with the flow rates of gases. (HTP, No. 10 at p.2)

DOE believes HTP's comment regarding the tracer gas test may have merit, but notes that this comment is outside the scope of this particular rulemaking, which is meant to remedy an omission in the residential furnace and boiler test procedure impacting manufacturers' ability to calculate AFUE of certain models. Instead, DOE will consider the issue of the tracer gas test in its proceedings for its broader test procedure rulemaking initiated by the January 2013 RFI.

Two manufacturers requested clarification as to how the changes proposed in the NOPR would affect the certification of residential furnaces and boilers. (Lochinvar, No. 6 at p. 1; HTP, No. 10 at p. 1) Lochinvar requested clarification as to whether the new calculations were meant to be an additional option or a replacement to conducting the heat-up and cool down-tests. (Lochinvar, Public Meeting Transcript, No. 5 at p. 17) HTP asked if manufacturers would be expected to use the same method of calculation for all models in a product line. (HTP, Public Meeting Transcript, No. 5 at pp. 18–19)

Today's final rule modifies the residential furnace and boiler test procedure to provide a means to accurately calculate AFUE for two-stage and modulating condensing furnace and boiler models meeting the criteria outlined in section 9.10, which permit omission of the otherwise-required heat-up and cool-down tests. As amended, the DOE test procedure provides two methods of calculation for models complying with the criteria outlined in section 9.10. Manufacturers have discretion to choose to rate such models either by using the procedures under section 9.10, or by using the data obtained in the cool-down and heat-up tests under sections 9.5 and 9.6, respectively. Manufacturers may choose either or both options for models within a single product line.

If manufacturers have previously utilized the option provided in section 9.10 for testing and rating the efficiency of two-stage and modulating condensing

furnaces or boilers, manufacturers must either retest for efficiency without using section 9.10, or recalculate the efficiency using the new equations being adopted in today's final rule. If retesting a given basic model using the methodology being adopted in this final rule results in a certified rating that is more consumptive or less efficient than its currently certified value, then the manufacturer must also recertify the basic model with the revised rating to the Department by the compliance date of the test procedure amendments being adopted in this final rule.

The APGA and the NPGA encouraged DOE to include a metric that accounts for the full-fuel cycle as part of the residential furnace and boiler test procedure. (APGA, No. 7 at p. 1; NPGA, No. 8 at p.1) Once again, DOE notes that today's final rule is limited in scope to remedying the above-discussed error in the DOE test procedure. However, DOE will consider this issue in the context of the broader test procedure rulemaking initiated by the January 2013 RFI.

#### *C. Final Corrective Action*

After considering comments presented at the March 13, 2013 public meeting, and additional written comments submitted following the public hearing, the Department is adopting the amendments proposed in the February 2013 NOPR (discussed in section III.A) with minor clarifications to the section numbering, as suggested by interested parties in comments on the NOPR. The amendments in today's final rule include a revised method for calculating the AFUE for two-stage and modulating condensing furnaces and boilers. While this change may lead to a revised AFUE rating for certain residential furnaces or boilers, as discussed above, DOE does not believe that the resulting changes in AFUE would require amending the applicable energy conservation standard or affect compliance with the standard by the models at issue here. As noted, the previously omitted equations apply only to two-stage and modulating condensing models, which are highly efficient and, even using the amended equations, are expected to achieve ratings well above the minimum standards. The current minimum energy conservation standards are based on AFUE ratings that correspond to non-condensing furnaces and boilers, and those values would not change as a result of today's amendments to remedy the omission of necessary equations pertaining to condensing models. DOE does not foresee that a model that would need to be re-rated using the equation adopted in today's notice would have a resulting

AFUE below the minimum required efficiency.

#### D. Effective and Compliance Dates

The final rule amendments discussed in this rulemaking are effective on August 9, 2013.

Consistent with 42 U.S.C. 6293(c), commencing on January 6, 2014, manufacturers must make representations of energy efficiency and energy consumption of residential furnaces and boilers using this amended test procedure. Until that time, manufacturers may make such representations based either on the final amended test procedure or on the previous test procedure, set forth at 10 CFR part 430, subpart B, appendix N as contained in the 10 CFR parts 200 to 499 edition revised as of January 1, 2013. Consistent with 42 U.S.C. 6291(8), representation of energy consumption means measures of energy use (including for this product, active mode, standby mode, and off mode energy use), annual operating cost, energy efficiency (including for this product, AFUE), or other measure of energy consumption. Given that the amended test procedure provides necessary equations which permit the omission of otherwise applicable heat-up and cool-down tests, manufacturers may wish to avail themselves of the opportunity for early compliance.

Manufacturers must make any certifications of compliance with the existing AFUE-based energy conservation standards using this amended test procedure on January 6, 2014. Until that time, manufacturers may make certifications of compliance based either on the final amended test procedure or on the previous test procedure, set forth at 10 CFR part 430, subpart B, appendix N as contained in the 10 CFR parts 200 to 499 edition revised as of January 1, 2013. Again, given that the amended test procedure provides necessary equations which permit the omission of otherwise applicable heat-up and cool-down tests, manufacturers may wish to avail themselves of the opportunity for early compliance.

#### IV. Procedural Issues and Regulatory Review

##### A. Review Under Executive Order 12866

The Office of Management and Budget (OMB) has determined that test procedure rulemakings do not constitute “significant regulatory actions” under section 3(f) of Executive Order 12866, “Regulatory Planning and Review,” 58 FR 51735 (Oct. 4, 1993). Accordingly, this regulatory action was not subject to

review under the Executive Order by the Office of Information and Regulatory Affairs (OIRA) in OMB.

##### B. Review under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended) requires preparation of an initial regulatory flexibility analysis (IRFA) for any rule that by law must be proposed for public comment and a final regulatory flexibility analysis (FRFA) for any such rule that an agency adopts as a final rule, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. A regulatory flexibility analysis examines the impact of the rule on small entities and considers alternative ways of reducing negative effects. Also, as required by Executive Order 13272, “Proper Consideration of Small Entities in Agency Rulemaking,” 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the DOE rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel’s Web site: <http://energy.gov/gc/office-general-counsel>.

DOE reviewed today’s final rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. DOE has concluded that the rule would not have a significant impact on a substantial number of small entities. The factual basis for this certification is as follows:

For manufacturers of residential furnaces and boilers, the Small Business Administration (SBA) has set a size threshold, which defines those entities classified as “small businesses” for the purposes of the Act. DOE used the SBA’s small business size standards to determine whether any small entities would be subject to the requirements of the rule. 13 CFR part 121. These size standards and codes are established by the North American Industry Classification System (NAICS) and are available at [http://www.sba.gov/sites/default/files/files/Size\\_Standards\\_Table.pdf](http://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf). Residential boiler manufacturing is classified under NAICS 333414, “Heating equipment (except warm air furnaces) manufacturing,” for which the size threshold is 500 employees. Residential furnace manufacturing is classified under NAICS 333415, “Air-conditioning and warm air heating equipment and commercial and industrial refrigeration

equipment manufacturing” for which the size threshold is 750 employees. DOE surveyed the AHRI certification directories for furnaces and boilers, as well as the SBA database and market research tools (*e.g.*, Hoovers<sup>4</sup>), to identify manufacturers of residential furnaces and boilers. DOE then consulted publically available data or contacted companies, as necessary, to determine if they meet the SBA’s definition of a “small business” manufacturer, and have their manufacturing facilities located within the United States. Based on this analysis, DOE identified 11 small businesses that manufacture residential furnaces, and 14 small businesses that manufacture residential boilers (two of which also manufacture residential furnaces), for a total of 23 small businesses potentially impacted by this rulemaking.

DOE believes the equations being adopted today would lessen manufacturer burden in comparison to application of the current test procedure. Today’s final rule amends DOE’s test procedure by incorporating additional equations to account for the use of section 9.10 of ASHRAE 103–1993 (the relevant industry standard incorporated by reference) for two-stage and modulating condensing furnaces and boilers. Section 9.10 permits a manufacturer of condensing furnaces and boilers the option to omit the specified heat-up and cool-down tests if the model has no measurable airflow through the combustion chamber and heat exchanger during the burner off period and has post-purge period(s) of less than 5 seconds. However, under the DOE test procedure, the equations needed to use section 9.10 did not exist for two-stage and modulating condensing models. As a result, the only available method to properly rate the performance of two-stage and modulating condensing furnaces and boilers has been conducting the heat-up and cool-down tests. Because section 9.10 previously lacked the requisite equations, manufacturers who used that option to rate the AFUE of their two-stage and modulating condensing furnace and boiler models will need to re-rate their models using either today’s new equations or the results of heat-up and cool-down tests.

The estimated costs of re-rating using the new equations (for manufacturers who had incorrectly applied the test procedure) is discussed below, along with the estimated costs of conducting the heat-up and cool-down tests.

<sup>4</sup> For more information see: <http://www.hoovers.com/>.

In the February 2013 NOPR, DOE stated that manufacturers are likely to choose one of two approaches to use the new equations to recalculate the efficiency of two-stage and modulating condensing models for which section 9.10 has been employed: (1) Manufacturers might recalculate the efficiency for each model individually by doing the calculations manually; or (2) manufacturers might update the AFUE calculation computer program to account for the new equations. 78 FR 7681, 7690 (Feb. 4, 2013).

In the NOPR, DOE estimated that recalculating the AFUE manually using the new equation would take between 30 minutes and 1 hour per basic model. At an hourly rate of \$60 for a test lab technician, DOE estimated that each model that is re-rated in this manner would cost approximately \$30 to \$60. *Id.*

Alternatively, an individual manufacturer may decide to reprogram its software for calculating AFUE to account for the new equation. In the NOPR, DOE estimated that a programmer would need between 16 and 40 hours to rewrite the program code to account for this new equation. At an hourly rate of \$80 for a programmer, the resulting cost would be a one-time expenditure of \$1280 to \$3200 to update the automatic AFUE calculation program. *Id.* HTP stated a concern that if each manufacturer is required to modify the AFUE calculation software to account for these corrections, unintended variation may be introduced to the market place. HTP commented that they expect the modification of the software to cost approximately \$5,000 for each manufacturer. (HTP, No. 10 at p. 2)

DOE believes that the equations being adopted in today's NOPR are clear and unambiguous enough that they could be implemented in the program in a consistent manner and does not agree that unintended variation from manufacturer to manufacturer would be a major concern. Further, in the NOPR, DOE noted that given the role AHRI has traditionally played and the potential for cost savings for AHRI members, AHRI may decide to reprogram its software. In this case, the software would be uniform for AHRI members, and the effort required to recalculate AFUE for individual manufacturers, would be much less than the cost AHRI would incur to modify the program. 78 FR 7681, 7690 (Feb. 4, 2013). Regarding HTP's assessment of the cost to reprogram the relevant software, DOE believes that \$5,000 is not unreasonable as a rough estimate. However, DOE's estimate in the NOPR was more refined,

being based on actual quotes obtained from computer programmers familiar with the AFUE calculation program that is currently used by industry. DOE's estimates of the programming time needed to add the two equations were conservatively based on actual information received from programmers. HTP did not provide any data in the form of the hourly cost of a programmer or the time required that would lead DOE to change its estimates. Thus, DOE believes that the total cost to reprogram the current industry software would fall in the range of \$1280 to \$3200, which is based on a cost of \$80 per hour for a programmer and 16 to 40 hours of programming time. Further, DOE notes that even at \$5,000, the cost would be small compared to the overall cost of manufacturing, testing, and certifying residential furnace and boiler products, making the impact of this option minimal for manufacturers. As noted in the February 2013 NOPR, if these costs were spread over the cost of each model re-certified, the cost on a per-model basis would be much lower.

At the time of this publication, the AHRI certification directories for residential furnaces and boilers contain a combined total of approximately 2000 active condensing models for which recalculation could potentially be required, although only a fraction of the total condensing models would be two-stage and modulating products which might need to be re-rated using the new equations. Further, AHRI required member manufacturers of condensing two-stage or condensing modulating boilers to either: (1) Re-rate their products at 90 percent AFUE; (2) discontinue the model; or (3) substantiate the model's efficiency rating by providing data from the heat-up and cool-down tests. (AHRI, No. 1 at p. 2) DOE examined the number of models in the AHRI certified directory for boilers that are rated at 90-percent AFUE (the majority of which are likely to be re-rated models that used option 9.10) and found that there are 210 models rated at 90-percent AFUE. If all of these models were to be re-rated through the use of the updated computer program, the per-model cost would be \$6 to \$15.

In the February 2013 NOPR, DOE estimated that conducting the heat-up and cool-down tests would require 2 hours combined for two-stage and modulating condensing products. 78 FR 7681, 7690 (Feb. 4, 2013). DOE estimated that at \$60 per hour for a lab technician, the cost to perform the heat-up and cool-down tests is approximately \$120 per model.

During the public meeting, Lochinvar commented that the February 2013 NOPR only accounted for the cost to perform the heat-up and cool-down tests. However, according to Lochinvar, manufacturers do not have the option of conducting the heat-up and cool-down test on one unit of a particular model and incorporating that data along with the steady-state test data from another unit of the same model to obtain an AFUE rating. As a result, Lochinvar contended that if a manufacturer had incorrectly rated their equipment under the existing test procedure and wished to re-rate the equipment using the heat-up and cool-down tests rather than using the section 9.10 method, the entire test would need to be performed again on that product or that family of products. Lochinvar stated that this would mean that the test burden would be at least 10 times the cost DOE listed in the February 2013 NOPR. (Lochinvar, Public Meeting Transcript, No. 5 at p. 24) HTP stated that impact for small businesses would be a significantly higher proportional cost relative to their revenue than it would be for large manufacturers. HTP estimated that the cost of addressing this issue, including re-rating and expenditure of company time, has cost HTP between \$250,000 and \$300,000. (HTP, No. 10 at p. 2)

DOE agrees that manufacturers seeking to re-rate their units by conducting the heat-up and cool-down tests may also need to conduct the steady-state portion of the test to obtain an accurate efficiency rating. DOE estimates that the cost of conducting the entire test method at a test lab would cost manufacturers approximately \$1600 per unit.

The costs to manufacturers of utilizing the equations being adopted in today's final rule is significantly lower than the cost of re-rating the models by performing the heat-up and cool-down tests, regardless of whether manufacturers choose to recalculate the efficiencies by hand or to update the automatic AFUE calculation program. Thus, the adoption of these equations would be likely to significantly reduce test burden in comparison to the current version of the test procedure that does not include these equations and requires the heat-up and cool-down test data in order to accurately calculate AFUE. Further, DOE believes the costs discussed above to recalculate efficiency using the new equations are small relative to the overall cost of manufacturing, testing, and certifying residential furnace and boiler products. For the reasons stated above, DOE certifies that this rule will not have a significant economic impact on a

substantial number of small entities. Therefore, DOE did not prepare a final regulatory flexibility analysis for the final rule. DOE has transmitted its certification and a supporting statement of factual basis to the Chief Counsel for Advocacy of the SBA for review pursuant to 5 U.S.C. 605(b). Thus, DOE reaffirms and certifies that this rule will not have a significant economic impact on a substantial number of small entities.

#### *C. Review Under the Paperwork Reduction Act of 1995*

Manufacturers of residential furnaces and boilers must certify to DOE that their products comply with any applicable energy conservation standards. In certifying compliance, manufacturers must test their products according to the DOE test procedures for residential furnaces and boilers, including any amendments adopted for those test procedures on the date that compliance is required. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment, including residential furnaces and boilers. (76 FR 12422 (March 7, 2011)). The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This requirement has been approved by OMB under OMB control number 1910-1400. Public reporting burden for the certification is estimated to average 20 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

#### *D. Review Under the National Environmental Policy Act of 1969*

In this final rule, DOE amends its test procedure for residential furnaces and boilers. DOE has determined that this rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and DOE's implementing regulations at 10 CFR part 1021. Specifically, this rule amends an existing rule without affecting the

amount, quality, or distribution of energy usage, and, therefore, will not result in any environmental impacts. Thus, this rulemaking is covered by Categorical Exclusion A5 under 10 CFR part 1021, subpart D, which applies to any rulemaking that interprets or amends an existing rule without changing the environmental effect of that rule. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

#### *E. Review Under Executive Order 13132*

Executive Order 13132, "Federalism," 64 FR 43255 (August 10, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE examined this final rule and has determined that it 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. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of today's final rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297(d)) No further action is required by Executive Order 13132.

#### *F. Review Under Executive Order 12988*

Regarding the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform," 61 FR 4729 (Feb. 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general

standard; and (4) promote simplification and burden reduction. Regarding the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this final rule meets the relevant standards of Executive Order 12988.

#### *G. Review Under the Unfunded Mandates Reform Act of 1995*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Public Law 104-4, sec. 201 (codified at 2 U.S.C. 1531). For a regulatory action resulting in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a "significant intergovernmental mandate," and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820. (This policy is also available at <http://energy.gov/gc/office-general-counsel>.) DOE examined today's final rule according to UMRA

and its statement of policy and determined that the rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure of \$100 million or more in any year. Accordingly, no further assessment or analysis is required under UMRA.

*H. Review under the Treasury and General Government Appropriations Act, 1999*

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. Today's final rule will not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

*I. Review Under Executive Order 12630*

Pursuant to Executive Order 12630, "Governmental Actions and Interference with Constitutionally Protected Property Rights," 53 FR 8859 (March 18, 1988), DOE has determined that this regulation will not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

*J. Review Under Treasury and General Government Appropriations Act, 2001*

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under information quality guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed today's final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

*K. Review Under Executive Order 13211*

Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OMB, a Statement of Energy Effects for any significant energy action. A "significant energy action" is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2)

is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use if the regulation is implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

Today's regulatory action to amend the test procedure for measuring the energy efficiency of residential furnaces and boilers is not a significant regulatory action under Executive Order 12866 or any successor order. Moreover, it would not have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as a significant energy action by the Administrator of OIRA. Therefore, it is not a significant energy action, and, accordingly, DOE has not prepared a Statement of Energy Effects for this rulemaking.

*L. Review Under Section 32 of the Federal Energy Administration Act of 1974*

Under section 301 of the Department of Energy Organization Act (Pub. L. 95–91; 42 U.S.C. 7101 *et seq.*), DOE must comply with all laws applicable to the former Federal Energy Administration, including section 32 of the Federal Energy Administration Act of 1974 (Pub. L. 93–275), as amended by the Federal Energy Administration Authorization Act of 1977 (Pub. L. 95–70). (15 U.S.C. 788; FEAA) Section 32 essentially provides in relevant part that, where a proposed rule authorizes or requires use of commercial standards, the notice of proposed rulemaking must inform the public of the use and background of such standards. In addition, section 32(c) requires DOE to consult with the Attorney General and the Chairman of the Federal Trade Commission (FTC) concerning the impact of the commercial or industry standards on competition.

The modifications to the test procedures addressed by this action do not incorporate by reference any testing methods that are not currently incorporated in the DOE test procedure for residential furnaces and boilers. DOE's final rule continues to use ASHRAE 103–1993 (Method of Testing for Annual Fuel Utilization Efficiency of Residential Central Furnaces and Boilers) as the basis for the DOE test procedure, while adding two necessary equations.

*M. Congressional Notification*

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of today's rule before its effective date. The report will state that it has been determined that the rule is not a "major rule" as defined by 5 U.S.C. 804(2).

**V. Approval of the Office of the Secretary**

The Secretary of Energy has approved publication of this final rule.

**List of Subjects in 10 CFR Part 430**

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Incorporation by reference, Intergovernmental relations, Small businesses.

Issued in Washington, DC, on June 26, 2013.

**Kathleen B. Hogan,**

*Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy.*

For the reasons stated in the preamble, DOE amends part 430 of Chapter II, subchapter D of title 10, Code of Federal Regulations as set forth below:

**PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS**

■ 1. The authority citation for part 430 continues to read as follows:

**Authority:** 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

■ 2. Appendix N to subpart B of part 430 is amended by:

- a. Revising sections 10.0 and 10.1;
- b. Redesignating sections 10.2, 10.2.1, 10.2.1.1, 10.2.1.2, 10.2.1.3, 10.2.1.4, 10.2.2, 10.2.3, 10.3, 10.5.1, 10.5.3, 10.6.1, 10.6.2, 10.6.3, 10.7.1, and 10.9 as sections 10.4, 10.4.1, 10.4.1.1, 10.4.1.2, 10.4.1.3, 10.4.1.4, 10.4.2, 10.4.3, 10.5, 10.7.1, 10.7.3, 10.8.1, 10.8.2, 10.8.3, 10.9.1, and 10.11; and
- d. Adding sections 10.2 and 10.3.

The revisions and additions read as follows:

**Appendix N to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Furnaces and Boilers**

\* \* \* \* \*

10.0 *Calculation of derived results from test measurements.* Calculations shall be as specified in section 11 of ANSI/ASHRAE 103–1993 (incorporated by reference, see § 430.3) and the October 24, 1996, Errata Sheet for ASHRAE 103–1993, except for sections 11.5.11.1, 11.5.11.2, and appendices B and C; and as specified in sections 10.1 through 10.10 and Figure 1 of this appendix.

10.1 *Annual fuel utilization efficiency.* The annual fuel utilization efficiency (AFUE) is as defined in sections 11.2.12 (non-condensing systems), 11.3.12 (condensing systems), 11.4.12 (non-condensing modulating systems), and 11.5.12 (condensing modulating systems) of ANSI/ASHRAE 103–1993 (incorporated by reference, see § 430.3), except for the definition for the term  $Eff_{yHS}$  in the defining equation for AFUE.  $Eff_{yHS}$  is defined as:

$Eff_{yHS}$  = heating seasonal efficiency as defined in sections 11.2.11 (non-condensing systems), 11.3.11 (condensing systems), 11.4.11 (non-condensing modulating systems), and 11.5.11 (condensing modulating systems) of ANSI/ASHRAE 103–1993, except that for condensing modulating systems sections 11.5.11.1 and 11.5.11.2 are replaced by sections 10.2 and 10.3 of this appendix.  $Eff_{yHS}$  is based on the assumptions that all weatherized warm air furnaces or boilers are located

outdoors, that warm air furnaces that are not weatherized are installed as isolated combustion systems, and that boilers that are not weatherized are installed indoors.

10.2 *Part-Load Efficiency at Reduced Fuel Input Rate.* Calculate the part-load efficiency at the reduced fuel input rate,  $Eff_{yU,R}$ , for condensing furnaces and boilers equipped with either step modulating or two-stage controls, expressed as a percent and defined as:

$$Eff_{yU,R} = 100 - L_{LA} + L_G - L_C - C_J L_J - \left[ \frac{t_{ON}}{t_{ON} + \left(\frac{Q_P}{Q_{IN}}\right)t_{OFF}} \right] \times (L_{S,ON} + L_{S,OFF} + L_{I,ON} + L_{I,OFF})$$

If the option in section 9.10 of ASHRAE 103–1993 (incorporated by reference, see § 430.3) is employed:

$$Eff_{yU,R} = 100 - L_{LA} + L_G - L_C - C_J L_J - \left[ \frac{t_{ON}}{t_{ON} + \left(\frac{Q_P}{Q_{IN}}\right)t_{OFF}} \right] (C_S)(L_{S,SS})$$

Where:

$L_{LA}$  = value as defined in section 11.2.7 of ASHRAE 103–1993  
 $L_G$  = value as defined in section 11.3.11.1 of ASHRAE 103–1993 at reduced input rate,  
 $L_C$  = value as defined in section 11.3.11.2 of ASHRAE 103–1993 at reduced input rate,  
 $L_J$  = value as defined in section 11.4.8.1.1 of ASHRAE 103–1993 at maximum input rate,  
 $t_{ON}$  = value as defined in section 11.4.9.11 of ASHRAE 103–1993,  
 $Q_P$  = pilot flame fuel input rate determined in accordance with section 9.2 of ASHRAE 103–1993 in Btu/h  
 $Q_{IN}$  = value as defined in section 11.4.8.1.1 of ASHRAE 103–1993,  
 $t_{OFF}$  = value as defined in section 11.4.9.12 of ASHRAE 103–1993 at reduced input rate,

$L_{S,ON}$  = value as defined in section 11.4.10.5 of ASHRAE 103–1993 at reduced input rate,  
 $L_{S,OFF}$  = value as defined in section 11.4.10.6 of ASHRAE 103–1993 at reduced input rate,  
 $L_{I,ON}$  = value as defined in section 11.4.10.7 of ASHRAE 103–1993 at reduced input rate,  
 $L_{I,OFF}$  = value as defined in section 11.4.10.8 of ASHRAE 103–1993 at reduced input rate,  
 $C_J$  = jacket loss factor and equal to:  
 = 0.0 for furnaces or boilers intended to be installed indoors  
 = 1.7 for furnaces intended to be installed as isolated combustion systems  
 = 2.4 for boilers (other than finned-tube boilers) intended to be installed as isolated combustion systems  
 = 3.3 for furnaces intended to be installed outdoors

= 4.7 for boilers (other than finned-tube boilers) intended to be installed outdoors  
 = 1.0 for finned-tube boilers intended to be installed outdoors  
 = 0.5 for finned-tube boilers intended to be installed as isolated combustion systems  
 $L_{S,SS}$  = value as defined in section 11.5.6 of ASHRAE 103–1993 at reduced input rate,  
 $C_S$  = value as defined in section 11.5.10.1 of ASHRAE 103–1993 at reduced input rate.

10.3 *Part-Load Efficiency at Maximum Fuel Input Rate.* Calculate the part-load efficiency at maximum fuel input rate,  $Eff_{yU,H}$ , for condensing furnaces and boilers equipped with two-stage controls, expressed as a percent and defined as:

$$Eff_{yU,H} = 100 - L_{LA} + L_G - L_C - C_J L_J - \left[ \frac{t_{ON}}{t_{ON} + \left(\frac{Q_P}{Q_{IN}}\right)t_{OFF}} \right] \times (L_{S,ON} + L_{S,OFF} + L_{I,ON} + L_{I,OFF})$$

If the option in section 9.10 of ASHRAE 103–1993 (incorporated by reference, see § 430.3) is employed:

$$Eff_{yU,H} = 100 - L_{LA} + L_G - L_C - C_J L_J - \left[ \frac{t_{ON}}{t_{ON} + \left(\frac{Q_P}{Q_{IN}}\right)t_{OFF}} \right] (C_S)(L_{S,SS})$$

Where:

- L<sub>LA</sub> = value as defined in section 11.2.7 of ASHRAE 103–1993,
- L<sub>G</sub> = value as defined in section 11.3.11.1 of ASHRAE 103–1993 at maximum input rate,
- L<sub>C</sub> = value as defined in section 11.3.11.2 of ASHRAE 103–1993 at maximum input rate,
- L<sub>J</sub> = value as defined in section 11.4.8.1.1 of ASHRAE 103–1993 at maximum input rate,
- t<sub>ON</sub> = value as defined in section 11.4.9.11 of ASHRAE 103–1993,
- Q<sub>P</sub> = pilot flame fuel input rate determined in accordance with section 9.2 of ASHRAE 103–1993 in Btu/h,
- Q<sub>IN</sub> = value as defined in section 11.4.8.1.1 of ASHRAE 103–1993,
- t<sub>OFF</sub> = value as defined in section 11.4.9.12 of ASHRAE 103–1993 at maximum input rate,
- L<sub>S,ON</sub> = value as defined in section 11.4.10.5 of ASHRAE 103–1993 at maximum input rate,
- L<sub>S,OFF</sub> = value as defined in section 11.4.10.6 of ASHRAE 103–1993 at maximum input rate,
- L<sub>I,ON</sub> = value as defined in section 11.4.10.7 of ASHRAE 103–1993 at maximum input rate,
- L<sub>I,OFF</sub> = value as defined in section 11.4.10.8 of ASHRAE 103–1993 at maximum input rate,
- C<sub>J</sub> = value as defined in section 10.2 of this appendix,
- L<sub>S,SS</sub> = value as defined in section 11.5.6 of ASHRAE 103–1993 at maximum input rate,
- C<sub>S</sub> = value as defined in section 11.5.10.1 of ASHRAE 103–1993 at maximum input rate.

\* \* \* \* \*

[FR Doc. 2013–16413 Filed 7–9–13; 8:45 am]

BILLING CODE 6450–01–P

**DEPARTMENT OF TRANSPORTATION**  
**Federal Aviation Administration**

**14 CFR Part 39**

[Docket No. FAA–2012–1067; Directorate Identifier 2011–NM–231–AD; Amendment 39–17444; AD 2013–09–03]

RIN 2120–AA64

**Airworthiness Directives; Dassault Aviation Airplanes**

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

**ACTION:** Final rule.

**SUMMARY:** We are adopting a new airworthiness directive (AD) for certain DASSAULT AVIATION Model FALCON 2000, FALCON 2000EX, MYSTERE–FALCON 900, and FALCON 900EX airplanes; and all Model MYSTERE–FALCON 50 airplanes. This

AD was prompted by reports that collapse of the main landing gear (MLG) could cause wing tank structure failure, which could result in fuel spillage and consequent fire hazard. This AD requires modification of the wing fuel tanks in the area of the wheel well. We are issuing this AD to prevent fuel spillage in the event of a MLG collapse, and consequent fire hazard.

**DATES:** This AD becomes effective August 14, 2013.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of August 14, 2013.

**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:** Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone (425) 227–1137; fax (425) 227–1149.

**SUPPLEMENTARY INFORMATION:**

**Discussion**

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on October 10, 2012 (77 FR 61539). That NPRM proposed to correct an unsafe condition for the specified products. The Mandatory Continuing Airworthiness Information (MCAI) states:

In service experience has shown that, in case of main landing gear collapse due to overloads during take off or landing (e.g., during high-speed runway excursions), the wing tank structure can fail, leading to fuel spillage. . . .

This condition, if not corrected, could result, in case of main landing gear collapse, in a fuel spillage which may constitute a fire hazard.

To address this unsafe condition, Dassault Aviation have developed a structural modification of the wing fuel tanks in the area of the wheel well which introduces a dry bay by adding a sealed boundary in front of the rear spar between ribs 4 and 5.

For the reasons described above, this [European Aviation Safety Agency (EASA)] AD [2011–0193, dated October 5, 2011] requires accomplishment of the above-mentioned modification for the Right Hand (RH) and Left Hand (LH) wing fuel tanks.

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 considered the comments received.

**Request for Updated Service Information**

Dassault Aviation requested that we revise the NPRM (77 FR 61539, October 10, 2012) to reference Dassault Mandatory Service Bulletin F900–388, Revision 3, dated October 19, 2011. (We referred to Dassault Mandatory Service Bulletin F900–388, Revision 2, dated March 10, 2010, as the appropriate source of service information for certain airplanes for accomplishing the modification specified in paragraph (g) of the NPRM.)

We agree. Dassault Mandatory Service Bulletin F900–388, Revision 3, dated October 19, 2011, clarifies the placard instructions for certain airplanes. We have updated the reference in paragraph (g)(3) of this AD to Dassault Mandatory Service Bulletin F900–388, Revision 3, dated October 19, 2011. We have also added paragraph (h)(3)(iii) to this AD to allow credit for actions done before the effective date of this AD using Dassault Mandatory Service Bulletin F900–388, Revision 2, dated March 10, 2010.

**Request for Clarification of Credit Service Bulletin**

Tidewater Inc. stated it has already complied with Dassault Mandatory Service Bulletin F2000EX–171, dated July 6, 2009, and requested we take that into consideration. The commenter noted that Dassault Mandatory Service Bulletin F2000EX–171, Revision 3, dated March 10, 2010, states that Dassault Mandatory Service Bulletin F2000EX–171, Revision 1, dated October 22, 2009; Revision 2, dated February 15, 2010; and Revision 3, dated March 10, 2010; are not applicable to aircraft already modified as specified in the original service bulletin.

We agree to clarify. Dassault Mandatory Service Bulletin F2000EX–171, Revision 3, dated March 10, 2010, does specifically state that Revision 3 is “not applicable to aircraft already changed per the original issue or revision 1 or revision 2.” Also, as proposed in the NPRM (77 FR 61539, October 10, 2012), paragraph (h) of this AD states that credit is allowed for actions done before the effective date of this AD using certain service information, including Dassault Mandatory Service Bulletin F2000EX–171, dated July 6, 2009; Revision 1, dated October 22, 2009; and Revision 2, dated February 15, 2010; as specified in

paragraph (h)(5) of this AD. No change has been made to the AD in this regard.

### Conclusion

We reviewed the available data, including the comments received, and determined that air safety and the public interest require adopting the AD with the changes described previously and minor editorial changes. We have determined that these changes:

- Are consistent with the intent that was proposed in the NPRM (77 FR 61539, October 10, 2012) for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM (77 FR 61539, October 10, 2012).

### Costs of Compliance

We estimate that this AD will affect 753 products of U.S. registry. We also estimate that it will take about 640 work-hours per product to comply with the basic requirements of this AD. The average labor rate is \$85 per work-hour. Required parts will cost about \$18,500 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these parts. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of this AD to the U.S. operators to be \$54,893,700, or \$72,900 per product.

### Authority for This Rulemaking

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

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

### Regulatory Findings

We determined that this AD will not have federalism implications under Executive Order 13132. This AD will

not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify 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 61539, October 10, 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.

### List of Subjects in 14 CFR Part 39

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

### Adoption of the Amendment

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

### PART 39—AIRWORTHINESS DIRECTIVES

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

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

#### § 39.13 [Amended]

- 2. The FAA amends § 39.13 by adding the following new AD:

**2013-09-03 Dassault Aviation:**  
Amendment 39-17444. Docket No. FAA-2012-1067; Directorate Identifier 2011-NM-231-AD.

#### (a) Effective Date

This airworthiness directive (AD) becomes effective August 14, 2013.

#### (b) Affected ADs

None.

### (c) Applicability

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

(1) Dassault Aviation Model FALCON 2000 and FALCON 2000EX airplanes, all serial numbers, except those on which modification M3072 has been installed.

(2) DASSAULT AVIATION Model MYSTERE-FALCON 50 airplanes, all serial numbers.

(3) DASSAULT AVIATION Model MYSTERE-FALCON 900 and FALCON 900EX airplanes, all serial numbers, except those on which modification M5413 has been installed.

### (d) Subject

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

### (e) Reason

This AD was prompted by reports that collapse of the main landing gear (MLG) could cause wing tank structure failure, which could result in fuel spillage and a consequent fire hazard. We are issuing this AD to prevent fuel spillage in the event of a MLG collapse, and consequent fire hazard.

### (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) Modification

Within 150 months after the effective date of this AD, do the modification of the right-hand and left-hand wing fuel tanks, in accordance with the Accomplishment Instructions of the applicable service information specified in paragraph (g)(1), (g)(2), (g)(3), (g)(4), or (g)(5) of this AD, as applicable. The service information specified in paragraphs (g)(1) through (g)(5) of this AD contains a paragraph which states that each person applying the service bulletins must have successfully completed a training program. This training is recommended, but is not required by this AD.

(1) For Model MYSTERE-FALCON 50 airplanes: Dassault Mandatory Service Bulletin F50-496, Revision 2, dated March 10, 2010, which includes the following appendices:

- (i) Appendix 1, Revision 2, dated February 15, 2010;
- (ii) Appendix 2, Revision 3, dated February 15, 2009;
- (iii) Appendix 3, Revision 2, dated October 21, 2009;
- (iv) Appendix 4, Revision 1, dated October 20, 2009; and
- (v) Appendix 5, Revision 3, dated February 15, 2010.

(2) For Model FALCON 900EX airplanes: Dassault Mandatory Service Bulletin F900EX-329, Revision 3, dated March 10, 2010, which includes the following appendices:

- (i) Appendix 1, Revision 2, dated February 15, 2010;
- (ii) Appendix 2, Revision 3, dated February 15, 2009;
- (iii) Appendix 3, Revision 2, dated October 21, 2009;

(iv) Appendix 4, Revision 1, dated October 20, 2009; and

(v) Appendix 5, Revision 3, dated February 15, 2010.

(3) For Model MYSTERE-FALCON 900 airplanes: Dassault Mandatory Service Bulletin F900-388, Revision 3, dated October 19, 2011, which includes the following appendices:

(i) Appendix 1, Revision 2, dated February 15, 2010;

(ii) Appendix 2, Revision 3, dated February 15, 2009;

(iii) Appendix 3, Revision 2, dated October 21, 2009;

(iv) Appendix 4, Revision 1, dated October 20, 2009; and

(v) Appendix 5, Revision 4, dated October 19, 2011.

(4) For Model FALCON 2000 airplanes: Dassault Mandatory Service Bulletin F2000-358, Revision 3, dated March 10, 2010, which includes the following appendices:

(i) Appendix 1, Revision 2, dated February 15, 2010;

(ii) Appendix 2, Revision 3, dated February 15, 2009;

(iii) Appendix 3, Revision 2, dated October 21, 2009;

(iv) Appendix 4, Revision 1, dated October 20, 2009; and

(v) Appendix 5, Revision 3, dated February 15, 2010.

(5) For Model FALCON 2000EX airplanes: Dassault Mandatory Service Bulletin F2000EX-171, Revision 3, dated March 10, 2010, which includes the following appendices:

(i) Appendix 1, Revision 2, dated February 15, 2010;

(ii) Appendix 2, Revision 3, dated February 15, 2009;

(iii) Appendix 3, Revision 2, dated October 21, 2009;

(iv) Appendix 4, Revision 1, dated October 20, 2009; and

(v) Appendix 5, Revision 3, dated February 15, 2010.

#### (h) Credit for Previous Actions

This paragraph provides credit for the modifications required by paragraph (g) of this AD, if those actions were performed before the effective date of this AD using the service information (which is not incorporated by reference in this AD) specified in paragraphs (h)(1) through (h)(5) of this AD, as applicable.

(1) For Model MYSTERE-FALCON 50 airplanes:

(i) Dassault Mandatory Service Bulletin F50-496, dated October 30, 2009, which includes the following appendices:

(A) Appendix 1, Revision 1, dated October 21, 2009;

(B) Appendix 2, Revision 2, dated October 21, 2009;

(C) Appendix 3, Revision 2, dated October 21, 2009;

(D) Appendix 4, Revision 1, dated October 20, 2009; and

(E) Appendix 5, Revision 2, dated October 22, 2009.

(ii) Dassault Mandatory Service Bulletin F50-496, Revision 1, dated February 15, 2010, which includes the following appendices:

(A) Appendix 1, Revision 2, dated February 15, 2010;

(B) Appendix 2, Revision 3, dated February 15, 2009;

(C) Appendix 3, Revision 2, dated October 21, 2009;

(D) Appendix 4, Revision 1, dated October 20, 2009; and

(E) Appendix 5, Revision 3, dated February 15, 2010.

(2) For Model FALCON 900EX airplanes:

(i) Dassault Mandatory Service Bulletin F900EX-329, dated September 25, 2009, which includes the following appendices:

(A) Appendix 1, dated July 6, 2009;

(B) Appendix 2, dated July 6, 2009;

(C) Appendix 3, Revision 1, dated

September 25, 2009;

(D) Appendix 4, dated July 6, 2009; and

(E) Appendix 5, Revision 1, dated September 24, 2009.

(ii) Dassault Mandatory Service Bulletin F900EX-329, Revision 1, dated October 30, 2009, which includes the following appendices:

(A) Appendix 1, Revision 1, dated October 21, 2009;

(B) Appendix 2, Revision 2, dated October 21, 2009;

(C) Appendix 3, Revision 2, dated October 21, 2009;

(D) Appendix 4, Revision 1, dated October 20, 2009; and

(E) Appendix 5, Revision 2, dated October 22, 2009.

(iii) Dassault Mandatory Service Bulletin F900EX-329, Revision 2, dated February 15, 2010, which includes the following appendices:

(A) Appendix 1, Revision 2, dated February 15, 2010;

(B) Appendix 2, Revision 3, dated February 15, 2009;

(C) Appendix 3, Revision 2, dated October 21, 2009;

(D) Appendix 4, Revision 1, dated October 20, 2009; and

(E) Appendix 5, Revision 3, dated February 15, 2010.

(3) For Model MYSTERE-FALCON 900 airplanes:

(i) Dassault Mandatory Service Bulletin F900-388, dated October 30, 2009, which includes the following appendices:

(A) Appendix 1, Revision 1, dated October 21, 2009;

(B) Appendix 2, Revision 2, dated October 21, 2009;

(C) Appendix 3, Revision 2, dated October 21, 2009;

(D) Appendix 4, Revision 1, dated October 20, 2009; and

(E) Appendix 5, Revision 2, dated October 22, 2009.

(ii) Dassault Mandatory Service Bulletin F900-388, Revision 1, dated February 15, 2010, which includes the following appendices:

(A) Appendix 1, Revision 2, dated February 15, 2010;

(B) Appendix 2, Revision 3, dated February 15, 2009;

(C) Appendix 3, Revision 2, dated October 21, 2009;

(D) Appendix 4, Revision 1, dated October 20, 2009; and

(E) Appendix 5, Revision 3, dated February 15, 2010.

(iii) Dassault Mandatory Service Bulletin F900-388, Revision 2, dated March 10, 2010, which includes the following appendices:

(A) Appendix 1, Revision 2, dated February 15, 2010;

(B) Appendix 2, Revision 3, dated February 15, 2009;

(C) Appendix 3, Revision 2, dated October 21, 2009;

(D) Appendix 4, Revision 1, dated October 20, 2009; and

(E) Appendix 5, Revision 3, dated February 15, 2010.

(4) For Model FALCON 2000 airplanes:

(i) Dassault Mandatory Service Bulletin F2000-358, dated September 25, 2009, which includes the following appendices:

(A) Appendix 1, dated July 6, 2009;

(B) Appendix 2, dated July 6, 2009;

(C) Appendix 3, Revision 1, dated September 25, 2009;

(D) Appendix 4, dated July 6, 2009; and

(E) Appendix 5, Revision 1, dated September 24, 2009.

(ii) Dassault Mandatory Service Bulletin F2000-358, Revision 1, dated October 30, 2009, which includes the following appendices:

(A) Appendix 1, Revision 1, dated October 21, 2009;

(B) Appendix 2, Revision 2, dated October 21, 2009;

(C) Appendix 3, Revision 2, dated October 21, 2009;

(D) Appendix 4, Revision 1, dated October 20, 2009; and

(E) Appendix 5, Revision 2, dated October 22, 2009.

(iii) Dassault Mandatory Service Bulletin F2000-358, Revision 2, dated February 15, 2010, which includes the following appendices:

(A) Appendix 1, Revision 1, dated October 21, 2009;

(B) Appendix 2, Revision 2, dated October 21, 2009;

(C) Appendix 3, Revision 2, dated October 21, 2009;

(D) Appendix 4, Revision 1, dated October 20, 2009; and

(E) Appendix 5, Revision 2, dated October 22, 2009.

(iv) Dassault Mandatory Service Bulletin F2000-358, Revision 3, dated February 15, 2010, which includes the following appendices:

(A) Appendix 1, Revision 2, dated February 15, 2010;

(B) Appendix 2, Revision 3, dated February 15, 2009;

(C) Appendix 3, Revision 2, dated October 21, 2009;

(D) Appendix 4, Revision 1, dated October 20, 2009; and

(E) Appendix 5, Revision 3, dated February 15, 2010.

(5) For Model FALCON 2000EX airplanes:

(i) Dassault Mandatory Service Bulletin F2000EX-171, dated July 6, 2009, which includes the following appendices:

(A) Appendix 1, dated July 6, 2009;

(B) Appendix 2, dated July 6, 2009;

(C) Appendix 3, dated July 6, 2009;

(D) Appendix 4, dated July 6, 2009; and

(E) Appendix 5, dated July 6, 2009.

(ii) Dassault Mandatory Service Bulletin F2000EX-171, Revision 1, dated October 22, 2009, which includes the following appendices:

(A) Appendix 1, Revision 1, dated October 21, 2009;

(B) Appendix 2, Revision 2, dated October 21, 2009;

(C) Appendix 3, Revision 2, dated October 21, 2009;

(D) Appendix 4, Revision 1, dated October 20, 2009; and

(E) Appendix 5, Revision 2, dated October 22, 2009.

(iii) Dassault Mandatory Service Bulletin F2000EX-171, Revision 2, dated February 15, 2010, which includes the following appendices:

- (A) Appendix 1, Revision 2, dated February 15, 2010;
- (B) Appendix 2, Revision 3, dated February 15, 2009;
- (C) Appendix 3, Revision 2, dated October 21, 2009;
- (D) Appendix 4, Revision 1, dated October 20, 2009; and
- (E) Appendix 5, Revision 3, dated February 15, 2010.

**(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: Tom Rodriguez, Aerospace Engineer, International Branch, ANM-116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057-3356; telephone (425) 227-1137; fax (425) 227-1149. Information may be emailed to: [9-ANM-116-AMOC-REQUESTS@faa.gov](mailto: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 Mandatory Continuing Airworthiness Information (MCAI) European Aviation Safety Agency Airworthiness Directive 2011-0193, dated October 5, 2011, for related information. This MCAI may be viewed on the Internet at [http://ad.easa.europa.eu/blob/easa\\_ad\\_2011\\_0193.pdf](http://ad.easa.europa.eu/blob/easa_ad_2011_0193.pdf).

(2) Service information identified in this AD that is not incorporated by referenced may be obtained at the addresses specified in paragraphs (k)(3) and (k)(4) of this AD.

**(k) 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.

(i) Dassault Mandatory Service Bulletin F50-496, Revision 2, dated March 10, 2010, which includes the following appendices:

- (A) Appendix 1, Revision 2, dated February 15, 2010;
- (B) Appendix 2, Revision 3, dated February 15, 2009;
- (C) Appendix 3, Revision 2, dated October 21, 2009;
- (D) Appendix 4, Revision 1, dated October 20, 2009; and
- (E) Appendix 5, Revision 3, dated February 15, 2010.

(ii) Dassault Mandatory Service Bulletin F900EX-329, Revision 3, dated March 10, 2010, which includes the following appendices:

- (A) Appendix 1, Revision 2, dated February 15, 2010;
- (B) Appendix 2, Revision 3, dated February 15, 2009;
- (C) Appendix 3, Revision 2, dated October 21, 2009;
- (D) Appendix 4, Revision 1, dated October 20, 2009; and
- (E) Appendix 5, Revision 3, dated February 15, 2010.

(iii) Dassault Mandatory Service Bulletin F900-388, Revision 3, dated October 19, 2011, which includes the following appendices:

- (A) Appendix 1, Revision 2, dated February 15, 2010;
- (B) Appendix 2, Revision 3, dated February 15, 2009;
- (C) Appendix 3, Revision 2, dated October 21, 2009;
- (D) Appendix 4, Revision 1, dated October 20, 2009; and
- (E) Appendix 5, Revision 4, dated October 19, 2011.

(iv) Dassault Mandatory Service Bulletin F2000-358, Revision 3, dated March 10, 2010, which includes the following appendices:

- (A) Appendix 1, Revision 2, dated February 15, 2010;
- (B) Appendix 2, Revision 3, dated February 15, 2009;
- (C) Appendix 3, Revision 2, dated October 21, 2009;
- (D) Appendix 4, Revision 1, dated October 20, 2009; and
- (E) Appendix 5, Revision 3, dated February 15, 2010.

(v) Dassault Mandatory Service Bulletin F2000EX-171, Revision 3, dated March 10, 2010, which includes the following appendices:

- (A) Appendix 1, Revision 2, dated February 15, 2010;
- (B) Appendix 2, Revision 3, dated February 15, 2009;
- (C) Appendix 3, Revision 2, dated October 21, 2009;
- (D) Appendix 4, Revision 1, dated October 20, 2009; and
- (E) Appendix 5, Revision 3, dated February 15, 2010.

(3) For service information identified in this AD, contact Dassault Falcon Jet, P.O. Box 2000, South Hackensack, New Jersey 07606; telephone 201-440-6700; Internet <http://www.dassaultfalcon.com>.

(4) 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.

(5) 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 April 23, 2013.

**Jeffrey E. Duven,**

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

[FR Doc. 2013-15141 Filed 7-9-13; 8:45 am]

**BILLING CODE 4910-13-P**

**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 39**

**[Docket No. FAA-2013-0535; Directorate Identifier 2013-CE-018-AD; Amendment 39-17489; AD 2013-13-01]**

**RIN 2120-AA64**

**Airworthiness Directives; Piper Aircraft, Inc. Airplanes**

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

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

**SUMMARY:** We are adopting a new airworthiness directive (AD) for certain Piper Aircraft, Inc. Models PA-46-310P, PA-46-350P, PA-46R-350T, and PA-46-500TP airplanes. This AD requires inspecting the fuel vent valves to identify if the nitrile parts are installed and modifying and eventually replacing the fuel vent valves if the nitrile parts are installed. This AD was prompted by nitrile fuel vent valves not providing the correct ventilation. If not corrected, this unsafe condition may lead to structural damage of the wings, which could result in loss of control. We are issuing this AD to correct the unsafe condition on these products.

**DATES:** This AD is effective July 10, 2013.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of July 10, 2013.

We must receive comments on this AD by August 26, 2013.

**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: U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this AD, contact Piper Aircraft, Inc., 2926 Piper Drive, Vero Beach, FL 32960; telephone: 1-877-879-0275; fax: (772) 978-6573; email: [customer.service@piper.com](mailto:customer.service@piper.com); Internet: <http://www.piper.com/pages/publications.cfm>. You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329-4148.

**Examining the AD Docket**

You may examine the AD docket on the Internet at <http://www.regulations.gov>; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The 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:** Gary Wechsler, Aerospace Engineer, Atlanta Aircraft Certification Office, FAA, 1701 Columbia Avenue, College Park, Georgia 30337; telephone: (404) 474-5575; fax: (404) 474-5606; email: [gary.wechsler@faa](mailto:gary.wechsler@faa).

**SUPPLEMENTARY INFORMATION:**

**Discussion**

We were notified by Piper Aircraft, Inc. that during a demonstration

emergency descent from 27,000 feet to 14,000 feet there was an incident on a Model PA-46 airplane. The fuel vent valve of the main fuel tank assembly did not provide proper ventilation, which resulted in structural damage to the wing.

The material used to manufacture the fuel vent valve was changed from fluorosilicone to nitrile, which affected the fuel vent valve's ability to vent atmospheric pressure to the main wing fuel tank during the rapid descent. The nitrile-made part did not allow enough air to flow through it because the stiffer nitrile-made part did not expand and open as large as the fluorosilicone-made part under the same pressure and temperature conditions.

Also, in combination with the temperature and pressure changes, the airplane had a low fuel condition, which increased the loading upon the main wing that caused the wing skin and underlying wing structure to buckle.

This condition, if not corrected, may lead to structural damage of the wings, which could result in loss of control.

**Relevant Service Information**

We reviewed Piper Aircraft, Inc. Mandatory Service Bulletin No. 1258, dated June 5, 2013. The service bulletin describes procedures for inspecting the fuel vent valves to identify if the nitrile parts are installed and modifying and eventually replacing the fuel vent valves if the nitrile parts are installed.

**FAA's Determination**

We are issuing 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.

**AD Requirements**

This AD requires accomplishing the actions specified in the service information described previously.

**FAA's Justification and Determination of the Effective Date**

An unsafe condition exists that requires the immediate adoption of this AD. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule because nitrile fuel vent valves do not provide correct ventilation and may lead to structural damage of the wings, which could result in loss of control. Therefore, we find that notice and opportunity for prior public comment are impracticable and that good cause exists for making this amendment effective in less than 30 days.

**Comments Invited**

This AD is a final rule that involves requirements affecting flight safety and was not preceded by notice and an opportunity for public comment. However, we invite you to send any written data, views, or arguments about this AD. Send your comments to an address listed under the ADDRESSES section. Include the Docket Number FAA-2013-0535 and Directorate Identifier 2013-CE-018-AD at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of those comments.

We will post all comments we receive, without change, to <http://www.regulations.gov>, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this AD.

**Costs of Compliance**

We estimate that this AD affects 1,379 airplanes of U.S. registry.

We estimate the following costs to comply with this AD:

**ESTIMATED COSTS**

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection to identify installation of nitrile fuel vent valves.	.5 work-hour × \$85 per hour = \$42.50 .....	Not applicable .....	\$42.50	\$58,607.50

We estimate the following costs to do any necessary modifications and replacements that would be required

based on the results of the inspection. We have no way of determining the

number of aircraft that might need these modifications and replacements:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Modification of the nitrile fuel vent valve (non O-ring panels).	6 work-hours × \$85 per hour = \$510 .....	Not applicable .....	\$510
Modification of the nitrile fuel vent valve (O-ring panels).	2.5 work-hours × \$85 per hour = \$212.50 .....	Not applicable .....	212.50
Replacement of the nitrile fuel vent valve with a fluorosilicone fuel vent valve (non O-ring panels).	6 work-hours × \$85 per hour = \$510 .....	\$9 .....	519
Replacement of the nitrile fuel vent valve with a fluorosilicone fuel vent valve (O-ring panels).	2.5 work-hours × \$85 per hour = \$212.50 .....	\$9 .....	221.50

**Authority for This Rulemaking**

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

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

**Regulatory Findings**

This AD will not have federalism implications under Executive Order 13132. This AD will not have a

substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

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

- (1) Is not a “significant regulatory action” under Executive Order 12866,
- (2) Is not a “significant rule” under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),
- (3) Will not affect intrastate aviation in Alaska, and
- (4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

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

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

**Adoption of the Amendment**

Accordingly, under the authority delegated to me by the Administrator,

the FAA amends 14 CFR part 39 as follows:

**PART 39—AIRWORTHINESS DIRECTIVES**

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

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

**§ 39.13 [Amended]**

- 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

**2013–13–01 Piper Aircraft, Inc.:**  
Amendment 39–17489; Docket No. FAA–2013–0535; Directorate Identifier 2013–CE–018–AD.

**(a) Effective Date**

This AD is effective July 10, 2013.

**(b) Affected ADs**

None.

**(c) Applicability**

This AD applies to the following Piper Aircraft, Inc. airplanes, listed in table 1 of paragraph (c) of this AD, certificated in any category:

TABLE 1 OF PARAGRAPH (C) OF THIS AD—APPLICABLE AIRPLANES

Model	Serial Nos.
PA–46–310P (Malibu) .....	46–8408001 through 46–8408087; 46–8508001 through 46–8508109; 46–8608001 through 46–8608067; and 4608001 through 4608140.
PA–46–350P (Mirage) .....	4622001 through 4622200; 4636001 through 4636591; and 4636593.
PA–46R–350T (Matrix) .....	4692001 through 4692190 and 4692192.
PA–46–500TP (Meridian) .....	4697001 through 4697520.

**(d) Subject**

Joint Aircraft System Component (JASC)/ Air Transport Association (ATA) of America Code 2810, Fuel Storage.

**(e) Unsafe Condition**

This AD was prompted by certain fuel vent valves not providing the correct ventilation. If not corrected, this unsafe condition may lead to structural damage of the wings, which could result in loss of control. We are issuing this AD to correct the unsafe condition on these products.

**(f) Compliance**

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

**(g) Inspection and Modification**

(1) Within the next 10 hours time-in-service (TIS) after July 10, 2013 (the effective date of this AD), inspect the left and right fuel vent valves of the main fuel tank vent assemblies to identify if they are the nitrile (black) valves following Part I of Piper Aircraft Inc. Mandatory Service Bulletin No. 1258, dated June 5, 2013.

(2) If during the inspection required in paragraph (g)(1) of this AD, you find that a nitrile (black) fuel vent valve is not installed, except for the requirement of paragraph (h)(3) of this AD, no further action is required by this AD.

(3) If during the inspection required in paragraph (g)(1) of this AD, you find that a nitrile (black) fuel vent valve is installed, before further flight, modify the fuel vent valve following Part II of Piper Aircraft, Inc. Mandatory Service Bulletin No. 1258, dated June 5, 2013. This includes the limitations requirement in paragraphs 3 and 4 of Part II of the service bulletin.

(4) In lieu of doing the modification required in paragraph (g)(3) of this AD, you may within the next 10 hours TIS after July 10, 2013 (the effective date of this AD), do the fuel vent valve replacement required in paragraph (h)(1) of this AD following Part III of Piper Aircraft, Inc. Mandatory Service Bulletin No. 1258, dated June 5, 2013.

#### (h) Replacement

(1) If during the inspection required in paragraph (g)(1) of this AD, you find that a nitrile (black) fuel vent valve is installed, within the next 90 days after July 10, 2013 (the effective date of this AD) if not already done before further flight as specified in paragraph (i)(4) of this AD, replace the nitrile (black) fuel vent valve with the fluorosilicone (orange) fuel vent valve following Part III of Piper Aircraft, Inc. Mandatory Service Bulletin No. 1258, dated June 5, 2013. This would include removing the limitations requirement in paragraphs 3 and 4 of Part II of the service bulletin.

(2) You may at any time before 90 days after July 10, 2013 (the effective date of this AD), replace the nitrile (black) fuel vent valve with the fluorosilicone (orange) fuel vent valve. This would include removing the limitations requirement in paragraphs 3 and 4 of Part II of the service bulletin.

(3) After July 10, 2013 (the effective date of this AD), do not install the nitrile (black) fuel vent valve on any of the affected airplanes.

#### (i) Positioning Flight

For the purpose of complying with paragraph (g)(1) of this AD, a single-positioning flight is allowed to a location where the inspection required in paragraph (g)(1) can be done provided the actions and limitations specified in paragraphs (i)(1) through (i)(4) of this AD are followed, and the flight is done within the initial 10-hour TIS inspection compliance time. A copy of the limitations from paragraphs 3 and 4 of Part II of Piper Aircraft, Inc. Mandatory Service Bulletin No. 1258, dated June 5, 2013, must be inserted in the pilot's operating handbook before the positioning flight and removed after the flight. An owner/operator (pilot) holding at least a private pilot certificate is allowed to insert these limitations and do the action of paragraph (i)(1) of this AD.

(1) During normal procedures checklist of every preflight inspection, check condition of wing surface for buckling, skin wrinkling, distortion or other damage. If any damage is found during the preflight inspection, before further flight, repairs must be done. Contact Piper Aircraft, Inc. at contact information found in paragraph (l)(3) of this AD for an FAA-approved repair and incorporate the repair. At the operator's discretion, this preflight inspection may be delegated to an appropriately certified mechanic.

(2) Flights must be limited to the minimum required crew. No passenger flights are allowed.

(3) Outside air temperature must not be lower than -34 degrees Celsius (-30 degrees Fahrenheit) during all phases of flight.

(4) Avoid unnecessary rapid descent maneuvers.

#### (j) 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.

#### (k) Related Information

For more information about this AD, contact Gary Wechsler, Aerospace Engineer, Atlanta ACO, FAA, 1701 Columbia Avenue, College Park, Georgia 30337; telephone: (404) 474-5575; fax: (404) 474-5606; email: [gary.wechsler@faa](mailto:gary.wechsler@faa).

#### (l) 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.

(i) Piper Aircraft, Inc. Mandatory Service Bulletin No. 1258, dated June 5, 2013.

(ii) Reserved.

(3) For Piper Aircraft, Inc. service information identified in this AD, contact Piper Aircraft, Inc., 2926 Piper Drive, Vero Beach, FL 32960; telephone: 1-877-879-0275; fax: (772) 978-6573; email: [customer.service@piper.com](mailto:customer.service@piper.com); Internet: <http://www.piper.com/pages/publications.cfm>.

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

(5) You may 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 Kansas City, Missouri, on June 18, 2013.

**James E. Jackson,**

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

[FR Doc. 2013-15149 Filed 7-9-13; 8:45 am]

**BILLING CODE 4910-13-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. FAA-2012-1039; Directorate Identifier 2011-NM-275-AD; Amendment 39-17491; AD 2013-13-03]

RIN 2120-AA64

#### Airworthiness Directives; Airbus Airplanes

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

**ACTION:** Final rule.

**SUMMARY:** We are adopting a new airworthiness directive (AD) for certain Airbus Model A319-112, -113, and -132 airplanes; Model A320-211, -212, -214, -231, and -232 airplanes; and Model A321-111 and -131 airplanes. This AD was prompted by a report of two fatigue cracks on the left-hand and right-hand sides of the continuity fittings at the front windshield lower framing on a Model A319 series airplane. This AD requires a high frequency eddy current (HFEC) inspection for any cracking on the left-hand and right-hand sides of the windshield central lower node continuity fittings, and repair if necessary. We are issuing this AD to detect and correct cracking of the windshield central lower node continuity fittings, which could reduce the structural integrity of the airplane.

**DATES:** This AD becomes effective August 14, 2013.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of August 14, 2013.

**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:** Sanjay Ralhan, Aerospace Engineer, International Branch, ANM-116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, Washington 98057-3356; telephone (425) 227-1405; fax (425) 227-1149.

#### SUPPLEMENTARY INFORMATION:

##### Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That

NPRM was published in the **Federal Register** on October 4, 2012 (77 FR 60658). The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2011–0231, dated December 9, 2011 (referred to after this as the Mandatory Continuing Airworthiness Information, or “the MCAI”), to correct an unsafe condition for the specified products. The MCAI states:

One operator reported finding two fatigue cracks on continuity fittings at left-hand (LH) and right-hand (RH) sides at the front windshield lower framing on an A319 aeroplane on which Airbus modification (mod.) 22058 had been embodied in production. Airbus mod. 22058 (which is included in Airbus mod. 21999) was introduced to improve the fatigue strength of the windshield front framing by increasing the thickness of framing flanges adjacent to the concerned fittings.

Further analyses have demonstrated that the damage tolerance and fatigue requirements of JAR 25.571 (b) are not met on aeroplanes in post-mod. 22058 configuration.

This condition, if not detected and corrected, could reduce the structural integrity of the affected aeroplanes.

Required actions include an HFEC inspection for any cracking on the left-hand and right-hand sides of the windshield central lower node continuity fittings, and repair 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 considered the comments received.

#### Request To Revise HFEC Inspection Requirement

Airbus requested that the one-time HFEC inspection in paragraph (g) of the NPRM (77 FR 60658, October 4, 2012) be revised in anticipation of further rulemaking by the EASA, which would mandate the airworthiness limitation inspection task and would correspond with the one-time HFEC inspection.

We disagree with Airbus’s request. We have determined that publishing this final rule without any further delay is in the interest of safety of the flying public. However, we will consider additional AD rulemaking, if appropriate, in the future. We have not revised this final rule in this regard.

#### Request for Approval of Repair

Airbus requested consideration that each Airbus Repair Approval Sheet (RAS) be approved under “AIRBUS

DOA EASA.21J.031,” provided that this is done after cracking is reported. Airbus stated that this would be an approved method for repair as required by paragraph (g) of the NPRM (77 FR 60658, October 4, 2012).

We agree. Airbus is an EASA-delegated agent; therefore, a RAS approved under Airbus Design Organization Approval (DOA) EASA.21J.031 would be a method of compliance for a repair required by this AD. We have not changed the final rule in this regard.

#### Request To Update Address for the Manufacturer

Airbus requested that the address for the manufacturer be updated. Airbus stated that in paragraph (k)(2) of the NPRM (77 FR 60658, October 4, 2012), “EAS” should be replaced with “EIAS.”

We agree with Airbus’s request to update the manufacturer’s address. Paragraphs (k)(2) and (l)(3) of this final rule have been updated accordingly.

#### Conclusion

We reviewed the available data, including the comments received, and determined that air safety and the public interest require adopting the AD with the change described previously—and minor editorial changes. We have determined that these changes:

- Are consistent with the intent that was proposed in the NPRM (77 FR 60658, October 4, 2012) for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM (77 FR 60658, October 4, 2012).

#### Costs of Compliance

We estimate that this AD will affect 105 products of U.S. registry. We also estimate that it will take about 20 work-hours per product to comply with the basic requirements of this AD. The average labor rate is \$85 per work-hour. Based on these figures, we estimate the cost of this AD to the U.S. operators to be \$178,500, or \$1,700 per product.

We have received no definitive data that would enable us to provide cost estimates 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 60658, October 4, 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.

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

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

#### Adoption of the Amendment

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

### § 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

**2013-13-03 Airbus:** Amendment 39-17491. Docket No. FAA-2012-1039; Directorate Identifier 2011-NM-275-AD.

#### (a) Effective Date

This airworthiness directive (AD) becomes effective August 14, 2013.

#### (b) Affected ADs

None.

#### (c) Applicability

This AD applies to Airbus Model A319-112, -113, and -132 airplanes; Model A320-211, -212, -214, -231, and -232 airplanes; and Model A321-111 and -131 airplanes; certificated in any category; manufacturer serial numbers 0259, 0260, 0264, 0266 through 0270 inclusive, 0275, 0276, 0278, 0287, 0296, 0300, 0303, 0312, 0320, 0321, 0323, 0325, 0328, 0332, 0334, 0335, 0337, 0346, 0352, 0353, 0356, 0365, 0369, 0375, 0377, 0382, 0383, 0396, 0398, 0401, 0412, 0413, 0416, 0419, 0421, 0431, 0432, 0438, 0440, 0441, 0445, 0453, 0458, 0459, 0466, 0468, 0473, 0474, 0482, 0484, 0491, 0493, 0497, 0498, 0501, 0502, 0505, 0507, 0509, 0518, 0520, 0521, 0529, 0531, 0534, 0537, 0538, 0544, 0549, 0554, 0555, 0560, 0563, 0577, 0578, 0585, 0598, 0600, 0608, 0612, 0618, 0621, 0625, 0637, 0660, 0685, 0976, 1010, 1092, 1096, 1103, 1139, 1143, 1158, 1251, 1356, and 1511.

#### (d) Subject

Air Transport Association (ATA) of America Code 53, Fuselage.

#### (e) Reason

This AD was prompted by a report of two fatigue cracks on the left-hand and right-hand sides of the continuity fittings at the front windshield lower framing on a Model A319 series airplane. We are issuing this AD to detect and correct cracking of the windshield central lower node continuity fittings, which could reduce the 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 and Corrective Action

Before the accumulation of 34,000 total flight cycles since the airplane's first flight, or within 4,500 flight cycles after the effective date of this AD, whichever occurs later: Perform a high frequency eddy current (HFEC) inspection for any cracking on the left-hand and right-hand sides of the windshield central lower node continuity fittings, in accordance with the

Accomplishment Instructions of Airbus Service Bulletin A320-53-1245, Revision 01, including Appendix 1, dated May 17, 2011. If any cracking is found, before further flight, repair using a method approved by the Manager, International Branch, ANM-116, FAA, or the European Aviation Safety Agency (EASA) (or its delegated agent).

#### (h) Reporting Requirement

Submit a report of the findings (both positive and negative) of the inspection required by paragraph (g) of this AD to Airbus, Customer Service Directorate, Attn: SDC32 Technical Data and Documentation Services, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; fax +33 5 61 93 28 06; email [sb.reporting@airbus.com](mailto:sb.reporting@airbus.com); at the applicable time specified in paragraph (h)(1) or (h)(2) of this AD.

(1) If the inspection was done on or after the effective date of this AD: Submit the report within 30 days after the inspection.

(2) If the inspection was done before the effective date of this AD: Submit the report within 30 days after the effective date of this AD.

#### (i) Credit for Previous Actions

This paragraph provides credit for the actions required by paragraph (g) of this AD, if those actions were performed before the effective date of this AD using Airbus Service Bulletin A320-53-1245, including Appendix 1, dated March 2, 2011, which is not incorporated by reference in this AD.

#### (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: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM-116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, Washington 98057-3356; telephone (425) 227-1405; fax (425) 227-1149. Information may be emailed to: [9-ANM-116-AMOC-REQUESTS@faa.gov](mailto: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.

(3) *Reporting Requirements:* A federal agency may not conduct or sponsor, and a person is not required to respond to, nor

shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120-0056. Public reporting for this collection of information is estimated to be approximately 5 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at: 800 Independence Ave. SW., Washington, DC 20591. Attn: Information Collection Clearance Officer, AES-200.

#### (k) Related Information

(1) Refer to MCAI EASA Airworthiness Directive 2011-0231, dated December 9, 2011, for related information. The MCAI may be viewed on the Internet at [http://ad.easa.europa.eu/blob/easa\\_ad\\_2011\\_0231.pdf](http://ad.easa.europa.eu/blob/easa_ad_2011_0231.pdf).

(2) Service information identified in this AD that is not incorporated by reference in this AD may be obtained at the addresses specified in paragraphs (l)(3) and (l)(4) of this AD.

#### (l) 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.

(i) Airbus Service Bulletin A320-53-1245, Revision 01, including Appendix 1, dated May 17, 2011.

(ii) Reserved.

(3) For service information identified in this AD, contact Airbus, Airworthiness Office—EIAS, 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](mailto:account.airworth-eas@airbus.com); Internet <http://www.airbus.com>.

(4) 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.

(5) 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 June 14, 2013.

#### Jeffrey E. Duven,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013-15153 Filed 7-9-13; 8:45 am]

**BILLING CODE 4910-13-P**

**DEPARTMENT OF TRANSPORTATION****Federal Aviation Administration****14 CFR Part 39**

[Docket No. FAA-2009-0776; Directorate Identifier 2009-NE-32-AD; Amendment 39-17481; AD 2010-17-11R1]

RIN 2120-AA64

**Airworthiness Directives; Dowty Propellers Propellers**

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

**ACTION:** Final rule.

**SUMMARY:** We are revising an existing airworthiness directive (AD) that applies to all Dowty Propellers R408/6-123-F/17 model propellers. That AD currently requires initial applications of sealant between the bus bar assembly and the backplate assembly of certain line-replaceable units, and repetitive applications of sealant on all R408/6-123-F/17 model propellers. This new AD requires the same actions and allows the use of an equivalent sealant as prescribed in revised service information. This AD was prompted by the need to add an optional terminating action to the applications of sealant. We are issuing this AD to prevent an in-flight double generator failure, which could result in reduced control of the airplane.

**DATES:** This AD is effective August 14, 2013.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD as of August 14, 2013.

**ADDRESSES:** For service information identified in this AD, contact Dowty Propellers, Anson Business Park, Cheltenham Road East, Gloucester GL2 9QN, UK; phone: 44 (0) 1452 716000; fax: 44 (0) 1452 716001. You may view this service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call 781-238-7125.

**Examining the AD Docket**

You may examine the AD docket on the Internet at <http://www.regulations.gov>; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (phone: 800 647 5527) is Document Management Facility, U.S.

Department of Transportation, Docket Operations, M 30, West Building Ground Floor, Room W12 140, 1200 New Jersey Avenue SE., Washington, DC 20590.

**FOR FURTHER INFORMATION CONTACT:**

Michael Schwetz, Aerospace Engineer, Boston Aircraft Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; phone: 781-238-7761; fax 781-238-7170; email: [michael.schwetz@faa.gov](mailto:michael.schwetz@faa.gov).

**SUPPLEMENTARY INFORMATION:****Discussion**

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to revise AD 2010-17-11, Amendment 39-16403 (75 FR 51656, August 23, 2010). That AD applies to the specified products. The NPRM published in the **Federal Register** on February 7, 2013 (78 FR 9005). That NPRM proposed to add an optional terminating action to the applications of sealant.

**Comments**

We gave the public the opportunity to participate in developing this AD. The following presents the comments received on the proposal and the FAA's response to each comment.

**Request To Add Revised Service Information**

Horizon Air requested that we reference the latest revision of Dowty Alert Service Bulletin (ASB) No. D8400-61-A66, which is Revision 7, dated December 1, 2011 in the Compliance and the Credit for Previous Actions sections of the final rule.

We partially agree. We changed paragraph (e)(1)(ii) of the Compliance section to read, "Use paragraph 3 of the Accomplishment Instructions of Dowty Propellers Alert Service Bulletin (ASB) No. D8400-61-A66, Revision 7, dated December 1, 2011 to apply the sealant." We do not agree with the change to the Credit for Previous Actions paragraph because referencing the ASB in the Compliance paragraph satisfies this request by directing the use of the latest revision as stated.

**Request To Add Equivalent Sealant**

Horizon Air requested that we allow the use of 3M 4200 sealant as an equivalent replacement for the 3M 5300 sealant listed in the Accomplishment Instructions of Dowty Propellers Service Bulletin (SB) No. D8400-61-94, Revision 3, dated October 23, 2012.

We agree. We changed the AD by modifying references to "sealant" to

"3M 5300 or 3M 4200 sealant" in the Compliance and Installation Prohibition paragraphs.

**Conclusion**

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

- Are consistent with the intent that was proposed in the NPRM (78 FR 9005, February 7, 2013) for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM (78 FR 9005, February 7, 2013).

**Differences Between This AD and the Service Information**

Dowty Propellers SB No. D8400-61-94, Revision 3, dated October 23, 2012 requires the application of 3M 5300 sealant between the bus bar assembly and the backplate assembly of Dowty Propeller R408/6-123-F/17. This AD also permits use of 3M 4200 sealant as an acceptable equivalent to the 3M 5300 sealant.

**Costs of Compliance**

We estimate that this AD will affect about 104 propellers installed on airplanes of U.S. registry. We also estimate that it will take about 3 hours per propeller to apply the sealant and that required sealant will cost about \$20 per propeller. We also estimate that it will take about 3 hours to replace the bus bar with a de-icer slip ring harness and that required parts will cost about \$1,200 per propeller. The average labor rate is \$85 per hour. Based on these figures, we estimate the cost of the AD on U.S. operators to be \$171,080.

**Authority for This Rulemaking**

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

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, "General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority

because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

### Regulatory Findings

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

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

- (1) Is not a "significant regulatory action" under Executive Order 12866,
- (2) Is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),
- (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.

### 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) 2010-17-11, Amendment 39-16403 (75 FR 51656, August 23, 2010), and adding the following new AD:

#### 2010-17-11R1 Dowty Propellers:

Amendment 39-17481; Docket No. FAA-2009-0776; Directorate Identifier 2009-NE-32-AD.

#### (a) Effective Date

This AD is effective August 14, 2013.

#### (b) Affected ADs

This AD revises AD 2010-17-11, Amendment 39-16403 (75 FR 51656, August 23, 2010).

#### (c) Applicability

This AD applies to Dowty Propellers R408/6-123-F/17 model propellers.

#### (d) Unsafe Condition

This AD was prompted by the need to add an optional terminating action to the applications of sealant. We are issuing this AD to prevent an in-flight double generator failure, which could result in reduced control of the airplane.

#### (e) Compliance

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

(1) For R408/6-123-F/17 model propellers with a hub, actuator, and backplate assembly line-replaceable unit serial number below DAP0347, do the following initial sealant application within 5,000 flight hours (FHs) after September 27, 2010, or within 100 FHs from the effective date of this AD, whichever occurs later:

(i) Apply 3M 5300 or 3M 4200 sealant between the bus bar assemblies and the backplate assembly.

(ii) Use paragraph 3 of the Accomplishment Instructions of Dowty Propellers Alert Service Bulletin (ASB) No. D8400-61-A66, Revision 7, dated December 1, 2011, to apply the sealant.

(2) Thereafter, for all R408/6-123-F/17 model propellers, re-apply sealant as specified in paragraphs (e)(1)(i) through (e)(1)(ii) of this AD within every additional 10,000 FHs.

#### (f) Installation Prohibition

After the effective date of this AD, do not install any Dowty Propellers R408/6-123-F/17 model propeller unless 3M 5300 or 3M 4200 sealant has been applied between the bus bar assembly and the backplate assembly as specified by this AD, or unless the optional terminating action as specified in paragraph (h) of this AD has been performed.

#### (g) Credit for Previous Actions

Sealant applications performed before the effective date of this AD that followed Dowty Propellers Service Bulletin (SB) No. D8400-61-66, dated February 9, 2007, Revision 1, dated May 4, 2007; ASB No. D8400-61-A66, Revision 2, dated August 19, 2009; Revision 3, dated November 10, 2009; Revision 4, dated January 19, 2010; Revision 5, dated June 16, 2010, or Revision 6, dated August 17, 2011 satisfy the initial sealant application requirement of this AD.

#### (h) Optional Terminating Action

As optional terminating action to the sealant application requirements of this AD, replace the bus bar assembly with a slip ring de-icer harness. Use paragraph 3.A. of the Accomplishment Instructions of Dowty Propellers SB No. D8400-61-94, Revision 2, dated August 29, 2012, or Revision 3, dated October 23, 2012, to do the replacement.

#### (i) Alternative Methods of Compliance (AMOCs)

The Manager, Boston Aircraft Certification Office, FAA, may approve AMOCs for this AD. Use the procedures found in 14 CFR 39.19 to make your request.

#### (j) Related Information

(1) Refer to European Aviation Safety Agency AD 2009-0114R1 (correction: dated December 12, 2012) for related information.

(2) For more information about this AD, contact Michael Schwetz, Aerospace Engineer, Boston Aircraft Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; phone: 781-238-7761; fax 781-238-7170; email: [michael.schwetz@faa.gov](mailto:michael.schwetz@faa.gov).

#### (k) 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 August 14, 2013.

(i) Dowty Propellers Alert Service Bulletin No. D8400-61-A66, Revision 7, dated December 1, 2011.

(ii) Dowty Propellers Service Bulletin No. D8400-61-94, Revision 2, dated August 29, 2012.

(iii) Dowty Propellers Service Bulletin No. D8400-61-94, Revision 3, dated October 23, 2012.

(4) For service information identified in this AD, contact Dowty Propellers, Anson Business Park, Cheltenham Road East, Gloucester GL 29QN, UK; phone: 44 (0) 1452 716000; fax: 44 (0) 1452 716001.

(5) You may view this service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call 781-238-7125.

(6) You may view this service information 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 Burlington, Massachusetts, on June 18, 2013.

**Robert Ganley,**

*Acting Assistant Manager, Engine & Propeller Directorate, Aircraft Certification Service.*

[FR Doc. 2013-15292 Filed 7-9-13; 8:45 am]

**BILLING CODE 4910-13-P**

**DEPARTMENT OF TRANSPORTATION****Federal Aviation Administration****14 CFR Part 39**

[Docket No. FAA-2013-0383; Directorate Identifier 2013-CE-008-AD; Amendment 39-17498; AD 2013-13-10]

RIN 2120-AA64

**Airworthiness Directives; Pilatus Aircraft Ltd. Airplanes**

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

**ACTION:** Final rule.

**SUMMARY:** We are adopting a new airworthiness directive (AD) for all PILATUS Aircraft Ltd. Model PC-7 airplanes. This AD results from mandatory continuing airworthiness information (MCAI) issued by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as a need to incorporate new revisions into the Limitations section of the FAA-approved maintenance program (e.g., maintenance manual). The limitations were revised to include an emergency fuel control system adjustment test. We are issuing this AD to require actions to address the unsafe condition on these products.

**DATES:** This AD is effective August 14, 2013.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD as of August 14, 2013.

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

For service information identified in this AD, contact PILATUS AIRCRAFT LTD., Customer Technical Support (MCC), P.O. Box 992, CH-6371 STANS, Switzerland; telephone: +41 (0)41 619 67 74; fax: +41 (0)41 619 67 73; Internet: <http://www.pilatus-aircraft.com> or email: [Techsupport@pilatus-aircraft.com](mailto:Techsupport@pilatus-aircraft.com). You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329-4148.

**FOR FURTHER INFORMATION CONTACT:**

Doug Rudolph, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329-4059; fax: (816) 329-4090; email: [doug.rudolph@faa.gov](mailto:doug.rudolph@faa.gov).

**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. The NPRM was published in the **Federal Register** on April 26, 2013 (78 FR 24689). The NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

This Airworthiness Directive (AD) is prompted by changes to the Airworthiness Limitations Section (ALS) of the Aircraft Maintenance Manual (AMM), which adds life-limits, revises life-limits or adds inspections not previously identified.

These documents include the maintenance instructions and/or airworthiness limitations developed by Pilatus Aircraft Ltd. and approved by FOCA. Failure to comply with these instructions and limitations could potentially lead to unsafe condition.

Pilatus Aircraft Ltd. published Pilatus PC-7 AMM report no. 01715 revision 31 dated 30 November 2012 to incorporate a 300 Flight Hour (FH) hour inspection on the Emergency Fuel Control System (FCS).

For the reason described above, this AD requires the implementation and the compliance with this new maintenance requirement.

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 (78 FR 24689, April 26, 2013) or on the determination of the cost to the public.

**Conclusion**

We reviewed the relevant data and determined that air safety and the public interest require adopting the AD as proposed except for minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM (78 FR 24689, April 26, 2013) for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM (78 FR 24689, April 26, 2013).

**Costs of Compliance**

We estimate that this AD will affect 15 products of U.S. registry. We also estimate that it will take about 1 work-

hour per product to comply with the basic requirements of this AD. The average labor rate is \$85 per work-hour. Required parts will cost about \$10 per product.

Based on these figures, we estimate the cost of this AD on U.S. operators to be \$1,425, or \$95 per product.

**Authority for This Rulemaking**

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

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

**Regulatory Findings**

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

For the reasons discussed above, I certify this AD:

(1) Is not a "significant regulatory action" under Executive Order 12866,

(2) Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

(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.

**Examining the AD Docket**

You may examine the AD docket on the Internet at <http://www.regulations.gov>; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains the NPRM (78 FR 24689, April 26, 2013), the regulatory

evaluation, any comments received, and other information. The street address for the Docket Office (telephone (800) 647-5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

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

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

#### Adoption of the Amendment

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

#### PART 39—AIRWORTHINESS DIRECTIVES

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

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

#### § 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

#### 2013-13-10 Pilatus Aircraft Ltd.:

Amendment 39-17498; Docket No. FAA-2013-0383; Directorate Identifier 2013-CE-008-AD.

#### (a) Effective Date

This airworthiness directive (AD) becomes effective August 14, 2013.

#### (b) Affected ADs

None.

#### (c) Applicability

This AD applies to PILATUS Aircraft Ltd. Model PC-7 airplanes, all serial numbers, certificated in any category.

#### (d) Subject

Air Transport Association of America (ATA) Code 76: Engine Controls.

#### (e) Reason

This AD was prompted by mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as a need to incorporate new revisions into the Limitations section of the FAA-approved maintenance program (e.g., maintenance manual). The limitations were revised to include an emergency fuel control system adjustment test. We are issuing this AD to ensure the continued operational safety of the affected airplanes.

#### (f) Actions and Compliance

Unless already done, do the following actions as specified in paragraphs (f)(1) and (f)(2) of this AD:

(1) Within the next 90 days after August 14, 2013 (the effective date of this AD) and repetitively thereafter at intervals not to exceed 300 hours time-in-service, do the Emergency Fuel Control System-Adjustment/

Test following the Functional Test Procedures on pages 501 and 502 of Section 76-20-00, Emergency Fuel Control System, of Chapter 76, Engine Controls, dated November 30, 2010, found in PILATUS PC-7 Turbo Trainer Aircraft Maintenance Manual, Document No. 01715, Revision 27 USA, dated November 30, 2010.

**Note 1 to paragraph (f)(1) of this AD:** Federal Office of Civil Aviation of Switzerland AD No. HB-2013-003, dated April 2, 2013, requires inserting, in its entirety, the revised Chapter/Section 05-10-20, Time Limited Inspection Requirements, of PILATUS PC-7 Turbo Trainer Aircraft Maintenance Manual, Document No. 01715, Revision 31, dated November 30, 2012, into the Limitations section of the aircraft maintenance manual. However, only the section referring to Chapter 76—Engine Controls found on page 4 of the revised Chapter 5 pertains to the requirements of this AD. Other chapters in the revised Chapter 5 are covered in other AD actions.

(2) As a result of the functional test required in paragraph (f)(1) of this AD, if a discrepancy is found that is not identified in the document listed in paragraph (f)(1) of this AD, before further flight after finding the discrepancy, contact Pilatus Aircraft Ltd. at the address specified in paragraph (i)(3) of this AD for an FAA-approved repair scheme approved specifically for compliance with this AD and incorporate the repair.

#### (g) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Standards Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Doug Rudolph, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329-4059; fax: (816) 329-4090; email: [doug.rudolph@faa.gov](mailto:doug.rudolph@faa.gov). Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

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

#### (h) Related Information

Refer to Federal Office of Civil Aviation (FOCA) AD HB-2013-003, dated March 19, 2013, which can be found in the AD docket on the Internet at <http://www.regulations.gov>, and PILATUS PC-7 Maintenance Manual, Time Limited Inspection Requirements, 50-10-20, pages 1 through 6, dated November 30, 2012, which can be obtained from the manufacturer at the address specified in paragraph (i)(3) of this AD, for related information.

#### (i) 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.

(i) Emergency Fuel Control System-Adjustment/Test, pages 501 and 502 of Section 76-20-00, Emergency Fuel Control System, of Chapter 76, Engine Controls, dated November 30, 2010, found in PILATUS PC-7 Turbo Trainer Aircraft Maintenance Manual (AFM), Document No. 01715, Revision 27 USA, dated November 30, 2010.

**Note 2 to paragraph (i)(2)(i) of this AD:** The correct revision level for the AFM is only indicated on page 1 of the Publication Transmittal Letter.

(ii) Reserved.

(3) For PILATUS Aircraft Ltd. service information identified in this AD, contact PILATUS AIRCRAFT LTD., Customer Technical Support (MCC), P.O. Box 992, CH-6371 STANS, Switzerland; telephone: +41 (0)41 619 67 74; fax: +41 (0)41 619 67 73; Internet: <http://www.pilatus-aircraft.com> or email: [Techsupport@pilatus-aircraft.com](mailto:Techsupport@pilatus-aircraft.com).

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

(5) You may 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 Kansas City, Missouri, on June 24, 2013.

**John Colomy,**

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

[FR Doc. 2013-15532 Filed 7-9-13; 8:45 am]

**BILLING CODE 4910-13-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

**[Docket No. FAA-2012-1035; Directorate Identifier 2011-NM-235-AD; Amendment 39-17492; AD 2013-13-04]**

**RIN 2120-AA64**

#### Airworthiness Directives; Airbus Airplanes

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

**ACTION:** Final rule.

**SUMMARY:** We are adopting a new airworthiness directive (AD) for certain

Airbus Model A318, A319, A320, and A321 series airplanes. This AD was prompted by a report of an uncommanded nose landing gear (NLG) retraction. This AD requires installing a power interruption protection circuit for the landing gear control interface unit (LGCIU). We are issuing this AD to prevent untimely unlocking and/or retraction of the NLG, which, while on the ground, could result in injury to ground personnel and damage to the airplane.

**DATES:** This AD becomes effective August 14, 2013.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of August 14, 2013.

**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:** 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:**

**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. The NPRM was published in the **Federal Register** on October 3, 2012 (77 FR 60331). The NPRM proposed to correct an unsafe condition for the specified products. The European Aviation Safety Agency (EASA), which is the aviation authority for the Member States of the European Community, has issued EASA Airworthiness Directive 2011-0202, dated October 13, 2011 (referred to after this as the Mandatory Continuing Airworthiness Information, or “the MCAI”), to correct an unsafe condition for the specified products.

The MCAI states:

After a push back from the gate, an A320 aeroplane was preparing to initiate taxi, when an uncommanded nose landing gear (NLG) retraction occurred, causing the nose of the aeroplane to hit the ground. Investigations revealed that the retraction was caused by a combination of a power interruption to LGCIUs [landing gear control interface unit] and an internal hydraulic leak through the landing gear (LG) selector valve 40GA.

Deeper investigations have revealed that LGCIU power interruption appears during

engine start at each flight. Even though no incident has been reported in service, it has been determined that a non compliance to the safety objective exists when combined with a dormant single failure of the selector valve seal leaking.

This condition, if not corrected, could lead to further incidents of untimely unlocking and/or retraction of the NLG which, while on the ground, could result in injury to ground personnel and damage to the aeroplane.

To address the possible hydraulic leak of the LG selector valve, EASA issued AD 2007-0065, currently at Revision 2.

For the reasons described above, this [EASA] AD requires installation of a power interruption protection circuit to the LGCIU and the accomplishment of associated modifications [installation of new seals on nose landing gear (NLG)/main landing gear (MLG) door valve selector and gear valve-selector and for certain airplanes, re-identification of identification plates].

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 have considered the comments received.

**Request To Reference Latest Service Information**

Airbus requested that we refer to Mandatory Service Bulletin A320-32-1346, Revision 05, including Appendices 01 and 02, dated January 13, 2012. US Airways and Virgin America requested that the NPRM (77 FR 60331, October 3, 2012) mandate this revision in lieu of Airbus Mandatory Service Bulletin A320-32-1346, Revision 04, including Appendices 01 and 02, dated April 22, 2011.

We disagree with the requests. We reviewed Airbus Mandatory Service Bulletin A320-32-1346, Revision 05, including Appendices 01 and 02, dated January 13, 2012. Revision 05 requires additional work such as changes to the part number of a placard and adds a test of a battery relay. Therefore, referring to that revision of the service information in the final rule would require issuance of a supplemental NPRM. In light of this, and in the interest of the safety of the flying public, we will reference the service information that was referenced in the proposed NPRM (77 FR 60331, October 3, 2012) so as to not delay issuance of this final rule. Airbus or affected operators may, however, request approval to use a later revision of referenced service information as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (j) of this AD. We have not changed the AD in this regard.

**Conclusion**

We reviewed the available data, including the comments received, and determined that air safety and the public interest require adopting the AD as proposed—except for minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM (77 FR 60331, October 3, 2012) for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM (77 FR 60331, October 3, 2012).

**Costs of Compliance**

We estimate that this AD will affect 755 products of U.S. registry. We also estimate that it will take about 48 work-hours per product to comply with the basic requirements of this AD. The average labor rate is \$85 per work-hour. Required parts will cost about \$8,220 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these parts. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of this AD to the U.S. operators to be up to \$9,286,500, or up to \$12,300 per product.

**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>

[www.regulations.gov](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 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.

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

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

#### Adoption of the Amendment

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

### PART 39—AIRWORTHINESS DIRECTIVES

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

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

#### § 39.13 [Amended]

- 2. The FAA amends § 39.13 by adding the following new AD:

**2013-13-04 Airbus:** Amendment 39-17492. Docket No. FAA-2012-1035; Directorate Identifier 2011-NM-235-AD.

#### (a) Effective Date

This airworthiness directive (AD) becomes effective August 14, 2013.

#### (b) Affected ADs

None.

#### (c) Applicability

This AD applies to Airbus Model A318-111, A318-112, A318-121, A318-122, A319-111, A319-112, A319-113, A319-114, A319-115, A319-131, A319-132, A319-133, A320-211, A320-212, A320-214, A320-231, A320-232, A320-233, A321-111, A321-112, A321-131, A321-211, A321-212, A321-213, A321-231, and A321-232 airplanes; certificated in any category; all manufacturer serial numbers, except airplanes on which Airbus modification 37866 has been embodied in production.

#### (d) Subject

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

#### (e) Reason

This AD was prompted by a report of an uncommanded nose landing gear (NLG) retraction. We are issuing this AD to prevent untimely unlocking and/or retraction of the NLG, which, while on the ground, could result in injury to ground personnel and damage to 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) Modification

At the applicable compliance time specified in paragraph (g)(1) or (g)(2) of this AD: Install a power interruption protection circuit for the landing gear control interface unit (LGCIU), in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320-32-1346, Revision 04, including Appendices 01 and 02, dated April 22, 2011 (for Model A318, A319, A320, and A321 series airplanes other than the Model A319CJ (corporate jet) airplanes); or Airbus Service Bulletin A320-32-1349, Revision 03, including Appendix 1, dated October 5, 2011 (for Model A319CJ (corporate jet) airplanes).

(1) For airplanes that have embodied Airbus modification 38947 specified in Airbus Service Bulletin A320-32-1348 during production or in service: Within 72 months after the effective date of this AD.

(2) For all airplanes other than those identified in paragraph (g)(1) of this AD: Within 60 months after the effective date of this AD.

#### (h) Re-Identification of Identification Plates

For airplanes on which the installation required by paragraph (g) of this AD have been done before the effective date of this AD using Airbus Service Bulletin A320-32-1346, dated December 4, 2008 (for Model A318, A319, A320, and A321 series airplanes other than Model A319CJ (corporate jet) airplanes): Within the applicable times specified in paragraphs (g)(1) and (g)(2) of this AD, re-identify the identification plates, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A320-32-1346, Revision 04, including Appendices 01 and 02, dated April 22, 2011 (for Model A318, A319, A320, and A321 series airplanes other than Model A319CJ (corporate jet) airplanes).

#### (i) Credit for Previous Actions

This paragraph provides credit for the actions required by paragraph (g) of this AD, if those actions were performed before the effective date of this AD using the service information specified in paragraphs (i)(1) through (i)(6) of this AD, which are not incorporated by reference in this AD.

(1) Airbus Service Bulletin A320-32-1346, Revision 01, dated October 27, 2009 (for Model A318, A319, A320, and A321 series airplanes).

(2) Airbus Service Bulletin A320-32-1346, Revision 02, dated November 4, 2009 (for Model A318, A319, A320, and A321 series airplanes).

(3) Airbus Service Bulletin A320-32-1346, Revision 03, dated January 7, 2010 (for Model A318, A319, A320, and A321 series airplanes).

(4) Airbus Service Bulletin A320-32-1349, dated December 4, 2008 (for Model A319CJ (corporate jet) airplanes).

(5) Airbus Service Bulletin A320-32-1349, Revision 01, dated August 31, 2009, (for Model A319CJ (corporate jet) airplanes).

(6) Airbus Service Bulletin A320-32-1349, Revision 02, dated June 16, 2010 (for Model A319CJ (corporate jet) airplanes).

#### (j) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, ANM-116, International Branch, 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: 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](mailto: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 Airworthiness Directive 2011-0202, dated October 13, 2011, for related information. This MCAI may be viewed on the Internet at [http://ad.easa.europa.eu/blob/easa\\_ad\\_2011\\_0202.pdf](http://ad.easa.europa.eu/blob/easa_ad_2011_0202.pdf).

(2) Service information identified in this AD that is not incorporated by reference may be obtained at the addresses specified in paragraphs (l)(3) and (l)(4) of this AD. (l)

#### 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.

(i) Airbus Service Bulletin A320-32-1346, Revision 04, including Appendices 01 and 02, dated April 22, 2011.

(ii) Airbus Service Bulletin A320-32-1349, Revision 03, including Appendix 1, dated October 5, 2011.

(3) For service information identified in this AD, contact Airbus, Airworthiness Office—ELIAS, 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](mailto:account.airworth-eas@airbus.com); Internet <http://www.airbus.com>.

(4) 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.

(5) 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 June 14, 2013.

**Ali Bahrami,**

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

[FR Doc. 2013-15335 Filed 7-9-13; 8:45 am]

**BILLING CODE 4910-13-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 71

[Docket No. FAA-2012-1138; Airspace Docket No. 12-ACE-6]

#### Amendment of Class E Airspace; Ogallala, NE

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

**ACTION:** Final rule.

**SUMMARY:** This action amends Class E airspace at Ogallala, NE. Additional controlled airspace is necessary to accommodate new Area Navigation (RNAV) Standard Instrument Approach Procedures at Searle Field Airport. This action enhances the safety and management of Instrument Flight Rule (IFR) operations at the airport.

**DATES:** Effective date: 0901 UTC, October 17, 2013. The Director of the Federal Register approves this incorporation by reference action under 1 CFR Part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

**FOR FURTHER INFORMATION CONTACT:** Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Fort Worth, TX 76137; telephone 817-321-7716.

#### SUPPLEMENTARY INFORMATION:

##### History

On March 26, 2013, the FAA published in the **Federal Register** a notice of proposed rulemaking (NPRM) to amend Class E airspace for the Ogallala, NE., area, creating additional controlled airspace at Searle Field Airport (78 FR 18262) Docket No. FAA-2012-1138. Interested parties were

invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received. Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9W dated August 8, 2012, and effective September 15, 2012, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

#### The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) Part 71 by amending Class E airspace extending upward from 700 feet above the surface to ensure that required controlled airspace exists from the current 8.6-mile radius of the airport to 11.2 miles southeast of the airport to contain aircraft executing new standard instrument approach procedures at Searle Field Airport, Ogallala, NE. This action enhances the safety and management of IFR operations at the airport.

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

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends controlled airspace at Searle Field Airport, Ogallala, NE.

#### Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1E, "Environmental Impacts: Policies and Procedures," paragraph 311a. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant preparation of an environmental assessment.

#### List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

#### Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

#### PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for 14 CFR Part 71 continues to read as follows:

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

##### § 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9W, Airspace Designations and Reporting Points, dated August 8, 2012, and effective September 15, 2012, is amended as follows:

Class E airspace areas extending upward from 700 feet or more above the surface.

\* \* \* \* \*

##### ACE NE E5 Ogallala, NE [Amended]

Searle Field Airport, NE  
(lat. 41°07'10" N., long. 101°46'11" W.)

That airspace extending upward from 700 feet above the surface within a 8.6-mile radius of Searle Field Airport, and within 2 miles each side of the 144° bearing from the airport extending from the 8.6-mile radius to 11.2 miles southeast of the airport.

Issued in Fort Worth, Texas, on June 24, 2013.

**David P. Medina,**

*Manager, Operations Support Group, ATO Central Service Center.*

[FR Doc. 2013-16448 Filed 7-9-13; 8:45 am]

**BILLING CODE 4910-13-P**

**DEPARTMENT OF TRANSPORTATION****Federal Aviation Administration****14 CFR Part 71**

[Docket No. FAA-2012-1334; Airspace  
Docket No. 12-ASO-18]

**Establishment of Class E Airspace;  
Sanibel, FL**

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

**ACTION:** Final rule; correction.

**SUMMARY:** This action corrects the geographic coordinates in the airspace description of a final rule, published in the **Federal Register** on June 10, 2013, establishing controlled airspace at Sanibel Island Heliport, Sanibel, FL.

**DATES:** Effective date: 0901 UTC, August 22, 2013. The Director of the Federal Register approves this incorporation by reference action under title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

**FOR FURTHER INFORMATION CONTACT:** John Fornito, Operations Support Group, Eastern Service Center, Federal Aviation Administration, P. O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305-6364.

**SUPPLEMENTARY INFORMATION:****History**

On June 10, 2013, the FAA published a final rule, in the **Federal Register** establishing Class E airspace at Sanibel Island Heliport, Sanibel, FL. (78 FR 34557). After publication, the FAA found typographical errors in the airspace designation and regulatory text for both the heliport and point in space coordinates. This action makes the corrections and is rewritten for clarity.

The Class E airspace designations are published in Paragraphs 6005 of FAA order 7400.9V, dated August 8, 2012, and effective September 15, 2012, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

**Correction to Final Rule**

Accordingly, pursuant to the authority delegated to me, on page 34558, beginning at line 50, the description of the Class E airspace for Sanibel Island Heliport, Sanibel, FL, as published in the **Federal Register** of June 10, 2013 (78 FR 34557), FR Doc. 2013-13107, is corrected to read:

\* \* \* \* \*

**ASO FL E5 Sanibel, FL [Corrected]**

Sanibel Island Heliport, FL  
(Lat. 26°27'46" N., long. 82°09'18" W.) Point  
in Space Coordinates  
(Lat. 26°27'52" N., long. 82°08'35" W.)

That airspace extending upward from 700 feet above the surface within a 6-mile radius of the point in space coordinates (lat. 26°27'52" N., long. 82°08'35" W) serving Sanibel Island Heliport.

Issued in College Park, Georgia, on June 28, 2013.

**Barry A. Knight,**

*Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.*

[FR Doc. 2013-16442 Filed 7-9-13; 8:45 am]

**BILLING CODE 4910-13-P**

**DEPARTMENT OF TRANSPORTATION****Federal Aviation Administration****14 CFR Part 71**

[Docket No. FAA-2012-1121; Airspace  
Docket No. 12-AGL-8]

**Establishment of Class E Airspace;  
Elbow Lake, MN**

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

**ACTION:** Final rule.

**SUMMARY:** This action establishes Class E airspace at Elbow Lake, MN. Controlled airspace is necessary to accommodate new Area Navigation (RNAV) Standard Instrument Approach Procedures at Elbow Lake Municipal—Pride of the Prairie Airport. The FAA is taking this action to enhance the safety and management of Instrument Flight Rule (IFR) operations at the airport.

**DATES:** Effective date: 0901 UTC, October, 17, 2013. The Director of the Federal Register approves this incorporation by reference action under 14 CFR part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

**FOR FURTHER INFORMATION CONTACT:** Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Fort Worth, TX 76137; telephone 817-321-7716.

**SUPPLEMENTARY INFORMATION:****History**

On March 26, 2013, the FAA published in the **Federal Register** a notice of proposed rulemaking (NPRM) to establish Class E airspace at Elbow Lake Municipal—Pride of the Prairie Airport, Elbow Lake, MN (78 FR 18267) Docket No. FAA-2012-1121. Interested

parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received. Also, in the NPRM a typographical error was found in the proposal citing the wrong radius mileage; the correct controlled airspace area is from within a 6.5-mile radius of the airport, not a 6-mile radius. Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9W dated August 8, 2012, and effective September 15, 2012, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

**The Rule**

This action amends Title 14 Code of Federal Regulations (14 CFR) part 71 by establishing Class E airspace extending upward from 700 feet above the surface within a 6.5-mile radius of Elbow Lake Municipal—Pride of the Prairie Airport, Elbow Lake, MN, to ensure that required controlled airspace exists to contain new standard instrument approach procedures at the airport. This action enhances the safety and management of IFR operations at the airport.

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

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it establishes

controlled airspace at Elbow Lake Municipal—Pride of the Prairie Airport, Elbow Lake, MN.

#### Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1E, “Environmental Impacts: Policies and Procedures,” paragraph 311a. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant preparation of an environmental assessment.

#### List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

#### Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

#### PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

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

#### § 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR part 71.1 of the Federal Aviation Administration Order 7400.9W, Airspace Designations and Reporting Points, dated August 8, 2012, and effective September 15, 2012, is amended as follows:

*Paragraph 6005: Class E airspace areas extending upward from 700 feet or more above the surface.*

\* \* \* \* \*

#### AGL MN E5 Elbow Lake, MN [New]

Elbow Lake Municipal—Pride of the Prairie Airport, MN  
(Lat. 45°59′05″ N., long. 95°59′31″ W.)

That airspace extending upward from 700 feet above the surface within a 6.5-mile radius of Elbow Lake Municipal—Pride of the Prairie Airport.

Issued in Fort Worth, Texas, on June 24, 2013.

**David P. Medina,**

*Manager, Operations Support Group, ATO Central Service Center.*

[FR Doc. 2013–16444 Filed 7–9–13; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF COMMERCE

### Bureau of Industry and Security

#### 15 CFR Part 748

[Docket No. 130611539–3539–01]

RIN 0694–AF93

#### Additions to the List of Validated End-Users in the People’s Republic of China: Samsung China Semiconductor Co. Ltd. and Advanced Micro-Fabrication Equipment, Inc., China

**AGENCY:** Bureau of Industry and Security, Commerce.

**ACTION:** Final rule.

**SUMMARY:** In this rule, the Bureau of Industry and Security (BIS) amends the Export Administration Regulations to add two end-users in the People’s Republic of China to the list of Validated End-Users (VEU). Specifically, BIS amends Supplement No. 7 to part 748 of the EAR to add Samsung China Semiconductor Co. Ltd. (Samsung China) and Advanced Micro-Fabrication Equipment, Inc., China (AMEC) as VEUs. With this rule, exports, reexports and transfers (in-country) of certain items to one Samsung China facility and one AMEC facility are now authorized under Authorization VEU.

**DATES:** This rule is effective July 10, 2013.

#### FOR FURTHER INFORMATION CONTACT:

Karen Nies-Vogel, Chair, End-User Review Committee, Bureau of Industry and Security, U.S. Department of Commerce, 14th Street & Pennsylvania Avenue NW., Washington, DC 20230; by telephone: (202) 482–5991, fax: (202) 482–3991, or email: [ERC@bis.doc.gov](mailto:ERC@bis.doc.gov).

#### SUPPLEMENTARY INFORMATION:

##### Background

##### Authorization Validated End-User

Validated End-Users (VEUs) are designated entities located in eligible destinations to which eligible items may be exported, reexported, or transferred (in-country) under a general authorization instead of a license. The names of the VEUs, as well as the date they were so designated, and their respective eligible destinations and items are identified in Supplement No. 7 to part 748 of the EAR. Under the terms described in that supplement, VEUs may obtain eligible items without an export license from the Bureau of Industry and Security (BIS), in conformity with Section 748.15 of the EAR. Eligible items vary between VEUs, but may include commodities, software,

and technology, except those controlled for missile technology or crime control reasons on the Commerce Control List (CCL) (part 774 of the EAR).

VEUs are reviewed and approved by the U.S. Government in accordance with the provisions of Section 748.15 and Supplement Nos. 8 and 9 to part 748 of the EAR. The End-User Review Committee (ERC), composed of representatives from the Departments of State, Defense, Energy, and Commerce, and other agencies, as appropriate, is responsible for administering the VEU program. BIS amended the Export Administration Regulations (EAR) in a final rule published on June 19, 2007 (72 FR 33646) to create Authorization VEU.

#### Addition to the List of Validated End-User Authorizations in the People’s Republic of China (PRC)

*Addition of Samsung China Semiconductor Co. Ltd. to the List of Validated End-Users in the PRC and Its “Eligible Destinations” and “Eligible Items (By ECCN)”*

This final rule amends Supplement No. 7 to part 748 of the EAR to add Samsung China Semiconductor Co. Ltd. (Samsung China) as a VEU, and to identify its eligible facility and the items that may be exported, reexported or transferred (in-country) to Samsung China under Authorization VEU, effective the date of this rule. The names and addresses of this newly-appointed VEU and its eligible end-user are as follows:

##### Validated End-User:

Samsung China Semiconductor Co. Ltd., City Gate #1, JinYE Road, Xi’an, People’s Republic of China 710065.

##### Eligible Destination:

Samsung China Semiconductor Co. Ltd., Xinglong Street, Chang’an District, Xi’an, People’s Republic of China 710065.

*Eligible Items (by ECCN) That May Be Exported, Reexported or Transferred (In-Country) to the Eligible Destination Identified Under Samsung China Semiconductor Co. Ltd.’s Validated End-User Authorization:*

Export Control Classification Numbers (ECCNs) 1C350.c.3, 1C350.d.7, 2B230, 2B350.d.2, 2B350.g.3, 2B350.i.4, 3B001.a.1, 3B001.b, 3B001.c, 3B001.e, 3B001.f, 3B001.h, 3C002, 3C004, 3D002, and 3E001 (limited to “technology” for items classified under 3C002 and 3C004 and “technology” for use consistent with the International Technology Roadmap for

Semiconductors process for items classified under ECCNs 3B001 and 3B002).

*Addition of Advanced Micro-Fabrication Equipment, Inc., China to the List of Validated End-Users in the PRC and Its "Eligible Destinations" and "Eligible Items (By ECCN)"*

This final rule also amends Supplement No. 7 to part 748 of the EAR to add Advanced Micro-Fabrication Equipment, Inc., China (AMEC) as a VEU, and to identify its eligible facility and the items that may be exported, reexported or transferred (in-country) to AMEC under Authorization VEU, effective the date of this rule. The names and addresses of this newly-appointed VEU and its eligible end-user are as follows:

*Validated End-User:*

Advanced Micro-Fabrication Equipment, Inc., China, 188 Taihua Road, Jinqiao Export Processing Zone (South Area), Pudong, Shanghai 201201, China.

*Eligible Destination:*

Advanced Micro-Fabrication Equipment, Inc., China, 188 Taihua Road, Jinqiao Export Processing Zone (South Area), Pudong, Shanghai 201201, China.

*Eligible Items (by ECCN) That May Be Exported, Reexported or Transferred (In-Country) to the Eligible Destination Identified Under Advanced Micro-Fabrication Equipment, Inc. Validated End-User Authorization*

Export Control Classification Numbers (ECCNs) 2B230, 3B001.c and 3B001.e (items classified under ECCNs 3B001.c and 3B001.e are limited to components and accessories).

Authorization VEU eliminates the burden on exporters and reexporters of preparing individual license applications because the export, reexport and transfer (in-country) of the eligible items specified for each VEU may be made under general authorization instead of under individual licenses. With the addition of Samsung China and AMEC as VEU's, exporters and reexporters can supply Samsung China and AMEC much more quickly, thus enhancing the competitiveness of both the VEU and its suppliers of U.S.-origin items.

To ensure appropriate facilitation of exports and reexports, on-site reviews of VEU's, including Samsung China and AMEC, may be warranted pursuant to Section 748.15(f)(2) of the EAR and Section 7(iv) of Supplement No. 8 to part 748 of the EAR. If such a review is warranted, BIS will inform the PRC Ministry of Commerce.

Since August 21, 2001, the Export Administration Act (the Act) has been in lapse and the President, through Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp., p. 783 (2002)), as amended by Executive Order 13637 of March 8, 2013, 78 FR 16129 (March 13, 2013), and as extended most recently by the Notice of August 15, 2012, 77 FR 49699 (August 16, 2012), has continued the EAR in effect under the International Emergency Economic Powers Act. BIS continues to carry out the provisions of the Act, as appropriate and to the extent permitted by law, pursuant to Executive Order 13222.

**Rulemaking Requirements**

1. Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This rule has been determined to be not significant for purposes of Executive Order 12866.

2. This rule involves collections previously approved by the Office of Management and Budget (OMB) under Control Number 0694-0088, "Multi-Purpose Application," which carries a burden hour estimate of 43.8 minutes to prepare and submit form BIS-748; and for recordkeeping, reporting and review requirements in connection with Authorization VEU, which carries an estimated burden of 30 minutes per submission. This rule is expected to result in a decrease in license applications submitted to BIS. Total burden hours associated with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA) and OMB Control Number 0694-0088 are not expected to increase significantly as a result of this rule.

Notwithstanding any other provisions of law, no person is required to respond to, nor be subject to a penalty for failure to comply with a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

3. This rule does not contain policies with Federalism implications as that term is defined under Executive Order 13132.

4. Pursuant to the Administrative Procedure Act (APA), 5 U.S.C. 553(b)(B), BIS finds good cause to waive

requirements that this rule be subject to notice and the opportunity for public comment because they are unnecessary. In determining whether to grant VEU designations, a committee of U.S. Government agencies evaluates information about and commitments made by candidate companies, the nature and terms of which are set forth in 15 CFR part 748, Supplement No. 8. The criteria for evaluation by the committee are set forth in 15 CFR 748.15(a)(2).

The information, commitments, and criteria for this extensive review were all established through the notice of proposed rulemaking and public comment process (71 FR 38313 (July 6, 2006) (proposed rule), and 72 FR 33646 (June 19, 2007) (final rule)). Given the similarities between the authorizations provided under the VEU program and export licenses (as discussed further below), the publication of this information does not establish new policy. In publishing this final rule, BIS merely adds to the list of VEU's and the respective eligible items and destinations within the established regulatory framework of the Authorization VEU program. Further, this rule does not abridge the rights of the public or eliminate the public's option to export under any of the forms of authorization set forth in the EAR.

Publication of this rule in other than final form is unnecessary because the authorizations granted in the rule are consistent with the authorizations granted to exporters for individual licenses (and amendments or revisions thereof), which do not undergo public review. In addition, as with license applications, VEU authorization applications contain confidential business information, which is necessary for the extensive review conducted by the U.S. Government in assessing such applications. This information is extensively reviewed according to the criteria for VEU authorizations, as set out in 15 CFR 748.15(a)(2). Additionally, just as the interagency reviews license applications, the authorizations granted under the VEU program involve interagency deliberation and result from review of public and non-public sources, including licensing data, and the measurement of such information against the VEU authorization criteria. Given the nature of the review, and in light of the parallels between the VEU application review process and the review of license applications, public comment on this authorization and subsequent amendments prior to publication is unnecessary. Moreover, because, as noted above, the criteria and

process for authorizing and administering VEU's were developed with public comments, allowing additional public comment on this amendment to individual VEU authorizations, which was determined according to those criteria, is unnecessary.

Section 553(d) of the APA generally provides that rules may not take effect earlier than thirty (30) days after they are published in the **Federal Register**. BIS finds good cause to waive the 30-day delay in effectiveness under 5 U.S.C. 553(d)(3) because the delay would be contrary to the public interest. BIS is simply amending the list of VEU authorizations by adding two new end-users consistent with established objectives and parameters administered and enforced by the responsible designated departmental representatives to the End-User Review Committee. Delaying this action's effectiveness could cause confusion with the new

VEU status as determined by those authorized government representatives and stifle the ongoing purpose of the VEU Authorization Program.

Accordingly, it is contrary to the public interest to delay this rule's effectiveness.

No other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this final rule. Because a notice of proposed rulemaking and an opportunity for public comment are not required under the APA or by any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable. As a result, no final regulatory flexibility analysis is required and none has been prepared.

**List of Subjects in 15 CFR Part 748**

Administrative practice and procedure, Exports, Reporting and recordkeeping requirements.

Dated: July 3, 2013.

**Kevin J. Wolf**,  
Assistant Secretary for Export Administration.

Accordingly, part 748 of the EAR (15 CFR parts 730–774) is amended as follows:

**PART 748—[AMENDED]**

■ 1. The authority citation for 15 CFR part 748 continues to read as follows:

**Authority:** 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 15, 2012, 77 FR 49699 (August 16, 2012).

■ 2. Amend Supplement No. 7 to part 748 to add in alphabetical order entries for “Advanced Micro-Fabrication Equipment, Inc., China” and “Samsung China Semiconductor Co. Ltd.” in “China (People’s Republic of)” to read as follows:

**SUPPLEMENT NO. 7 TO PART 748—AUTHORIZATION VALIDATED END-USER (VEU): LIST OF VALIDATED END-USERS, RESPECTIVE ITEMS ELIGIBLE FOR EXPORT, REEXPORT AND TRANSFER, AND ELIGIBLE DESTINATIONS**

Country	Validated end-user	Eligible items (by ECCN)	Eligible destination	Federal Register citation
				Nothing in this Supplement shall be deemed to supersede other provisions in the EAR, including but not limited to § 748.15(c).
*	*	*	*	*
	Advanced Micro-Fabrication Equipment, Inc., China.	2B230, 3B001.c and 3B001.e (items classified under ECCNs 3B001.c and 3B001.e are limited to components and accessories).	Advanced Micro-Fabrication Equipment, Inc., China, 188 Taihua Road, Jinqiao Export Processing Zone (South Area), Pudong, Shanghai 201201, China.	78 FR [INSERT PAGE NUMBER], 7/10/13.
*	*	*	*	*
	Samsung China Semiconductor Co. Ltd.	1C350.c.3, 1C350.d.7, 2B230, 2B350.d.2, 2B350.g.3, 2B350.i.4, 3B001.a.1, 3B001.b, 3B001.c, 3B001.e, 3B001.f, 3B001.h, 3C002, 3C004, 3D002, and 3E001 (limited to “technology” for items classified under 3C002 and 3C004 and “technology” for use consistent with the International Technology Roadmap for Semiconductors process for items classified under ECCNs 3B001 and 3B002).	Samsung China Semiconductor Co. Ltd., Xinglong Street, Chang’an District, Xi’an, People’s Republic of China 710065.	78 FR [INSERT PAGE NUMBER], 7/10/13.
*	*	*	*	*

[FR Doc. 2013–16525 Filed 7–9–13; 8:45 am]  
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**FEDERAL TRADE COMMISSION**  
**16 CFR Part 803**  
**RIN 3084–AA91**  
**Premerger Notification; Reporting and Waiting Period Requirements**  
**AGENCY:** Federal Trade Commission.  
**ACTION:** Final rule.

**SUMMARY:** The Commission is amending the premerger notification rules (“the Rules”) to provide a framework for the withdrawal of a premerger notification filing under the Hart Scott Rodino Act (“the Act” or “HSR”). The Act and Rules require the parties to certain mergers and acquisitions to file reports with the Federal Trade Commission (“the Commission”) and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (“the Assistant Attorney General”) (collectively, “the Agencies”)

and to wait a specified period of time before consummating such transactions. The reporting and waiting period requirements are intended to enable these enforcement agencies to determine whether a proposed merger or acquisition may violate the antitrust laws if consummated and, when appropriate, to obtain effective preliminary relief in federal court to prevent consummation. This final rulemaking sets forth the procedure for voluntarily withdrawing an HSR filing, establishes when an HSR filing will be

automatically withdrawn if a filing publicly announcing the termination of a transaction is made with the U.S. Securities and Exchange Commission ("SEC") under the Securities Exchange Act of 1934 and rules promulgated under that act, and sets forth the procedure for resubmitting a filing after a withdrawal without incurring an additional filing fee.

**DATES:** These final rules are effective August 9, 2013.

**FOR FURTHER INFORMATION CONTACT:**

Robert L. Jones, Deputy Assistant Director, Premerger Notification Office, Bureau of Competition, Room H-303, Federal Trade Commission, Washington, DC 20580, (202) 326-3100, [rjones@ftc.gov](mailto:rjones@ftc.gov).

**SUPPLEMENTARY INFORMATION:**

**Statement of Basis and Purpose**

Section 7A of the Clayton Act requires the parties to certain mergers or acquisitions to make premerger notification filings with the Agencies and to wait a specified period of time before consummating such transactions. The reporting requirement and the waiting period that it triggers are intended to enable the Agencies to determine whether a proposed merger or acquisition may violate the antitrust laws if consummated and, when appropriate, to obtain effective preliminary relief in federal court to prevent consummation, pursuant to § 7 of the Act. Section 7A(d)(1) of the Act, 15 U.S.C. 18a(d)(1), directs the Commission, with the concurrence of the Assistant Attorney General, in accordance with the Administrative Procedure Act, 5 U.S.C. 553, to require that premerger notification be in such form and contain such information and documentary material as may be necessary and appropriate to make that determination. In addition, Section 7A(d)(2) of the Act, 15 U.S.C. 18a(d)(2), grants the Commission, with the concurrence of the Assistant Attorney General, in accordance with 5 U.S.C. 553, the authority to define the terms used in the Act and prescribe such other rules as may be necessary and appropriate to carry out the purposes of Section 7A.

On February 1, 2013, the Commission posted a Notice of Proposed Rulemaking and Request for Public Comment on its Web site, and the notice was published in the **Federal Register** on February 14, 2013.<sup>1</sup> The proposal recommended

adding § 803.12 to the HSR Rules,<sup>2</sup> which would set forth a procedure for voluntarily withdrawing an HSR filing, establish when an HSR filing would be automatically withdrawn after a party files a public announcement of the termination of a transaction on EDGAR, the Electronic Data Gathering, Analysis, and Retrieval system where companies who file reports with the SEC must make such submissions, and set forth the procedure for resubmitting a filing with no additional filing fee after a withdrawal. Additionally, the Commission proposed adding § 803.9(f) to establish that no additional filing fee is required when § 803.12(c) is utilized. The comment period closed on April 15, 2013.

Under proposed rule § 803.12(a), at any time, an acquiring person, or in transactions to which § 801.30 does not apply (a "non-§ 801.30 transaction"), an acquiring or an acquired person, may withdraw its premerger notification filing by notifying the FTC and the Antitrust Division in writing. Doing so will nullify the filing and terminate the pendency of any formal Request for Additional Information ("Second Request") if substantial compliance has not been certified. If the transaction has been granted early termination or the initial or extended waiting period has expired, the one year period that parties have under § 803.7(a) to consummate the transaction will terminate. If the parties wish to pursue the acquisition at a future date, new notifications and a new filing fee will be required (unless the withdraw-refile procedure in paragraph (c) of § 803.12 is utilized), and a new waiting period must be observed prior to consummation of the acquisition.

Proposed rule § 803.12(b) linked the continuing viability of an HSR filing with disclosures required by the SEC under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) and rules promulgated under that act. Under those SEC disclosure requirements, when the terms or conditions of a tender offer have not been met and subsequently the tender offer has expired, is terminated or has otherwise been withdrawn, the offeror must file an amendment to its Schedule TO with the SEC. This amended filing brings the pending tender offer to a definitive end, and if the offeror wishes to launch another tender offer, it must start the process from the beginning by filing a new Schedule TO. Similar disclosure requirements exist for acquisitions outside of the § 801.30 tender offer context, such that if the parties

terminate a definitive material agreement, they must file a Form 8-K with the SEC disclosing the termination of the agreement. If the parties subsequently become interested in moving forward with the transaction once again and sign another definitive material agreement, they must file a new Form 8-K with the SEC. In both cases, the Commission proposed that the associated HSR filing would be automatically withdrawn on the date of the filing with the SEC and that the parties must notify the Agencies by letter when the SEC filing is made. Any subsequent transaction between the parties, if otherwise reportable, would require a new HSR filing and a new filing fee (unless the special circumstances of § 803.12(c) apply).

Proposed rule § 803.12(c) would apply when a filing is voluntarily withdrawn by the acquiring person pursuant to proposed § 803.12(a) or when the acquiring person's filing is automatically withdrawn pursuant to proposed § 803.12(b) as discussed above. The acquiring person could resubmit the HSR filing prior to the close of the second business day after withdrawal without paying an additional filing fee if the acquiring person complied with certain requirements. Proposed rule § 803.9(f) would establish that no filing fee is required when Proposed rule § 803.12(c) is used.

The Commission received no public comments on the proposed rulemaking from bar associations, industry groups, or from companies or individuals likely to be directly affected by the proposed rules. The Commission received one public comment addressing the Proposed Rules, from Mr. Kenneth Hsu, a law student, on March 29, 2013. The comment is published on the FTC Web site at <http://www.ftc.gov/os/comments/hsrruleamend/index.shtm>.

Mr. Hsu's comment did not support the rule, expressing concerns that the automatic withdrawal provision could discourage companies from entering into HSR transactions, while potentially incurring substantial costs during a pending investigation. Mr. Hsu did not address any other aspect of the proposed rulemaking. After carefully considering the comment, discussed below, the Commission, with the concurrence of the Assistant Attorney General, is adopting the rule as proposed.<sup>3</sup>

<sup>1</sup> 78 FR 10574 (February 14, 2013). The Commission also has a pending rulemaking concerning transfers of exclusive rights to pharmaceutical patents. 77 FR 50057 (August 20, 2012).

<sup>2</sup> 16 CFR Parts 801 to 803.

<sup>3</sup> The final rules makes one minor grammatical change from the proposed rule in § 803.12(c), clarifying the language referring to an acquired person's filing.

### Public Comment on the Proposed Rules

Mr. Hsu's comment claims that, "the automatic withdrawal provision . . . sets forth convincing disincentives to engage in transactions covered by HSR rules." The comment does not, however, provide any data or basis for this statement. The costs associated with HSR filings do not appear to deter parties from pursuing their transactions. In the rare cases that a party chooses to terminate a transaction and pursue it at later date, it seems highly improbable that companies would forego a transaction based on the costs of refile because of the auto-withdrawal provision.

The comment claims that the definition of "public announcement" is extremely broad and that one statement indicating a desire to recommence a tender offer or agreement made in an SEC filing would trigger the automatic withdrawal procedure. This claim is not accurate. § 803.12 is narrowly written and only two specific events—filing a Schedule TO—A with the SEC announcing the expiration or termination of a tender offer, or filing a Form 8—K announcing the termination of a definitive agreement—trigger the automatic withdrawal procedure, a process entirely under the control of the filing company. Recommencing or adjusting the terms of a tender offer is not terminating a tender offer under the rule and would not result in an automatic withdrawal of an HSR filing.

The comment also states that the new rules would impose substantial costs on companies during premerger investigations while waiting for FTC approval and that firms can currently avoid such costs by "temporarily withdrawing offers or agreements until they are assured of FTC approval." Parties to a transaction, however, cannot avoid these costs by temporarily withdrawing the offer or agreement, as a temporary withdrawal does not currently mitigate the responsibility of complying with the provisions of the HSR Act. Under the rules, if the parties have triggered the auto-withdrawal provision by making the requisite filing with the SEC, then they have publicly announced the termination of the transaction. As a result, the parties mitigate their own costs and relieve the Agencies of the obligation to continue to spend scarce resources on a now hypothetical deal. Additionally, if the parties do intend to restart the deal, the proposed rules allow parties to refile within two business days with no additional filing fee under §§ 803.12(c) and 803.9(f).

While the comment claims that the proposed rules will create confusion about procedures for FTC and SEC filings, the Commission believes the rules will provide clarity by harmonizing the SEC and FTC treatment of publicly announced terminations of transactions and by formalizing what is currently an informal procedure for voluntarily withdrawing and refile an HSR notification.

Despite the comment's claim that the rules will impose substantial costs on companies and discourage HSR transactions, no evidence was provided in support of that assertion and, as noted above, no comments were received from bar associations, industry groups, companies, or individuals who are likely to be directly affected by the rules.

### Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601–612, requires that the agency conduct an initial and final regulatory analysis of the anticipated economic impact of the amendments on small businesses, except where the Commission certifies that the regulatory action will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605. Because of the size of the transactions necessary to invoke an HSR filing, the premerger notification rules rarely affect small businesses. The 2000 amendments to the Act exempted all transactions valued at \$50 million or less, with subsequent automatic adjustments to take account of changes in GNP resulting in a current threshold of \$70.9 million. Further, none of the rule amendments expands the coverage of the premerger notification rules in a way that would affect small business. In addition, very few entities will refile their premerger notifications and incur new filing costs following withdrawal of their notifications under the rules. Accordingly, the Commission certifies that these rules will not have a significant economic impact on a substantial number of small entities. This document serves as the required notice of this certification to the Small Business Administration.

### Paperwork Reduction Act

The Paperwork Reduction Act, 44 U.S.C. 3501–3521, requires agencies to submit "collections of information" to the Office of Management and Budget ("OMB") and obtain clearance before instituting them. Such collections of information include reporting, recordkeeping, or disclosure requirements contained in regulations. The existing information collection

requirements in the Rules and Form have been reviewed and approved by OMB under Control No. 3084–0005. The current OMB clearance expires on August 31, 2014. The rule amendments would have, at most, a minor effect on the FTC's current burden estimates.<sup>4</sup>

The rule amendments formalize the existing informal procedure for parties to voluntarily withdraw and resubmit their filings. Consequently, the amendments do not change the burden with respect to transactions for which the filings are voluntarily withdrawn under § 803.12(a).

Calculating the burden for the auto-withdrawal amendments in § 803.12(b) requires an analysis of two potential scenarios. In one scenario, a filing is automatically withdrawn and the acquiring person utilizes the two-day resubmission process under § 803.12(c). In that case, no additional transaction is generated as the acquiring person simply restarts the waiting period on the same transaction. In the second scenario, the parties to a terminated transaction for which the filing is automatically withdrawn do not utilize the two-day resubmission process under § 803.12(c) but later decide to move forward with the transaction. In that case, a new filing would be required. Both of these scenarios are rare, as it is very unlikely that a transaction for which the HSR filing is automatically withdrawn during the merger review process (due to the parties' SEC filing indicating that the transaction has been terminated) would be subsequently restarted. Based on past experience, this would occur approximately once every fifteen years. If the parties to such a transaction do not utilize the two-day resubmission process, the rule change would require non-index HSR filings for, on average, a small fraction of a single transaction per year. The currently cleared estimate for a single non-index filing is 37 hours.<sup>5</sup> See 76 FR

<sup>4</sup> The currently cleared burden hours total is 53,756, calculated as follows: [(1,428 non-index filings × 37 hours) + (22 transactions requiring more precise valuation × 40 hours) + (20 index filings 2 hours)]. See 76 FR 42471, 42479 (July 19, 2011). The instant amendments, as detailed below, would incrementally add no more than 3 hours to this total. Separately, the FTC has estimated incremental PRA burden of 2,664 hours for the Commission's proposed amendments to sections 801.1 and 801.2 of the Rules that clarify that a transaction involving the transfer of exclusive rights to a patent in the pharmaceutical industry is potentially reportable under the Act. See 77 FR 50057 at 50061.

<sup>5</sup> "Index" filings pertain to banking transactions, and thus would not be affected by the amendments. Index filings are incorporated, however, into the FTC's currently cleared burden estimates (the FTC has jurisdiction over the administration of index filings). They are mentioned here to distinguish them from and to further explain a "non-index"

42471, 42479 (July 19, 2011). PNO staff believes that this new filing would require the same work and diligence as any new non-index filing. Assuming, then, an average of 37 hours for one transaction, when applied to a traditional frequency of .067 (one every fifteen years), this amounts to an annual average of 3 hours, rounded up. Applied to an assumed hourly wage or rate of \$460/hour for an executive or attorney's handling, associated labor cost would approximate \$1,380. This labor cost would be even lower if, instead of filing a new premerger notification, the parties utilized the two-day resubmission process, which requires only a new certification, new affidavit, and an update of Item 4 of the form.

PNO staff believes that any incremental capital/non-labor costs presented by the amendments would be marginal. Businesses subject to the Rules generally have or would obtain necessary equipment for other business purposes. Staff believes that the existing requirements (and extension to certain additional transactions) necessitate ongoing, regular training so that covered entities stay current and have a clear understanding of federal mandates. This should constitute a small portion of and be subsumed within the ordinary training that employees receive apart from that associated with the information collected under the Rules and the corresponding HSR Form.

The PRA requires that an agency's collection of information be necessary for the proper performance of the agency's function, and that the information collected have "practical utility."<sup>6</sup> According to the PRA, "practical utility" is the ability of an agency to use information, particularly the ability to process such information

filing. Clayton Act Sections 7A(c)(6) and (c)(8) exempt from the requirements of the premerger notification program certain transactions that are subject to the approval of other agencies, but only if copies of the information submitted to these other agencies are also submitted to the Agencies. Thus, parties must submit copies of these "index" filings, but completing the task requires significantly less time than non-exempt transactions (which require "non-index" filings), as illustrated by the calculations in footnote 2 above.

<sup>6</sup> 44 U.S.C. 3508: Determination of necessity for information; hearing.

Before approving a proposed collection of information, the Director [of the Office of Management and Budget] shall determine whether the collection of information by the agency is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility. Before making a determination the Director may give the agency and other interested persons an opportunity to be heard or to submit statements in writing. To the extent, if any, that the Director determines that the collection of information by an agency is unnecessary for any reason, the agency may not engage in the collection of information.

in a timely and useful fashion.<sup>7</sup> The rule amendments will formalize and clarify procedures for voluntarily withdrawing and re-filing HSR notifications. The amendments will also harmonize the SEC and FTC treatment of publicly announced terminations of transactions. By allowing parties to voluntarily withdraw the filings for transactions they are no longer pursuing and by automatically withdrawing filings where the parties have notified the SEC of the termination of the transactions, the amendments will relieve the Agencies of the obligation to continue to spend scarce resources on transactions that become hypothetical. If at a later date the parties choose to renew the transactions, they may, depending on the circumstances, re-certify and update their premerger notification filings or submit new premerger notification filings. These updated materials are necessary for the Agencies to review the transactions in accordance with the HSR Act.

#### List of Subjects in 16 CFR Part 803

Antitrust.

For the reasons stated in the preamble, the Federal Trade Commission amends 16 CFR part 803 as set forth below:

#### PART 803—TRANSMITTAL RULES

■ 1. The authority citation for part 803 continues to read as follows:

**Authority:** 15 U.S.C. 18a(d).

■ 2. Amend § 803.9 by revising the introductory text of paragraph (a) and adding paragraph (f) to read as follows:

#### § 803.9 Filing fee.

(a) Each acquiring person shall pay the filing fee required by the act to the Federal Trade Commission, except as provided in paragraphs (b), (c) and (f) of this section. No additional fee is to be submitted to the Antitrust Division of the Department of Justice.

\* \* \* \* \*

(f) For a transaction described by paragraph (c) of § 803.12, the parties shall pay no additional filing fee.

■ 3. Add § 803.12 to read as follows:

<sup>7</sup> 44 U.S.C. 3502(11). In determining whether information will have "practical utility," OMB will consider "whether the agency demonstrates actual timely use for the information either to carry out its functions or make it available to third-parties or the public, either directly or by means of a third-party or public posting, notification, labeling, or similar disclosure requirement, for the use of persons who have an interest in entities or transactions over which the agency has jurisdiction." 5 CFR 1320.3(l).

#### § 803.12 Withdraw and refile notification.

(a) *Voluntary.* An acquiring person, and in the case of an acquisition to which § 801.30 does not apply, an acquired person, may withdraw its notification by notifying the Federal Trade Commission and the Antitrust Division in writing of such withdrawal.

(b) *Upon public announcement of termination.* An acquiring person's notification or, in the case of an acquisition to which § 801.30 of this chapter does not apply, an acquiring or an acquired person's notification, will be deemed to have been withdrawn if any filing that publicly announces the expiration, termination or withdrawal of a tender offer or the termination of an agreement or letter of intent is made by the acquiring person or the acquired person with the U.S. Securities and Exchange Commission ("SEC") under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) and rules promulgated under that act. The acquiring person or acquired person must notify the Federal Trade Commission and the Antitrust Division by letter that such filing has been made with the SEC and the withdrawal shall be deemed effective on the date of the SEC filing. Withdrawal of the HSR notification(s) shall occur even if statements are made in the SEC filing indicating a desire to recommence the tender offer or enter into a new or amended agreement or letter of intent. This paragraph is inapplicable if the initial 15-day or 30-day waiting period has expired without issuance of a request for additional information or documentary material and without an agreement in place with the Agencies to delay closing of the transaction ("a timing agreement"); or early termination of that waiting period has been granted, without a timing agreement in place; or if a request for additional information or documentary material has been issued and the Agencies have either granted early termination or allowed the extended waiting period to expire following certification of compliance without a timing agreement in place.

(c) *Resubmission without a new filing fee.* (1) An acquiring person whose notification has been voluntarily withdrawn pursuant to paragraph (a) of this section, or an acquiring person whose notification is deemed to have been automatically withdrawn under paragraph (b) of this section, may resubmit its notification, thereby initiating a new waiting period for the same transaction without an additional filing fee pursuant to § 803.9(f). This procedure may be used only one time,

and only under the following circumstances:

(i) The proposed acquisition does not change in any material way;

(ii) The resubmitted notification is recertified, and the submission, as it relates to Items 4(a), 4(b), 4(c), and 4(d), is updated to the date of the resubmission;

(iii) A new executed affidavit is provided with the resubmitted HSR filing; and

(iv) The resubmitted notification is refiled prior to the close of the second business day after withdrawal.

(2) If the acquired person, in the case of an acquisition to which § 801.30 of this chapter does not apply, withdraws its notification under paragraph (a) of this section or if its notification is automatically withdrawn under paragraph (b) of this section, no resubmission is available under this paragraph.

*Examples:* 1. A commences a tender offer to acquire 100% of B's voting securities and files a Schedule TO with the SEC and a premerger notification filing with the Federal Trade Commission and the Antitrust Division ("the Agencies"). Subsequently, A decides to withdraw the tender offer and files an amended Schedule TO announcing the withdrawal. A states in its amended filing, designated as a Schedule TO-T/A on EDGAR, the SEC's Electronic Data Gathering, Analysis, and Retrieval system, which announces the tender offer withdrawal that it reserves the right to recommence the tender offer, should circumstances change. A's premerger notification filing is deemed to have been withdrawn on the date of the filing of the Schedule TO-T/A with the SEC.

2. A commences a tender offer for at least 75% of B's voting securities and files a Schedule TO with the SEC stating that the tender offer will expire after 30 days. A also files a premerger notification filing with the Agencies and a request for additional information or documentary material ("Second Request") is issued. At the end of the 30 day effective period of the tender offer sufficient shares have not been tendered and the tender offer expires. A files a closing Schedule TO-T/A with the SEC announcing the expiration of the tender offer. A's premerger notification filing is deemed to have been withdrawn on the date of the filing of the Schedule TO-T/A with the SEC.

3. A commences a tender offer for 100% of B's voting securities and files a Schedule TO with the SEC stating that shareholders tendering their shares will receive \$2.00 per share. During the effective period of the tender offer, A

increases the amount it will pay per share to \$2.25 and files a Schedule TO-T/A with the SEC announcing the increased share price. A's premerger notification filing is not deemed to have been withdrawn on the date of the filing of the Schedule TO-T/A with the SEC because it is not notifying the SEC that the tender offer has expired or is being withdrawn.

4. A commences a tender offer for 100% of B's voting securities and files a Schedule TO with the SEC. During the effective period of the tender offer, A and B enter into a merger agreement and A files a Schedule TO-T/A with the SEC announcing the withdrawal of the tender offer. A's premerger notification filing is deemed to have been withdrawn on the date of the filing of the Schedule TO-T/A with the SEC. A can, however, refile within two business days on the merger agreement, commencing a new waiting period, without paying an additional filing fee, if it meets the requirements of § 803.12(c).

5. A and B enter into a merger agreement conditioned on successful completion of due diligence. A and B file premerger notification filings with the Agencies and also Form 8-Ks with the SEC announcing they have entered into an agreement to merge. Subsequent findings in the course of due diligence cause A and B to terminate the merger agreement and A files an additional Form 8-K announcing the termination of an agreement. A states that it may seek to enter into a new or amended merger agreement with B. A's premerger notification filing is deemed to have been withdrawn on the date of the filing of the Form 8-K announcing the termination of the merger agreement. A can, however, refile within two business days on a new merger agreement, commencing a new waiting period, without paying an additional filing fee, if it meets the requirements of § 803.12(c).

6. A and B enter into a merger agreement and file premerger notification filings with the Agencies and Form 8-Ks with the SEC. Second requests are issued. A and B subsequently certify compliance with the second request, starting the extended waiting period. Prior to the expiration of the extended waiting period, the parties enter into an agreement with the agency conducting the investigation to delay closing of the transaction, allowing the consummation of the acquisition only after 30-days' notice (a "timing agreement"), and the extended waiting period expires. During the pendency of the timing agreement, A and B terminate the merger agreement

and A files a Form 8-K with the SEC announcing the termination of an agreement. A's premerger notification filing is deemed withdrawn on the date of the SEC filing as a result of that filing, even though the extended waiting period has expired and the parties are still within the one year period following that expiration under § 803.7(a). Note that had the extended waiting period expired and no timing agreement had been entered into, a filing with the SEC announcing the termination of the agreement would not result in the withdrawal of A's premerger notification filing.

7. A and B enter into a merger agreement and file premerger notification filings with the Agencies and Form 8-Ks with the SEC. The agencies complete their review and early termination of the initial 30-day waiting period is granted. Prior to the expiration of the one year period following the grant of early termination, A and B terminate the merger agreement and A files a Form 8-K with the SEC announcing the termination of an agreement. A's premerger notification filing is not deemed withdrawn as a result of the SEC filing because the initial 30-day premerger notification waiting period had been granted early termination. Therefore, the parties still have the full one year period prior to the expiration of the notification under § 803.7(a) to consummate the transaction should it be recommenced.

By direction of the Commission,  
Commissioner Wright dissenting.

**Donald S. Clark,**  
*Secretary.*

**Note:** The following statement will not appear in the Code of Federal Regulations.

**Dissenting Statement of Commissioner Joshua D. Wright Regarding Amendments to Hart-Scott-Rodino Rules**

*FTC Matter No. P989316*

June 28, 2013

The Commission voted today to publish final amendments to the Hart-Scott-Rodino ("HSR") Rules. The final amendments establish, among other things, a procedure for the automatic withdrawal of an HSR filing upon the submission of a filing to the U.S. Securities and Exchange Commission announcing that the notified transaction has been terminated.<sup>1</sup> I want to thank

<sup>1</sup> The amendments to the HSR Rules also would codify, with one modification, the existing procedure for pulling and refileing an HSR notification without payment of an additional filing

staff in the Premerger Notification Office for their efforts in drafting the amendments to the HSR Rules and for their diligent administration of the premerger notification program.

I disagree with the Commission's decision to publish the final amendments to the HSR Rules. It has long been accepted as a principle of good governance that federal agencies should issue new regulations only if their benefits exceed their costs.<sup>2</sup> In my view, the record does not support the conclusion that the new automatic withdrawal rule offers any benefits that justify its adoption. The notice of proposed rulemaking claims the automatic withdrawal rule is necessary to prevent the antitrust agencies from "expend[ing] scarce resources on hypothetical transactions."<sup>3</sup> However, I have not seen evidence that any of the over 68,000 transactions that have been notified under the HSR Rules has resulted in the allocation of resources to a truly hypothetical transaction.

In the absence of evidence that the automatic withdrawal rule would remedy a problem that exists under the current HSR regime, and thus benefit the public, I believe we should refrain from creating new regulations.

[FR Doc. 2013-16539 Filed 7-9-13; 8:45 am]

BILLING CODE 6750-01-P

## CONSUMER PRODUCT SAFETY COMMISSION

### 16 CFR Part 1500

[Docket No. CPSC-2009-0004]

#### Children's Products Containing Lead; Procedures and Requirements for Exclusions From Lead Limits Under Section 101(b) of the Consumer Product Safety Improvement Act

**AGENCY:** Consumer Product Safety Commission.

**ACTION:** Final rule.

**SUMMARY:** The Consumer Product Safety Commission (CPSC or Commission) is issuing this rule to amend its existing regulations pertaining to procedures and requirements for exclusions from lead

fee. I have no objection to this portion of the amendments.

<sup>2</sup> See Exec. Order No. 13,563, 3 CFR part 215 (2012), reprinted in 5 U.S.C. 601 app. (2006 & Supp. V 2011); Exec. Order No. 12,866, 3 CFR part 638 (1994), reprinted as amended in 5 U.S.C. 601 (2006 & Supp. V 2011); Exec. Order No. 12,291, 3 CFR part 127 (1982), revoked by Exec. Order No. 12,866, 3 CFR part 638.

<sup>3</sup> Premerger Notification; Reporting and Waiting Period Requirements, 78 FR 10574, 10575 (proposed Feb. 14, 2013) (to be codified at 16 CFR part 803).

limits under section 101(b) of the Consumer Product Safety Improvement Act of 2008 (CPSIA) to reflect statutory changes mandated by Public Law 112-28.

**DATES:** *Effective Date:* July 10, 2013.

**FOR FURTHER INFORMATION CONTACT:** Hyun Sun Kim, Office of the General Counsel, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; email: [hkim@cpsc.gov](mailto:hkim@cpsc.gov); telephone: 301-504-7632.

**SUPPLEMENTARY INFORMATION:** Under section 101(a) of the CPSIA, consumer products designed or intended primarily for children 12 years old and younger that contain lead content in excess of 100 ppm are considered to be banned hazardous substances under the Federal Hazardous Substances Act (FHSA). The Commission previously published 16 CFR 1500.90 to provide procedures and requirements for evaluating products or materials for possible exclusion from the lead limits under section 101(b)(1) of the CPSIA.

On August 12, 2011, Public Law 112-28 replaced section 101(b)(1) of the CPSIA in its entirety. Section 101(b)(1) of the CPSIA, as amended, now provides for a functional purpose exception from the lead content limits under certain circumstances and sets forth the procedures for granting an exception in the statute. 15 U.S.C. 1278(a)(b). Because the existing regulations at 16 CFR 1500.90 no longer reflect the current law, the Commission is amending that section to replace the current procedures and requirements with the statutory procedures and requirements set forth under Public Law 112-28. In addition, the Commission anticipates providing the public with a staff guidance on the applicable procedures for requesting an exemption, which will be made available on the CPSC Web site.

Although the Administrative Procedure Act (APA) generally requires notice and comment rulemaking, section 553 of the APA provides an exception when the agency, for good cause, finds that notice and public procedure are "impracticable, unnecessary, or contrary to the public interest." In this circumstance, the Commission concludes that notice and comment is not necessary. The statutory provision upon which 16 CFR 1500.90 was based has been revised and there is no action the Commission could take in response to comments that would change the underlying statutory provision.

### List of Subjects in 16 CFR Part 1500

Consumer protection, Hazardous materials, Hazardous substances, Imports, Infants and children, Labeling, Law enforcement, and Toys.

For the reasons stated above in the preamble, the Commission amends title 16 of the Code of Federal Regulations as follows:

#### PART 1500—HAZARDOUS SUBSTANCES AND ARTICLES: ADMINISTRATION AND ENFORCEMENT REGULATIONS

■ 1. The authority citation for part 1500 continues to read as follows:

**Authority:** 15 U.S.C. 1261-1278, 122 Stat. 3016, 125 Stat. 273.

■ 2. In § 1500.90, revise paragraph (b) and remove paragraphs (c) through (h) to read as follows:

\* \* \* \* \*

(b) *Exclusion of certain materials or products and inaccessible component parts.* The CPSIA provides the following functional purpose exception from the lead limits stated in section 101(a) of the CPSIA.

(1) *Functional purpose exception*—(i) *In general.* The Commission, on its own initiative or upon petition by an interested party, shall grant an exception to the limit under paragraph (a) of this section for a specific product, class of product, material, or component part if the Commission, after notice and a hearing, determines that:

(A) The product, class of product, material, or component part requires the inclusion of lead because it is not practicable or not technologically feasible to manufacture such product, class of product, material, or component part, as the case may be, in accordance with paragraph (a) of this section by removing the excessive lead or by making the lead inaccessible;

(B) The product, class of product, material, or component part is not likely to be placed in the mouth or ingested, taking into account normal and reasonably foreseeable use and abuse of such product, class of product, material, or component part by a child; and

(C) An exception for the product, class of product, material, or component part will have no measurable adverse effect on public health or safety, taking into account normal and reasonably foreseeable use and abuse.

(ii) *Measurement.* For purposes of paragraph (b)(1)(i)(C) of this section, there is no measurable adverse effect on public health or safety if the exception described in paragraph (b)(1)(i) of this section will result in no measurable increase in blood lead levels of a child.

The Commission may adopt an alternative method of measurement other than blood lead levels if it determines, after notice and a hearing, that such alternative method is a better scientific method for measuring adverse effect on public health and safety.

(iii) *Procedures for granting exception*—(A) *Burden of proof*. A party seeking an exception under paragraph (b)(1)(i) of this section has the burden of demonstrating that it meets the requirements of such paragraph.

(B) *Grounds for decision*. In the case where a party has petitioned for an exception, in determining whether to grant the exception, the Commission may base its decision solely on the materials presented by the party seeking the exception and any materials received through notice and a hearing.

(C) *Admissible evidence*. In demonstrating that it meets the requirements of paragraph (b)(1)(i) of this section, a party seeking an exception under such paragraph may rely on any nonproprietary information submitted by any other party seeking such an exception and such information shall be considered part of the record presented by the party that relies on that information.

(D) *Scope of exception*. If an exception is sought for an entire product, the burden is on the petitioning party to demonstrate that the criteria in paragraph (b)(1)(i) of this section are met with respect to every accessible component or accessible material of the product.

(iv) *Limitation on exception*. If the Commission grants an exception for a product, class of product, material, or component part under paragraph (b)(1)(i) of this section, the Commission may, as necessary to protect public health or safety:

(A) Establish a lead limit that such product, class of product, material, or component part may not exceed; or

(B) Place a manufacturing expiration date on such exception or establish a schedule after which the manufacturer of such product, class of product, material, or component part shall be in full compliance with the limit established under paragraph (b)(1)(iv)(A) of this section or the limit set forth under paragraph (a) of this section.

(v) *Application of exception*. An exception under paragraph (b)(1)(i) of this section for a product, class of product, material, or component part shall apply regardless of the date of manufacture unless the Commission expressly provides otherwise.

(vi) *Previously submitted petitions*. A party seeking an exception under this

paragraph may rely on materials previously submitted in connection with a petition for exclusion under this section. In such cases, petitioners must notify the Commission of their intent to rely on materials previously submitted. Such reliance does not affect petitioners' obligation to demonstrate that they meet all requirements of this paragraph as required by paragraph (b)(1)(iii)(A) of this section.

(2) [Reserved]

\* \* \* \* \*

Dated: June 28, 2013.

**Todd A. Stevenson,**  
Secretary, Consumer Product Safety  
Commission.

[FR Doc. 2013-15944 Filed 7-9-13; 8:45 am]

**BILLING CODE 6355-01-P**

## DEPARTMENT OF HOMELAND SECURITY

### U.S. Customs and Border Protection

### DEPARTMENT OF THE TREASURY

#### 19 CFR Part 111

#### Customs Brokers

#### CFR Correction

In Title 19 of the Code of Federal Regulations, Parts 0 to 140, revised as of April 1, 2013, on page 684, in § 111.13, in paragraph (b), reinstate the second sentence to read as follows:

#### § 111.13 Written examination for individual license.

\* \* \* \* \*

(b) \* \* \* Written examinations will be given on the first Monday in April and October unless the regularly scheduled examination date conflicts with a national holiday, religious observance, or other foreseeable event and the agency publishes in the **Federal Register** an appropriate notice of a change in the examination date. \* \* \*

\* \* \* \* \*

[FR Doc. 2013-16653 Filed 7-9-13; 8:45 am]

**BILLING CODE 1505-01-D**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

#### 33 CFR Part 100

[Docket No. USCG-2012-0572]

#### Regattas and Marine Parades; Great Lakes Annual Marine Events

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of enforcement of regulation.

**SUMMARY:** The Coast Guard will enforce various special local regulations for annual regattas and marine parades in the Captain of the Port Detroit zone from 9:00 a.m. on June 21, 2013 through 7:00 p.m. on July 28, 2013. This action is necessary and intended to ensure safety of life on the navigable waters immediately prior to, during, and immediately after regattas or marine parades. Enforcement of these special local regulations rule will establish restrictions upon, and control movement of, vessels in specified areas immediately prior to, during, and immediately after regattas or marine parades. During the enforcement periods, no person or vessel may enter the regulated areas without permission of the Captain of the Port.

**DATES:** The regulations in 33 CFR 100.914, .915, .918, and .919 will be enforced at various times between June 21, 2013 and July 28, 2013.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this notice, call or email LT Adrian Palomeque, Prevention Department, Sector Detroit, Coast Guard; telephone (313)568-9508, email [Adrian.F.Palomeque@uscg.mil](mailto:Adrian.F.Palomeque@uscg.mil).

**SUPPLEMENTARY INFORMATION:** The Coast Guard will enforce the following special local regulations in 33 CFR 100 at the following dates and times:

(1) *Sec. 100.914 Trenton Rotary Roar on the River, Trenton, MI.*

This special local regulation will be enforced from 12:00 a.m. to 6:00 p.m. on July 19, 2013 and from 8:00 a.m. to 8:00 p.m. on July 20 and 21, 2013.

(2) *Sec. 100.915 St. Clair River Classic Offshore Race, St. Clair, MI.*

This special local regulation will be enforced from 10:00 a.m. to 7:00 p.m. on July 26, 27 and 28, 2013.

(3) *Sec. 100.918 Detroit APBA Gold Cup, Detroit MI.*

This special local regulation will be enforced from 7:00 a.m. to 7:00 p.m. on July 12, 13 and 14, 2013.

(4) *Sec. 100.919 International Bay City River Roar, Bay City, MI.*

This special local regulation will be enforced from 9:00 a.m. to 6:00 p.m. on June 21, 22, and 23, 2013. In the case of inclement weather on June 23, 2013, this special local regulation will also be enforced from 9:00 a.m. to 6:00 p.m. on June 24, 2013.

#### Regulations

(1) In accordance with the general regulations in 33 CFR 100.901, entry into, transiting, or anchoring within these regulated areas is prohibited

unless authorized by the Captain of the Port Detroit, or his designated on-scene representative.

(2) These regulated areas are closed to all vessel traffic, except as may be permitted by the Captain of the Port Detroit or his designated on-scene representative.

(3) The “designated on-scene representative” of the Captain of the Port is any Coast Guard commissioned, warrant, or petty officer who has been designated by the Captain of the Port to act on his behalf. The designated on-scene representative of the Captain of the Port will be aboard either a Coast Guard or Coast Guard Auxiliary vessel. The Captain of the Port or his designated on scene representative may be contacted via VHF Channel 16.

(4) Vessel operators desiring to enter or operate within the regulated area shall contact the Captain of the Port Detroit or his designated on-scene representative to obtain permission.

(5) Vessel operators given permission to enter or operate in the regulated area must comply with all directions given to them by the Captain of the Port or his designated on-scene representative.

Dated: June 20, 2013.

**J.E. Ogden,**

*Captain, U.S. Coast Guard, Captain of the Port Detroit.*

[FR Doc. 2013-16519 Filed 7-9-13; 8:45 am]

BILLING CODE 9110-04-P

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

#### 33 CFR Parts 100 and 165

[Docket Number USCG-2013-0447]

RIN 1625-AA08; 1625-AA00

#### Special Local Regulations and Safety Zones; Marine Events in Captain of the Port Long Island Sound Zone

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule.

**SUMMARY:** The Coast Guard is establishing one special local regulation for a regatta and four safety zones for two fireworks displays and two swim events within the Captain of the Port (COTP) Long Island Sound (LIS) Zone. This action is necessary to provide for the safety of life on navigable waters during these events. The special local regulation and safety zones will facilitate public notification of the event and provide protective measures for the maritime public and event participants from the hazards associated with these

events. Entry into, transit through, mooring or anchoring within these zones is prohibited unless authorized by COTP Sector Long Island Sound.

**DATES:** This rule is effective from July 10, 2013 to September 1, 2013. Certain provisions of this rule address events and dates which have already passed. Those regulations were enforced with actual notice on the event dates. Other provisions of this rule will be enforced during the specific dates and times listed in § 100.35T01-0447 and Tables 1 and 2 of § 165.T01-0447.

**ADDRESSES:** Documents mentioned in this preamble are part of docket [USCG-2013-0447]. To view documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov>, type the docket number in the “SEARCH” box and click “SEARCH.” Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12-140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this rule, call or email Petty Officer Scott Baumgartner, Prevention Department, Coast Guard Sector Long Island Sound, (203) 468-4559, [Scott.A.Baumgartner@uscg.mil](mailto:Scott.A.Baumgartner@uscg.mil). If you have questions on viewing or submitting material to the docket, call Barbara Hairston, Program Manager, Docket Operations, telephone (202) 366-9826.

#### SUPPLEMENTARY INFORMATION:

##### Table of Acronyms

COTP Captain of the Port  
DHS Department of Homeland Security  
FR Federal Register  
LIS Long Island Sound  
NPRM Notice of Proposed Rulemaking

#### A. Regulatory History and Information

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are “impracticable, unnecessary, or contrary to the public interest.” Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because Coast

Guard was not provided enough notice by the sponsoring organizations and these temporary regulations will help promote the safety of event participants and the maritime public. More specific details for each event are listed below.

The Connecticut River Raft Race is a recurring marine event that has previously gone through the public comment process and is currently listed as a permanent marine event in the Code of Federal Regulations. For this year’s event, the start and finish points of the race have been relocated to spots within the same general vicinity of Middletown, CT, but with improved access to the Connecticut River creating safer entry and exit conditions for event participants and support personnel. Recently, the Coast Guard received information on the new positions in the marine event application submitted on April 4, 2013, and learned from event Race Committee President, Dan Pritchard, that the race has previously utilized these newly requested access points for the past four years. The application of April 4, 2013 was not received 135 days in advance of the event and therefore has resulted in late notice to the Coast Guard. However, requiring a move to the original positions does not promote the safety of the event participants and crews. Further, no comments have been received by U.S. Coast Guard Sector Long Island Sound regarding the change of the events start and finish points.

The Coast Guard received information about the Riverhead Rocks Triathlon from the event sponsor, Event Power, on May 2, 2013. Event Power held the Riverhead Rocks Triathlon during the previous year but did not submit a marine event application for the event and was not aware of the requirement for submitting a request for a new event 135 days in advance, resulting in late notification to the Coast Guard. Event Power is unable to reschedule the event as the triathlon is being held in conjunction with additional prescheduled activities occurring the same weekend, and because of the difficulty of rescheduling the early morning start of the swim event with the desired high tide cycle. While the event impacts a navigable channel, there is little commercial traffic along the affected section of the Peconic River and the swim event is expected to last approximately one hour.

The Coast Guard received a marine event application for the Go 4th Saltaire Bay Fireworks Display on April 19, 2013. This is a new event and the event sponsor, Go 4th Committee, was not aware of the requirement for submitting a request for a new event 135 days in

advance. Therefore, Go 4th Committee's event application of April 19, 2013 has resulted in late notification to the Coast Guard. The Event Sponsor is unable to reschedule the event because of its association with Independence Day celebrations.

In addition to the Go 4th Committee's fireworks display application, the Coast Guard has also received a marine event application for the Village of Saltaire Fireworks Display on April 25, 2013. The event is schedule to take place on August 3, 2013. This is a new event and the event sponsor, Village of Saltaire, was not aware of the requirement for submitting a request for a new event 135 days in advance. As a result the application of April 25, 2013 has resulted in late notification to the Coast Guard. Additionally, as a result of the event being funded through a combination of public and private funds, which have been appropriated with the specific intent of holding the event on August 3, 2013, the Village of Saltaire is unable to reschedule the event.

The Coast Guard received information about the Smith Point Triathlon from

the event sponsor, Event Power, on May 2, 2013. The triathlon has been held in late August and in the same location each year for past six years. Event Power did not submit a marine event application for any previous occurrences and was not aware of the requirement for submitting a request for a new event 135 days in advance, resulting in late notification to the Coast Guard. Event Power is unwilling and unable to reschedule the event because of its previous history and present advertising of the event occurring in late August and in its current location. Further, rescheduling for a later date would move the event into the fall and put event participants, support personnel, and other waterway users at greater risk due to lower water temperatures. The event does not impact a navigable channel and the swim event is expected to last approximately one hour.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. The earliest event identified in this rule is scheduled to begin on June

30, 2013. This rule is unlikely to be published before that date and any delay in the effective period could increase the risk for event participants and other waterway users.

#### B. Basis and Purpose

The legal basis for this temporary rule is 33 U.S.C. 1226, 1231, 1233; 46 U.S.C. Chapters 454, 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05-1, 6.04-1, 6.04-6 and 160.5; Pub. L. 107-295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1 which collectively authorize the Coast Guard to define regulatory special local regulations and safety zones.

This temporary rule establishes special local regulations and safety zones in order to provide for the safety of life on navigable waterways during regattas, fireworks displays and swim events.

#### C. Discussion of the Temporary Final Rule

This temporary rule modifies one special local regulation for a regatta and establishes safety zones for two swim events and two fireworks displays.

#### Regattas

1 Connecticut River Raft Race ..	<ul style="list-style-type: none"> <li>Location: All waters of the Connecticut River Middletown, CT between Gildersleeve Island (Marker no. 99) 41°36'02.13" N 072°37'22.71" W and Portland Riverside Marina (Marker no. 88) 41°33'38.30" N 072°37'36.53" W (NAD 83).</li> </ul>
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#### Fireworks Displays

2 Go 4th Saltaire Bay Fireworks	<ul style="list-style-type: none"> <li>Location: Barge in Saltaire Bay near Saltaire, NY in approximate position 40°38'37.72" N, 073°11'58.52" W (NAD 83).</li> </ul>
3 Village of Saltaire Fireworks ...	<ul style="list-style-type: none"> <li>Location: Barge in Saltaire Bay near Saltaire, NY in approximate position 40°38'37.72" N, 073°11'58.52" W (NAD 83).</li> </ul>

#### Swim Events

4 Riverhead Rocks Triathlon .....	<ul style="list-style-type: none"> <li>Location: All waters of the Peconic River, Riverhead, NY between the area bounded to the west by a line connecting points at 40°54'58.09" N 072°39'37.56" W on the northern bank and 40°54'56.74" N 072°39'37.56" W on the southern bank and bounded to the east by a line connecting points at 40°55'01.92" N 072°38'51.08" W on the northern bank and 40°54'59.15" N 072°38'51.08" W on the southern bank (NAD 83). All positions are approximate.</li> </ul>
5 Smith Point Triathlon .....	<ul style="list-style-type: none"> <li>Location: Waters of Narrow Bay, Shirley, NY near Smith Point Park within the area bounded by land along its southern edge and points in position 40°44'14.28" N 072°51'40.68" W northerly through position 40°44'20.83" N 072°51'40.68" W, then easterly through position 40°44'20.83" N 072°51'19.73" W, then southerly through position 40°44'14.85" N 072°51'19.73" W (NAD 83). All positions are approximate.</li> </ul>

The Connecticut River Raft Race involves many participants operating human-powered and/or sail-powered vessels of their own design and construction along a stretch of the Connecticut River near Middletown, CT. Due to the hazards facing these participants, including the unknown and/or untested seaworthiness of their vessels and potential limitations to vessel navigation and/or maneuverability, a regulated area is needed to protect participants,

spectators and other waterway users. The Riverhead Rocks Triathlon and Smith Point Triathlon each incorporate swim legs that will place many swimmers in navigable waters. A regulated area is required to minimize the hazards posed by spectators and other waterway users operating their vessels in close proximity to the event participants. The safety zones established for these swim events will minimize risk from boat traffic to the participants and improve visibility and

maneuverability for the safety vessels supporting these events. The fireworks displays listed above are expected to attract large numbers of spectator vessels that will congregate around the location of these events. Regulated areas, specifically safety zones, are established for each of these fireworks displays and are needed to protect both spectators and participants from the safety hazards created by them, including unexpected pyrotechnics detonation and burning debris.

This rule prevents vessels from entering, transiting, mooring or anchoring within areas specifically designated as regulated areas during the periods of enforcement unless authorized by the COTP or designated representative.

The Coast Guard has determined that these regulated areas will not have a significant impact on vessel traffic due to their temporary nature, limited size, and the fact that vessels are allowed to transit the navigable waters outside of the regulated areas. The COTP will cause public notifications to be made by all appropriate means including but not limited to the Local Notice to Mariners and Broadcast Notice to Mariners.

#### D. Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on these statutes and executive orders.

##### 1. Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders.

The Coast Guard determined that this rule is not a significant regulatory action for the following reasons: The regulated areas will be of limited duration and cover only a small portion of the navigable waterways. Furthermore, vessels may transit the navigable waterways outside of the regulated areas. Vessels requiring entry into the regulated areas may be authorized to do so by the COTP or designated representative.

Advanced public notifications will also be made to the local maritime community by the Local Notice to Mariners as well as Broadcast Notice to Mariners.

##### 2. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their

fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

The temporary safety zones will not have a significant economic impact on a substantial number of small entities for the following reasons: The regulated areas will be of limited size and of short duration, and vessels that can safely do so may navigate in all other portions of the waterways except for the areas designated as regulated areas. Additionally, notifications will be made before the effective period by all appropriate means, including but not limited to the Local Notice to Mariners and Broadcast Notice to Mariners well in advance of the events.

##### 3. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT**, above.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency’s responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

##### 4. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

##### 5. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has 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. We have

analyzed this rule under that Order and determined that this rule does not have implications for federalism.

##### 6. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

##### 7. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

##### 8. Taking of Private Property

This rule will not cause a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

##### 9. Civil Justice Reform

This rule meets 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.

##### 10. Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

##### 11. Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

## 12. Energy Effects

This action is not a “significant energy action” under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.

## 13. Technical Standards

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

## 14. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.ID, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves the establishment of special local regulations and safety zones. This rule is categorically excluded from further review under paragraphs 34(g) and (h) of Figure 2–1 of the Commandant Instruction. An environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

### List of Subjects

#### 33 CFR Part 100

Marine safety, Navigation (water), Reporting and recording requirements, Waterways.

#### 33 CFR Part 165

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

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR parts 100 and 165 as follows:

### PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for part 100 continues to read as follows:

**Authority:** 33 U.S.C. 1233.

■ 2. Add § 100.35T01–0447 to read as follows:

#### § 100.35T01–0447 Special Local Regulation; Connecticut River Raft Race; Connecticut River; Middletown, CT.

(a) *Regulated Area.* The following is designated as a special local regulation area. All waters of the Connecticut River near Middletown, CT between Gildersleeve Island (Marker no. 99) 41°36′02.13″ N 072°37′22.71″ W and Portland Riverside Marina (Marker no. 88) 41°33′38.30″ N 072°37′36.53″ W (NAD 83).

(b) *Enforcement Period.* These special local regulations will be enforced on July 27, 2013 from 9:30 a.m. to 2:30 p.m.

(c) *Definitions*—(1) *Designated representative.* A “designated representative” is any Coast Guard commissioned, warrant or petty officer of the U.S. Coast Guard who has been designated by the Captain of the Port (COTP), Sector Long Island Sound (LIS), to act on his or her behalf. The designated representative may be on an official patrol vessel or may be on shore and will communicate with vessels via VHF–FM radio or loudhailer. In addition, members of the Coast Guard Auxiliary may be present to inform vessel operators of this regulation.

(2) *Official patrol vessels.* Official patrol vessels may consist of any Coast Guard, Coast Guard Auxiliary, state, or local law enforcement vessels assigned or approved by the COTP.

(3) *Spectators.* All persons and vessels not registered with the event sponsor as participants or official patrol vessels.

(d) *Special Local Regulations.* (1) Vessel operators desiring to enter or operate within the regulated areas shall contact the COTP at 203–468–4401 (Sector LIS command center) or the designated representative via VHF channel 16.

(2) Vessels may not transit the regulated areas without the COTP or designated representative approval. Vessels permitted to transit must operate at a no wake speed, in a manner which will not endanger participants or other crafts in the event.

(3) Spectators or other vessels shall not anchor, block, loiter, or impede the transit of event participants or official patrol vessels in the regulated areas during the effective dates and times, or dates and times as modified through the Local Notice to Mariners, unless authorized by COTP or designated representative.

(4) The COTP or designated representative may control the movement of all vessels in the regulated area. When hailed or signaled by an official patrol vessel, a vessel shall come to an immediate stop and comply with the lawful directions issued. Failure to comply with a lawful direction may

result in expulsion from the area, citation for failure to comply, or both.

(5) The COTP or designated representative may delay or terminate any marine event in this subpart at any time it is deemed necessary to ensure the safety of life or property.

### PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for Part 165 continues to read as follows:

**Authority:** 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; and Department of Homeland Security Delegation No. 0170.1

■ 2. Add § 165.T01–0447 to read as follows:

#### § 165.T01–0447 Safety Zones; Fireworks Displays and Swim Events in Captain of the Port Long Island Sound Zone.

(a) *Regulations.* The general regulations contained in 33 CFR 165.23 as well as the following regulations apply to the events listed in the TABLES 1 and 2 of § 165.T01–0447. These regulations will be enforced for the duration of each event.

(b) *Enforcement Period.* This rule will be enforced from on the dates and times listed for each event in TABLES 1 and 2 of § 165.T01–0447. If the event is delayed by inclement weather, the regulations will be enforced on the rain date indicated in TABLES 1 and 2 of § 165.T01–0447.

(c) *Definitions.* The following definitions apply to this section:

(1) *Designated Representative.* A “designated representative” is any Coast Guard commissioned, warrant or petty officer of the U.S. Coast Guard who has been designated by the Captain of the Port (COTP), Sector Long Island Sound, to act on his or her behalf. The designated representative may be on an official patrol vessel or may be on shore and will communicate with vessels via VHF–FM radio or loudhailer. In addition, members of the Coast Guard Auxiliary may be present to inform vessel operators of this regulation.

(2) *Official Patrol Vessels.* Official patrol vessels may consist of any Coast Guard, Coast Guard Auxiliary, state, or local law enforcement vessels assigned or approved by the COTP.

(3) *Spectators.* All persons and vessels not registered with the event sponsor as participants or official patrol vessels.

(d) Spectators desiring to enter or operate within the regulated areas should contact the COTP or the designated representative via VHF channel 16 or by telephone at (203)

468–4401 to obtain permission to do so. Spectators given permission to enter or operate in the regulated area must comply with all directions given to them by the COTP Sector Long Island Sound or the designated on-scene representative.

(e) Upon being hailed by an official patrol vessel or the designated representative, by siren, radio, flashing light or other means, the operator of the

vessel shall proceed as directed. Failure to comply with a lawful direction may result in expulsion from the area, citation for failure to comply, or both.

(f) The regulated area for all fireworks displays listed in the TABLE 1 of § 165.T01–0447 is that area of navigable waters within a 600 foot radius of the launch platform for each fireworks display. Fireworks barges used in these locations will also have a sign on their

port and starboard side labeled “FIREWORKS—STAY AWAY.” This sign will consist of 10 inch high by 1.5 inch wide red lettering on a white background.

(g) For all swim events listed in TABLE 2 to § 165.T01–447, vessels not associated with the event shall maintain a separation of at least 100 yards from the participants.

TABLE 1 TO § 165.T01–0447

Fireworks Display Events	
1 Go 4th Saltaire Bay Fireworks .....	<ul style="list-style-type: none"> <li>• Date: July 4, 2013 from 9 p.m. until 10:30 p.m.</li> <li>• Rain Date: July 5, 2013 from 9 p.m. until 10:30 p.m.</li> <li>• Location: Waters of the Saltaire Bay off Saltaire, NY in approximate position 40°38'37.72" N, 073°11'58.52" W (NAD 83).</li> </ul>
2 Village of Saltaire Fireworks .....	<ul style="list-style-type: none"> <li>• Date: August 3, 2013 from 9 p.m. until 10:30 p.m.</li> <li>• Rain Date: August 31, 2013 from 9 p.m. until 10:30 p.m.</li> <li>• Rain Date: September 1, 2013 from 9 p.m. until 10:30 p.m.</li> <li>• Location: Waters of the Saltaire Bay off Saltaire, NY in approximate position 40°38'37.72" N, 073°11'58.52" W (NAD 83).</li> </ul>

TABLE 2 TO § 165.T01–0447

Swim Events	
1 Riverhead Rocks Triathlon .....	<ul style="list-style-type: none"> <li>• Date: June 30, 2013 from 6:45 a.m. until 8 a.m.</li> <li>• Location: All waters of the Peconic River, Riverhead, NY between the area bounded to the west by a line connecting points at 40°54'58.09" N 072°39'37.56" W on the northern bank and 40°54'56.74" N 072°39'37.56" W on the southern bank and bounded to the east by a line connecting points at 40°55'01.92" N 072°38'51.08" W on the northern bank and 40°54'59.15" N 072°38'51.08" W on the southern bank (NAD 83). All positions are approximate.</li> </ul>
2 Smith Point Triathlon .....	<ul style="list-style-type: none"> <li>• Date: August 4, 2013 from 6:15 a.m. until 9:30 a.m.</li> <li>• Location: Waters of Narrow Bay, Shirley, NY near Smith Point Park within the area bounded by land along its southern edge and points in position 40°44'14.28" N 072°51'40.68" W northerly through position 40°44'20.83" N 072°51'40.68" W, then easterly through position 40°44'20.83" N 072°51'19.73" W, then southerly through position 40°44'14.85" N 072°51'19.73" W (NAD 83). All positions are approximate.</li> </ul>

Dated: June 27, 2013.  
**J.M. Vojvodich,**  
*Captain, U.S. Coast Guard, Captain of the Port Sector Long Island Sound.*  
 [FR Doc. 2013–16522 Filed 7–9–13; 8:45 am]  
**BILLING CODE 9110–04–P**

**DEPARTMENT OF HOMELAND SECURITY**

**Coast Guard**

**33 CFR Part 105**

[Docket No. USCG–2013–0397]

RIN 1625–AC06

**Navigation and Navigable Waters; Technical, Organizational, and Conforming Amendments; Correction**

**AGENCY:** Coast Guard, DHS.  
**ACTION:** Final rule; correction.

**SUMMARY:** The Coast Guard published a final rule in the **Federal Register** on July 1, 2013, making non-substantive corrections throughout Title 33 of the Code of Federal Regulations. In fixing a non-substantive typographical error, that document inadvertently replaced two words. This rule corrects that action and reverts the inadvertently replaced language to its original wording.

**DATES:** Effective on July 10, 2013.

**FOR FURTHER INFORMATION CONTACT:** Mr. Paul Crissy, Coast Guard; telephone 202–372–1093, email *Paul.H.Crissy@uscg.mil*.

**SUPPLEMENTARY INFORMATION:**

**1. Viewing Documents Associated With This Rule**

To view the original notice and its accompanying document, go to *http://www.regulations.gov*, type the docket number in the “SEARCH” box and click

“SEARCH.” Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**B. Background**

On July 1, 2013, the Coast Guard published its annual technical amendment to make non-substantive changes to Title 33 of the Code of Federal Regulations (78 FR 39163). This rule coincided with the annual recodification of Title 33 that occurs on July 1, 2013.

**C. Need for Correction**

The Coast Guard published a document in the **Federal Register** for

this technical amendment. In 33 CFR 105.257(b)(2), the word “facility” was mistakenly changed to “vessel.” Additionally, the acronym “FSO” was mistakenly changed to “VSO.” The intended edit of § 105.257(b)(2) was only to delete an extra space from the parenthetical listing the Coast Guard’s Homeport Web site—no other edits were to be made. This rule restores use of the words “facility” and “FSO” to the affected paragraph.

#### List of Subjects in 33 CFR Part 105

Maritime security, Reporting and recordkeeping requirements, Security measures.

Accordingly, 33 CFR part 105 is corrected by making the following correcting amendment:

#### PART 105—MARITIME SECURITY: FACILITIES

- 1. The authority citation for part 105 continues to read as follows:

**Authority:** 33 U.S.C. 1226, 1231; 46 U.S.C. 70103; 50 U.S.C. 191; 33 CFR 1.05–1, 6.04–11, 6.14, 6.16, and 6.19; Department of Homeland Security Delegation No. 0170.1.

#### § 105.257 [Amended]

- 2. In § 105.257(b)(2), remove the word “vessel”, and add, in its place, the word “facility”; remove the text “VSO” and add, in its place, the text “FSO”.

Dated: July 3, 2013.

**Kathryn A. Sinniger**,  
Chief, Office of Regulations and  
Administrative Law, U.S. Coast Guard.

[FR Doc. 2013–16516 Filed 7–9–13; 8:45 am]

BILLING CODE 9110–04–P

#### NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

#### 36 CFR Part 1280

[FDMS No. NARA–13–0001]; Agency No. NARA–2013–033

RIN 3095–AB77

#### Use of Meeting Rooms and Public Spaces

**AGENCY:** National Archives and Records Administration (NARA).

**ACTION:** Final rule.

**SUMMARY:** NARA has amended its regulations on the public use of NARA facilities in the Washington, DC, area. The regulations have been revised to clarify instances where fees may be charged for services related to building use. It also updates contact information for requesting use of NARA public areas in the Washington, DC, National

Archives Building and the National Archives at College Park.

**DATES:** This rule is effective August 9, 2013.

**FOR FURTHER INFORMATION CONTACT:** Kimberly Keravuori at 301–837–3151.

**SUPPLEMENTARY INFORMATION:** On April 5, 2013, NARA published a proposed rule in the *Federal Register* (78 FR 20563) for a 60-day comment period. This proposed rule clarified instances where fees may be charged for services related to building use. It also updated contact information for requesting use of NARA public areas in the Washington, DC National Archives Building and the National Archives at College Park. The public comment period closed on June 4, 2013. In response, NARA received no comments and is now issuing the changes in final form.

This rule is not a significant rule for the purposes of Executive Order 12866 and has not been reviewed by the Office of Management and Budget. As required by the Regulatory Flexibility Act, it is hereby certified that this proposed rule will not have a significant impact on small entities.

#### List of Subjects in 36 CFR Part 1280

Archives and records.

For the reasons set forth in the preamble, NARA amends part 1280 of title 36, Code of Federal Regulations, as follows:

#### PART 1280—USE OF NARA FACILITIES

- 1. The authority citation for part 1280 continues to read as follows:

**Authority:** 44 U.S.C. 2102 notes, 2104(a), 2112, 2903.

- 2. Amend § 1280.78 by revising paragraph (c) to read as follows:

#### § 1280.78 Does NARA charge fees for the use of public areas in the National Archives Building?

\* \* \* \* \*

(c) Federal and quasi-Federal agencies, State, local, and tribal governmental institutions using public space for official government functions pay fees to the National Archives Trust Fund only for the costs for room rental, administrative fees, additional cleaning, security, and other staff services NARA provides.

- 3. Amend § 1280.80 by revising paragraph (a) to read as follows:

#### § 1280.80 How do I request to use NARA public areas in the National Archives Building?

(a) Direct your request to use space to Special Events (Partnerships Division),

National Archives and Records Administration, 700 Pennsylvania Avenue NW., Washington, DC 20408; or request by email to [specialevents@nara.gov](mailto:specialevents@nara.gov).

\* \* \* \* \*

- 4. Revise § 1280.87 to read as follows:

#### § 1280.87 Does NARA charge fees for the use of public areas in the National Archives at College Park?

NARA may charge a fee under 44 U.S.C. 2903(b) for the use of public areas in the National Archives at College Park. We inform organizations in advance and in writing of the total estimated cost of using the public areas. Federal and quasi-Federal agencies, State, local, and tribal governmental institutions using public space for official government functions pay fees to the National Archives Trust Fund only for the costs for room rental, administrative fees, additional cleaning, security, and other staff services NARA provides.

- 5. Amend § 1280.88 by revising paragraph (a) as follows:

#### § 1280.88 How do I request to use NARA public areas in the National Archives at College Park?

(a) Direct your request to use space to Special Events (Partnerships Division), National Archives and Records Administration, 700 Pennsylvania Avenue NW., Washington, DC 20408; or request by email to [specialevents@nara.gov](mailto:specialevents@nara.gov).

\* \* \* \* \*

Dated: June 28, 2013.

**David S. Ferriero**,  
Archivist of the United States.

[FR Doc. 2013–16581 Filed 7–9–13; 8:45 am]

BILLING CODE 7515–01–P

#### POSTAL SERVICE

#### 39 CFR Part 111

#### Collect on Delivery (COD)—Service Features

**AGENCY:** Postal Service™.

**ACTION:** Final rule.

**SUMMARY:** The Postal Service will revise *Mailing Standards of the United States Postal Service*, Domestic Mail Manual (DMM®) 503.13, 507.4 and 508.1 to provide new standards for the automatic holding period for Collect on Delivery (COD) articles, expand the acceptable payment methods for COD articles, and provide current options for the redirecting of COD articles.

**DATES:** *Effective date:* July 28, 2013.

**FOR FURTHER INFORMATION CONTACT:** Grace Letto at 202-268-2282, or Suzanne Newman at 202-268-5581.

**SUPPLEMENTARY INFORMATION:** The Postal Service published a notice of proposed rulemaking on May 31, 2013 (78 FR 32612-32613) (available at [www.gpo.gov](http://www.gpo.gov)), which included a 30-day comment period. Since no comments or objections to the proposed rule were received, the Postal Service will adopt the proposed changes to Collect on Delivery (COD) service features.

**Summary of Changes To Be Implemented**

The Postal Service will revise the DMM in various sections to redesign some of the features of COD service. In response to mailer's requests for the expedited return of their articles when COD shipments are unclaimed by the addressee, this revision will modify the holding period for COD articles from the current 30-day maximum to a maximum of 10 days.

Additionally, these revisions will retire the current manual PS Form 3849-D, *Notice to Sender of Undelivered COD Mail*. The primary function served by PS Form 3849-D can be provided by USPS Package Intercept® service, which allows mailers the option to redirect COD articles to a new address, to a designated Post Office™ for Hold For Pickup service, or back to the sender. Unlike PS Form 3849-D, which entails sending of a notification to the mailer by mail and requiring the mailer to then send written instructions back to the Postmaster, which may take more than 10 days to complete, Package Intercept service provides mailers with an immediate avenue to request a COD article be redirected to a new address. Since items subject to Package Intercept requests are also held for a 10-day period, this option aligns with the proposed new holding period for COD articles. However, the ability for a mailer, after mailing, to adjust the COD amount to be collected will be eliminated when the Form 3849-D is retired. The USPS® will continue to return COD articles to the mailer at the end of the holding period if no other applicable request is received; and to return COD articles addressed to an addressee who moved and left no forwarding address.

Additionally, payment options for COD articles will be expanded to allow money orders made payable to the mailer as an additional acceptable payment method for the addressee at the time of delivery. Payment remittance mailpieces will now include unique tracking barcodes affixed by USPS,

allowing further visibility into the COD payment process through mail processing scans captured on the remittance en route to the recipient.

As a result of these revisions, PS Form 3816, *COD form*, will be revised to reflect the changes.

**List of Subjects in 39 CFR Part 111**

Administrative practice and procedure, Postal Service.

Accordingly, 39 CFR part 111 is amended as follows:

**PART 111—[AMENDED]**

■ 1. The authority citation for 39 CFR part 111 continues to read as follows:

**Authority:** 5 U.S.C. 552(a); 13 U.S.C. 301-307; 18 U.S.C. 1692-1737; 39 U.S.C. 101, 401, 403, 404, 414, 416, 3001-3011, 3201-3219, 3403-3406, 3621, 3622, 3626, 3632, 3633, and 5001.

■ 2. Revise the following sections of the *Mailing Standards of the United States Postal Service, Domestic Mail Manual (DMM)*:

**Mailing Standards of the United States Postal Service, Domestic Mail Manual (DMM)**

\* \* \* \* \*

**500 Additional Mailing Services**

\* \* \* \* \*

**503 Extra Services**

\* \* \* \* \*

**12.0 Collect on Delivery (COD)**

\* \* \* \* \*

**12.2 Basic Information**

**12.2.1 Description**

\* \* \* *[Revise the first, second and fourth sentences of 12.2.1 as follows:]* Any mailer may use collect on delivery (COD) service to mail an article for which the mailer has not been paid and have its price and the cost of the postage collected from the addressee (or addressee's agent). The recipient has the option to pay the COD charges using either cash, or a personal check or money order made payable to the mailer. \* \* \* If the recipient pays the amount due by check or money order payable to the mailer, the USPS forwards the check or money order to the mailer. \* \* \*

\* \* \* \* \*

*[Revise the title and text of 12.2.7 as follows:]*

**12.2.7 Redirecting COD Article**

The mailer of a COD article may use USPS Package Intercept service to redirect the COD article to a new addressee, to a designated Post Office

using Hold For Pickup service (508.7), or to the sender by paying the applicable fee and as provided in 507.5.

*[Delete 12.2.8, Notice to Mailer, in its entirety.]*

\* \* \* \* \*

**507 Mailer Services**

\* \* \* \* \*

**4.0 Address Correction Services**

\* \* \* \* \*

**4.3 Sender Instruction**

\* \* \* \* \*

**4.3.2 Extra Services**

\* \* \* This mail is treated as follows:  
\* \* \*

*[Revise item 4.3.2c as follows:]*

c. The mailer of a COD article also may use USPS Package Intercept service to redirect the COD article to a new addressee, to a designated Post Office using Hold for Pickup service (508.7.0), or to the sender by paying the applicable fee and as provided in 507.5. The USPS returns the article to the mailer at the end of the COD holding period if no other request is received. When COD articles are addressed to a person who moved and left no forwarding address, the article is returned to the mailer. The postage charge (but not registration or COD fees) for returning the mail, if any, is collected from the mailer.

\* \* \* \* \*

*[Revise item 4.3.2g as follows:]*

g. The USPS holds undeliverable collect on delivery (COD) articles for no fewer than 3 days and no more than 10 days.

\* \* \* \* \*

**508 Recipient Services**

**1.0 Recipient Options**

**1.1 Basic Recipient Concerns**

\* \* \* \* \*

**1.1.7 Priority Mail Express and Accountable Mail**

The following conditions also apply to the delivery of Priority Mail Express and accountable mail (Registered Mail, Certified Mail, insured for more than \$200.00, or COD, as well as mail for which a return receipt or a return receipt for merchandise is requested or for which the sender has specified restricted delivery):

\* \* \* \* \*

*[Revise item 508.1.1.7f as follows:]*

f. A notice is provided to the addressee for a mailpiece that cannot be delivered. If the piece is not called for or redelivery is not requested, the piece is returned to the sender after 15 days

(5 days for Priority Mail Express, 10 days for COD), unless the sender specifies fewer days on the piece.

\* \* \* \* \*

We will publish an amendment to 39 CFR part 111 to reflect these changes.

**Stanley F. Mires,**

*Attorney, Legal Policy & Legislative Advice.*

[FR Doc. 2013-16523 Filed 7-9-13; 8:45 am]

**BILLING CODE 7710-12-P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R08-OAR-2010-0389; FRL-9832-1]

#### Approval and Promulgation of Air Quality Implementation Plans; State of Colorado; Second Ten-Year PM<sub>10</sub> Maintenance Plan for Cañon City

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Direct final rule.

**SUMMARY:** EPA is taking final action approving State Implementation Plan (SIP) revisions submitted by the State of Colorado. On June 18, 2009, the Governor of Colorado's designee submitted to EPA a revised maintenance plan for the Cañon City area for the National Ambient Air Quality Standards (NAAQS) for particulate matter with an aerodynamic diameter less than or equal to 10 microns (PM<sub>10</sub>), which was adopted by the State on November 20, 2008. As required by Clean Air Act (CAA) section 175A(b), this revised maintenance plan addresses maintenance of the PM<sub>10</sub> standard for a second 10-year period beyond the area's original redesignation to attainment for the PM<sub>10</sub> NAAQS. In addition, EPA is also taking final action approving the revised maintenance plan's 2020 transportation conformity motor vehicle emissions budget for PM<sub>10</sub>. This action is being taken under sections 110 and 175A of the CAA.

**DATES:** This rule is effective on September 9, 2013 without further notice, unless EPA receives adverse comment by August 9, 2013. If adverse comment is received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R08-OAR-2010-0389, by one of the following methods:

- <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.

- *E-Mail:* [ostigaard.crystal@epa.gov](mailto:ostigaard.crystal@epa.gov).
- *Fax:* (303) 312-6064 (please alert the individual listed in the **FOR FURTHER INFORMATION CONTACT** if you are faxing comments).

- *Mail:* Carl Daly, Director, Air Program, U.S. Environmental Protection Agency (EPA), Region 8, Mailcode 8P-AR, 1595 Wynkoop Street, Denver, Colorado 80202-1129.

- *Hand Delivery:* Carl Daly, Director, Air Program, U.S. Environmental Protection Agency (EPA), Region 8, Mailcode 8P-AR, 1595 Wynkoop Street, Denver, Colorado 80202-1129. Such deliveries are only accepted Monday through Friday, 8:00 a.m. to 4:30 p.m., excluding Federal holidays. Special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID No. EPA-R08-OAR-2010-0389. 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. The <http://www.regulations.gov> Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to 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, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional instructions on submitting comments, go to Section I. General Information of the **SUPPLEMENTARY INFORMATION** section of this document.

*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 Program, U.S. Environmental Protection Agency (EPA), Region 8, Mailcode 8P-AR, 1595 Wynkoop Street, Denver, Colorado 80202-1129. EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8:00 a.m. to 4:00 p.m., excluding Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Crystal Ostigaard, Air Program, U.S. Environmental Protection Agency, Region 8, Mailcode 8P-AR, 1595 Wynkoop Street, Denver, Colorado 80202-1129, (303) 312-6602, [ostigaard.crystal@epa.gov](mailto:ostigaard.crystal@epa.gov).

#### SUPPLEMENTARY INFORMATION:

##### Definitions

For the purpose of this document, we are giving meaning to certain words or initials as follows:

- (i) The words or initials *Act* or *CAA* mean or refer to the Clean Air Act, unless the context indicates otherwise.
- (ii) The initials *APCD* mean or refer to the Colorado Air Pollution Control Division.
- (iii) The initials *AQCC* mean or refer to the Colorado Air Quality Control Commission.
- (iv) The initials *AQS* mean or refer to the EPA Air Quality System database.
- (v) The words *Colorado* and *State* mean or refer to the State of Colorado.
- (vi) The initials *CDOT* mean or refer to the Colorado Department of Transportation.
- (vii) The initials *CDPHE* mean or refer to the Colorado Department of Public Health and Environment.
- (viii) The words *EPA*, *we*, *us* or *our* mean or refer to the United States Environmental Protection Agency.
- (ix) The initials *FHWA* mean or refer to the Federal Highway Administration.
- (x) The initials *FTA* mean or refer to the Federal Transit Administration.
- (xi) The initials *MVEB* mean or refer to motor vehicle emissions budget.
- (xii) The initials *NAAQS* mean or refer to National Ambient Air Quality Standard.
- (xiii) The initials *PM<sub>10</sub>* mean or refer to particulate matter with an aerodynamic diameter of less than or equal to 10 micrometers (coarse particulate matter).
- (xiv) The initials *RTP* mean or refer to the Regional Transportation Plan.
- (xv) The initials *SIP* mean or refer to State Implementation Plan.
- (xvi) The initials *TIP* mean or refer to the Transportation Improvement Program.
- (xvii) The initials *TSD* mean or refer to technical support document.

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- IV. EPA’s Evaluation of the Revised Cañon City PM<sub>10</sub> Maintenance Plan
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**I. General Information**

1. *Submitting CBI.* Do not submit CBI to EPA through <http://www.regulations.gov> or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- a. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- b. Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- c. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- d. Describe any assumptions and provide any technical information and/or data that you used.
- e. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- f. Provide specific examples to illustrate your concerns, and suggest alternatives.
- g. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- h. Make sure to submit your comments by the comment period deadline identified.

**II. Background**

The Cañon City area was designated nonattainment for PM<sub>10</sub> and classified as moderate by operation of law upon enactment of the CAA Amendments of 1990. See 56 FR 56694, 56705, 56736 (November 6, 1991). EPA approved

Colorado’s nonattainment area SIP for the Cañon City PM<sub>10</sub> nonattainment area on December 23, 1993 (58 FR 68036) and its PM<sub>10</sub> contingency measures SIP for the area on December 14, 1994 (59 FR 64332).

On September 22, 1997, the Governor of Colorado submitted a request to EPA to redesignate the Cañon City moderate PM<sub>10</sub> nonattainment area to attainment for the 1987 PM<sub>10</sub> NAAQS. Along with this request, the State submitted a maintenance plan, which demonstrated that the area was expected to remain in attainment of the PM<sub>10</sub> NAAQS through 2015. EPA approved the Cañon City maintenance plan and redesignation to attainment on May 30, 2000 (65 FR 34399).

Eight years after an area is redesignated to attainment, CAA section 175A(b) requires the state to submit a subsequent maintenance plan to EPA, covering a second 10-year period.<sup>1</sup> This second 10-year maintenance plan must demonstrate continued maintenance of the applicable NAAQS during this second 10-year period. To fulfill this requirement of the Act, the Governor of Colorado’s designee submitted the second 10-year update of the PM<sub>10</sub> maintenance plan to EPA on June 18, 2009 (hereafter, “revised Cañon City PM<sub>10</sub> Maintenance Plan”).

As described in 40 CFR 50.6, the level of the national primary and secondary 24-hour ambient air quality standards for PM<sub>10</sub> is 150 micrograms per cubic meter (µg/m<sup>3</sup>). An area attains the 24-hour PM<sub>10</sub> standard when the expected number of days per calendar year with a 24-hour concentration in excess of the standard (referred to herein as “exceedance”), as determined in accordance with 40 CFR part 50, appendix K, is equal to or less than one, averaged over a three-year period.<sup>2</sup> See 40 CFR 50.6 and 40 CFR part 50, appendix K.

Table 1 below shows the maximum monitored 24-hour PM<sub>10</sub> values for the Cañon City PM<sub>10</sub> maintenance area for 2004 through 2012. The table reflects that the values for the Cañon City area are well below the PM<sub>10</sub> NAAQS standard of 150 µg/m<sup>3</sup>.

<sup>1</sup> In this case, the initial maintenance period described in CAA section 175A extended through 2010. Thus, the second 10-year period extends through 2020.

<sup>2</sup> An exceedance is defined as a daily value that is above the level of the 24-hour standard, 150 µg/m<sup>3</sup>, after rounding to the nearest 10 µg/m<sup>3</sup> (i.e., values ending in five or greater are to be rounded up). Thus, a recorded value of 154 µg/m<sup>3</sup> would not be an exceedance since it would be rounded to 150 µg/m<sup>3</sup>; whereas, a recorded value of 155 µg/m<sup>3</sup> would be an exceedance since it would be rounded to 160 µg/m<sup>3</sup>. See 40 CFR part 50, appendix K, section 1.0.

**TABLE 1—CAÑON CITY PM<sub>10</sub> MAXIMUM 24-HOUR VALUES**

[Based on data from City Hall, 128 Main Street, AQS Identification Number 08–043–0003]

Year	Maximum value (µg/m <sup>3</sup> )
2004	* 17
2005	33
2006	54
2007	31
2008	54
2009	38
2010	31
2011	71
2012	61

\* Only operated Oct.–Dec. 2004.

Table 2 below shows the estimated number of exceedances for the Cañon City PM<sub>10</sub> maintenance area for the three-year periods of 2004 through 2006, 2005 through 2007, 2006 through 2008, 2007 through 2009, 2008 through 2010, 2009 through 2011, and 2010 through 2012. The table reflects continuous attainment of the PM<sub>10</sub> NAAQS.

**TABLE 2—CAÑON CITY PM<sub>10</sub> ESTIMATED EXCEEDANCES**

[Based on data from City Hall, 128 Main Street, AQS Identification Number 08–043–0003]

Design value period	3-Year estimated number of exceedances
2004–2006	0
2005–2007	0
2006–2008	0
2007–2009	0
2008–2010	0
2009–2011	0
2010–2012	0

**III. What was the State’s process?**

Section 110(a)(2) of the CAA requires that a state provide reasonable notice and public hearing before adopting a SIP revision and submitting it to EPA.

The Colorado Air Quality Control Commission (AQCC) held a public hearing for the revised Cañon City PM<sub>10</sub> Maintenance Plan on November 20, 2008. The AQCC approved and adopted the revised Cañon City PM<sub>10</sub> Maintenance Plan during this hearing. The Governor’s designee submitted the revised plan to EPA on June 18, 2009.

We have evaluated the revised maintenance plan and have determined that the State met the requirements for reasonable public notice and public hearing under section 110(a)(2) of the CAA. On December 18, 2009, by operation of law under CAA section 110(k)(1)(B), the revised maintenance

plan was deemed to have met the minimum “completeness” criteria found in 40 CFR part 51, appendix V.

#### IV. EPA’s Evaluation of the Revised Cañon City PM<sub>10</sub> Maintenance Plan

The following are the key elements of a maintenance plan for PM<sub>10</sub>: Emission Inventory, Maintenance Demonstration, Monitoring Network/Verification of Continued Attainment, Contingency Plan, and Transportation Conformity Requirements: Motor Vehicle Emission Budget for PM<sub>10</sub>. Below, we describe our evaluation of these elements as they pertain to the revised Cañon City PM<sub>10</sub> Maintenance Plan.

##### A. Emission Inventory

The revised Cañon City PM<sub>10</sub> Maintenance Plan includes two inventories of daily PM<sub>10</sub> emissions for the Cañon City area, one for 2006 and one for 2020. The Air Pollution Control Division (APCD) developed these emission inventories using EPA-approved emissions modeling methods and updated transportation and demographics data. Each emission inventory is a list, by source category, of the air contaminants directly emitted into the Cañon City PM<sub>10</sub> maintenance area. A more detailed description of the 2006 and 2020 inventories and information on model assumptions and parameters for each source category are contained in the State’s PM<sub>10</sub> maintenance plan Technical Support Document (TSD). Included in both inventories are agriculture, highway vehicle exhaust, railroads, road dust, commercial cooking, construction, fuel combustion, non-road sources, structure fires, woodburning, and stationary sources. We find that Colorado has prepared adequate emission inventories for the area.

##### B. Maintenance Demonstration

The revised Cañon City PM<sub>10</sub> Maintenance Plan uses emission roll-forward modeling to demonstrate maintenance of the 24-hour PM<sub>10</sub> NAAQS through 2020. Using the 2006 and 2020 emissions inventories, the State first determined the projected growth in PM<sub>10</sub> emissions from the 2006 base year to the 2020 maintenance year. The State estimated that emissions would increase from 2,149.0 pounds per day in 2006 to 2,736.6 pounds per day in 2020. This represents an increase of 27.3 percent.

The State then applied this percentage increase to the design day concentration of 56 µg/m<sup>3</sup>, which was the highest 24-hour maximum PM<sub>10</sub> value recorded in Cañon City from 2005–2007. This resulted in an estimated maximum 24-

hour PM<sub>10</sub> concentration in 2020 of 71.3 µg/m<sup>3</sup>. This is well below the 24-hour PM<sub>10</sub> NAAQS of 150 µg/m<sup>3</sup>.

At EPA’s request, the State provided supplemental emissions inventories in April of 2011. These inventories differ from those in the revised Cañon City PM<sub>10</sub> Maintenance Plan in two respects. First, they reflect potential point source emissions, not just projected actual point source emissions. Second, they reflect annual emissions, not daily.

EPA requested this information from the State because the original maintenance plan reviewed the emissions inventories for projected actual point source emissions and potential point source emissions for demonstration of maintenance, however, the June 18, 2009 maintenance plan did not contain the inventory for potential point source emissions. Therefore, for a complete review of the second 10-year maintenance plan by EPA this information was needed.

To further assess the State’s maintenance demonstration, we conducted an additional roll-forward analysis using information from these inventories. We compared the projected annual inventory for 2020 of 540.85 tons per year of PM<sub>10</sub> from all source categories (which is based on potential emissions from point sources) to the annual inventory for 2006 for all source categories of 392.11 tons per year of PM<sub>10</sub> (which is based on actual emissions from point sources) to arrive at a projected increase in area emissions of 37.9% between 2006 and 2020. We then applied this percentage increase to the same design day concentration of 56 µg/m<sup>3</sup> that the State used. Doing so, we calculated a projected maximum 24-hour PM<sub>10</sub> concentration in 2020 of 77.22 µg/m<sup>3</sup>. This value is also well below the 24-hour PM<sub>10</sub> NAAQS of 150 µg/m<sup>3</sup> and confirms the State’s maintenance demonstration. Thus, the State has adequately demonstrated that the Cañon City area will maintain the PM<sub>10</sub> NAAQS through 2020.

##### C. Monitoring Network/Verification of Continued Attainment

In the revised Cañon City PM<sub>10</sub> Maintenance Plan, the State commits to continue to operate an air quality monitoring network in accordance with 40 CFR part 58 to verify continued attainment of the PM<sub>10</sub> NAAQS. This includes the continued operation of a PM<sub>10</sub> monitor in the Cañon City area, which the State will rely on to track PM<sub>10</sub> emissions in the maintenance area. The State also commits to conduct an annual review of the air quality surveillance system in accordance with 40 CFR 58.20(d) to determine whether

the system continues to meet the monitoring objectives presented in appendix D of 40 CFR part 58. Additionally, the State commits to track and document PM<sub>10</sub> mobile source parameters and new and modified stationary source permits. If these and the resulting emissions change significantly over time, the APCD will perform appropriate studies to determine: (1) whether additional and/or re-sited monitors are necessary, and (2) whether mobile and stationary source emissions projections are on target.

Based on the above, we are taking final action approving these commitments as satisfying the relevant requirements. These commitments are similar to those we approved in the original maintenance plan.

##### D. Contingency Plan

Section 175A(d) of the CAA requires that a maintenance plan include contingency provisions to promptly correct any violation of the NAAQS that occurs after redesignation of an area. To meet this requirement the State has identified appropriate contingency measures along with a schedule for the development and implementation of such measures.

As stated in the revised Cañon City PM<sub>10</sub> Maintenance Plan, the contingency measures will be triggered by a violation of the PM<sub>10</sub> NAAQS. However, the maintenance plan notes that an exceedance of the PM<sub>10</sub> NAAQS may initiate a voluntary, local process by Cañon City and the APCD to identify and evaluate potential contingency measures.

Cañon City, in coordination with the APCD, AQCC, and the Colorado Department of Transportation (CDOT) will initiate a process to begin evaluating potential contingency measures no more than 60 days after notification from APCD that a violation of the PM<sub>10</sub> NAAQS has occurred. The AQCC will then hold a public hearing to consider the contingency measures recommended by Cañon City, APCD and CDOT along with any other contingency measures the AQCC believes may be appropriate to effectively address the violation. The State commits to adopt and implement any necessary contingency measures within one year after a violation occurs.

The State identifies the following as potential contingency measures in the revised Cañon City PM<sub>10</sub> Maintenance Plan: (1) Increased street sweeping requirements; (2) expanded, mandatory use of alternative de-icers; (3) more stringent street sand specifications; (4) road paving requirements; (5)

woodburning restrictions; (6) re-establishing new source review permitting requirements for stationary sources; and (7) other emission control measures appropriate for the area based on consideration of cost effectiveness, PM<sub>10</sub> emission reduction potential, economic and social considerations, or other factors.

We find that the contingency measures provided in the revised Cañon City PM<sub>10</sub> Maintenance Plan are sufficient and meet the requirements of section 175A(d) of the CAA.

#### *E. Transportation Conformity Requirements: Motor Vehicle Emission Budget for PM<sub>10</sub>*

Transportation conformity is required by section 176(c) of the CAA. EPA's conformity rule at 40 CFR part 93 requires that transportation plans, programs, and projects conform to SIPs and establishes the criteria and procedures for determining whether or not they conform. Conformity to a SIP means that transportation activities will not produce new air quality violations, worsen existing violations, or delay timely attainment of the NAAQS. To effectuate its purpose, the conformity rule requires a demonstration that emissions from the Regional Transportation Plan (RTP) and the Transportation Improvement Program (TIP) are consistent with the motor vehicle emissions budget(s) (MVEB(s)) contained in a control strategy SIP revision or maintenance plan (40 CFR 93.101, 93.118, and 93.124). An MVEB is defined as the level of mobile source emissions of a pollutant relied upon in the attainment or maintenance demonstration to attain or maintain compliance with the NAAQS in the nonattainment or maintenance area. Further information concerning EPA's interpretations regarding MVEBs can be found in the preamble to EPA's November 24, 1993, transportation conformity rule (see 58 FR 62193—62196).

The revised Cañon City PM<sub>10</sub> Maintenance Plan contains a single MVEB of 1,613 lbs/day of PM<sub>10</sub> for the year 2020, the maintenance year. Once the State submitted the revised plan with the 2020 MVEB to EPA for approval, 40 CFR 93.118 required that EPA determine whether the MVEB was adequate.

Our criteria for determining whether a SIP's MVEB is adequate for conformity purposes are outlined in 40 CFR 93.118(e)(4), which was promulgated August 15, 1997 (see 62 FR 43780). Our process for determining adequacy is described in our July 1, 2004 Transportation Conformity Rule

Amendments (see 69 FR 40004) and in relevant guidance.<sup>3</sup> We used these resources in making our adequacy determination described below.

On March 15, 2011, EPA announced the availability of the revised Cañon City PM<sub>10</sub> Maintenance Plan, and the PM<sub>10</sub> MVEB, on EPA's transportation conformity adequacy Web site. EPA solicited public comment on the MVEB, and the public comment period closed on April 14, 2011. We did not receive any comments. This information is available at EPA's conformity Web site: <http://www.epa.gov/otaq/stateresources/transconf/cursips.htm#canon>.

By letter to the Colorado Department of Public Health and Environment (CDPHE) dated May 4, 2011, EPA found that the revised Cañon City PM<sub>10</sub> Maintenance Plan and the 2020 PM<sub>10</sub> MVEB were adequate for transportation conformity purposes.<sup>4</sup> However, we noted in our letter that the revised Cañon City PM<sub>10</sub> Maintenance Plan did not discuss the PM<sub>10</sub> MVEB for 2015 of 7,439 lbs/day from the original PM<sub>10</sub> maintenance plan that EPA approved in 2000 (see 65 FR 34399, May 30, 2000).

According to 40 CFR 93.118(e)(1), the EPA-approved 2015 PM<sub>10</sub> MVEB must continue to be used for analysis years 2015 through 2019 (as long as such years are within the timeframe of the transportation plan), unless the State elects to submit a SIP revision to revise the 2015 PM<sub>10</sub> MVEB and EPA approves the SIP revision. This is because the revised Cañon City PM<sub>10</sub> Maintenance Plan did not revise the previously-approved 2015 PM<sub>10</sub> MVEB nor establish a new MVEB for 2015. Accordingly, the MVEB “. . . for the most recent prior year . . .” (*i.e.*, 2015) from the original maintenance plan must continue to be used (see 40 CFR 93.118(b)(1)(ii) and (b)(2)(iv)).

We note that there is a considerable difference between the 2020 and 2015 budgets—1,613 lbs/day versus 7,439 lbs/day. This is largely an artifact of changes in the methods, models, and emission factors used to estimate mobile source emissions. The 2020 MVEB is consistent with the State's 2020 emissions inventory for vehicle exhaust and road dust, and, thus, is consistent with the State's maintenance demonstration for 2020.

<sup>3</sup> “Companion Guidance for the July 1, 2004 Final Transportation Conformity Rule, Conformity Implementation in Multi-Jurisdictional Nonattainment and Maintenance Areas for Existing and New Air Quality Standards” (EPA420-B-04-012 July, 2004).

<sup>4</sup> In a **Federal Register** notice dated August 2, 2011, we notified the public of our finding (see 76 FR 46288). This adequacy determination became effective on August 17, 2011.

The discrepancy between the 2015 and 2020 MVEBs is not a significant issue for several reasons. As a practical matter, the 2020 MVEB of 1,613 lbs/day of PM<sub>10</sub> would be controlling for any conformity determination involving the relevant years because conformity would have to be shown to both the 2015 MVEB and the 2020 MVEB. Also, for any maintenance plan, such as the revised Cañon City PM<sub>10</sub> Maintenance Plan, that only establishes a MVEB for the last year of the maintenance plan, 40 CFR 93.118(b)(2)(i) requires that the demonstration of consistency with the budget be accompanied by a qualitative finding that there are no factors that would cause or contribute to a new violation or exacerbate an existing violation in the years before the last year of the maintenance plan. Therefore, when a conformity determination is prepared which assesses conformity for the years before 2020, the 2020 MVEB and the underlying assumptions supporting it would have to be considered. Finally, 40 CFR 93.110 requires the use of the latest planning assumptions in conformity determinations. Thus, the most current motor vehicle and road dust emission factors would need to be used, and we expect the analysis would show greatly reduced PM<sub>10</sub> motor vehicle and road dust emissions from those calculated in the first maintenance plan. In view of the above, EPA is approving the 2020 PM<sub>10</sub> MVEB of 1,613 lbs/day.

#### **V. Final Action**

We are approving the revised Cañon City PM<sub>10</sub> Maintenance Plan that was submitted to us on June 18, 2009. We are approving the revised maintenance plan because it demonstrates maintenance through 2020 as required by CAA section 175A(b), retains the control measures from the initial PM<sub>10</sub> maintenance plan that EPA approved in May of 2000, and meets other CAA requirements for a section 175A maintenance plan. Our approval includes approval of the revised maintenance plan's 2020 transportation conformity MVEB for PM<sub>10</sub> of 1,613 lbs/day.

#### **VI. Statutory and Executive Order Reviews**

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a “significant regulatory action” and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355, May

22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it 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).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does 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 (64 FR 43255, August 10, 1999). This action merely approves a state rule as meeting Federal requirements, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the state to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection

burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

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 rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of 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 Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by September 9, 2013. 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. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. 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, Particulate matter, Reporting and recordkeeping requirements.

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

Dated: June 20, 2013.

**Shaun L. McGrath,**

*Regional Administrator, Region 8.*

40 CFR part 52 is amended as follows:

## PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

### Subpart G—Colorado

■ 2. Section 52.332 is amended by adding paragraph (q) to read as follows:

#### § 52.332 Control strategy: Particulate matter.

\* \* \* \* \*

(q) Revisions to the Colorado State Implementation Plan, PM<sub>10</sub> Revised Maintenance Plan for Cañon City, as adopted by the Colorado Air Quality Control Commission on November 20, 2008, State effective on December 30, 2008, and submitted by the Governor's designee on June 18, 2009. The revised maintenance plan satisfies all applicable requirements of the Clean Air Act.

[FR Doc. 2013-16506 Filed 7-9-13; 8:45 am]

**BILLING CODE 6560-50-P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R05-OAR-2009-0805; FRL-9832-4]

### Approval of Air Quality Implementation Plans; Indiana; Approval of "Infrastructure" SIP With Respect to Source Impact Analysis Provisions for the 2006 24-Hour PM<sub>2.5</sub> NAAQS

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** Pursuant to its authority under the Clean Air Act (CAA), EPA is taking final action to approve portions of submissions made by the Indiana Department of Environmental Management (IDEM) to address the section 110(a)(1) and (2) requirements of the CAA, often referred to as the "infrastructure" state implementation plan (SIP). Specifically, we are finalizing the approval of portions of IDEM's submissions intended to meet certain requirements of sections 110(a)(2)(C), 110(a)(2)(D)(i)(II), and 110(a)(2)(J) of the CAA with respect to the 2006 24-hour PM<sub>2.5</sub> national ambient air quality standards (2006 PM<sub>2.5</sub> NAAQS). Among other provisions, these sections of the CAA require states to perform source impact analyses as part of their prevention of significant deterioration (PSD) programs. EPA is finalizing approval of Indiana's

submissions intended to satisfy this requirement. The proposed rule associated with this final action was published on August 2, 2012.

**DATES:** This final rule is effective on August 9, 2013.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA-R05-OAR-2009-0805. All documents in the docket are listed in the [www.regulations.gov](http://www.regulations.gov) index. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly-available only in hard copy. Publicly-available docket materials are available either electronically in [www.regulations.gov](http://www.regulations.gov) or in hard copy at the U.S. Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Andy Chang at (312) 886-0258 before visiting the Region 5 office.

**FOR FURTHER INFORMATION CONTACT:**

Andy Chang, Environmental Engineer, Attainment Planning and Maintenance Section, Air Programs Branch (AR-18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886-0258, [chang.andy@epa.gov](mailto:chang.andy@epa.gov).

**SUPPLEMENTARY INFORMATION:**

Throughout this document whenever “we,” “us,” or “our” is used, we mean EPA. This supplementary information section is arranged as follows:

- I. What is the background for this action?
- II. What is the result of IDEM’s SIP-approved update to the definition of the 2006 PM<sub>2.5</sub> NAAQS?
- III. What action is EPA taking?
- IV. Statutory and Executive Order Reviews.

**I. What is the background for this action?**

Under sections 110(a)(1) and (2) of the CAA, and implementing EPA policy, states are required to submit infrastructure SIPs to ensure that their SIPs provide for implementation, maintenance, and enforcement of the NAAQS, including the 2006 PM<sub>2.5</sub> NAAQS. These submissions must contain any revisions needed for meeting the applicable SIP requirements of section 110(a)(2), or certifications that their existing SIPs for particulate matter already met those requirements.

EPA highlighted this statutory requirement in an October 2, 2007,

guidance document entitled “Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 1997 8-hour Ozone and PM<sub>2.5</sub> National Ambient Air Quality Standards” (2007 Memo). On September 25, 2009, EPA issued additional guidance pertaining to the 2006 PM<sub>2.5</sub> NAAQS entitled “Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 2006 24-Hour Fine Particle (PM<sub>2.5</sub>) National Ambient Air Quality Standards (NAAQS)” (2009 Memo). The SIP submissions referenced in this rulemaking pertain to the applicable requirements of sections 110(a)(1) and (2) of the CAA. Indiana made its infrastructure SIP submission for the 2006 PM<sub>2.5</sub> NAAQS on October 20, 2009, and provided supplemental submissions to EPA on June 25, 2012, and July 12, 2012.

On August 2, 2012, EPA published its proposed action on Region 5 states’ submissions (see 77 FR 45992). Notably, we proposed to find that Indiana had met the applicable infrastructure SIP requirements of sections 110(a)(2)(C), 110(a)(2)(D)(i)(II), and 110(a)(2)(J) concerning state PSD programs generally, thereby satisfying the requirement that the State has an adequate PSD program pursuant to these sections for the 2006 PM<sub>2.5</sub> NAAQS.

During the comment period for the August 2, 2012, proposed rulemaking, EPA received five comment letters, one of which observed that the Indiana SIP was insufficient for purposes of the State’s PSD program for the 2006 PM<sub>2.5</sub> NAAQS.<sup>1</sup> The commenter noted that 326 Indiana Administrative Code (IAC) 2-2-5(a)(1) requires an analysis of a new or modified source’s emissions demonstrating that the emissions will not cause or contribute to air pollution in violation of any ambient air quality standard, as designated in 326 IAC 1-3. The language contained in 326 IAC 1-3 explicitly referenced only the 1997 PM<sub>2.5</sub> NAAQS, and not the 2006 PM<sub>2.5</sub> NAAQS of 35 micrograms per cubic meter. Therefore, a literal read of Indiana’s PSD regulations at the time of EPA’s proposed rulemaking for the 2006 PM<sub>2.5</sub> NAAQS infrastructure SIP indicated that a source impact analysis would only need to comply with the 1997 PM<sub>2.5</sub> NAAQS. The commenter did note that 326 IAC 2-1.1-5 contains language that would prohibit issuance of a registration, permit, modification approval, or operating permit revision if issuance would allow a source to cause or contribute to a violation of the NAAQS. However, 326 IAC 2-1.1-5 is

<sup>1</sup> EPA addressed the remainder of the comment letters in a separate rulemaking (see 77 FR 65478).

currently not in the SIP, and the language contained therein had not been submitted by Indiana for incorporation into the SIP.

As a result of this comment received in response to our August 2, 2012, proposed rulemaking, we did not promulgate final action on this limited aspect of Indiana’s infrastructure SIP in our October 29, 2012, final rulemaking (see 77 FR 65478). We did, however, promulgate final action on the majority of all other applicable elements of Indiana’s infrastructure SIP. In the October 29, 2012, rulemaking, we committed to address the source impact analysis requirements of Indiana’s PSD program in a separate action; this final rulemaking serves as that action.

**II. What is the result of IDEM’s SIP-approved update to the definition of the 2006 PM<sub>2.5</sub> NAAQS?**

Integral to the applicable infrastructure SIP requirements for IDEM’s PSD program with respect to the source impact analysis requirements for the 2006 PM<sub>2.5</sub> NAAQS was the need for the state to update its definitions contained in 326 IAC 1-3 to reflect the 2006 PM<sub>2.5</sub> NAAQS and submit these revisions for incorporation into the SIP. On April 19, 2013, EPA published its direct final approval of revisions to IDEM’s SIP at 326 IAC 1-3-4(b)(8) that among other things, contained the Federally promulgated 2006 PM<sub>2.5</sub> NAAQS codified at 40 CFR 50.13 (see 78 FR 23492). Notably, the revisions aligned the state and Federal ambient air quality standards, calculations for compliance, and ambient concentration collection methods for the 2006 PM<sub>2.5</sub> NAAQS. No adverse comments were received on this notice, and the SIP revisions became effective on June 18, 2013.

As a result of EPA’s April 19, 2013, action, the requirements contained in 326 IAC 2-2-5(a)(1), *i.e.*, the requirement for an analysis of a new or modified source’s emissions demonstrating that the emissions will not cause or contribute to air pollution in violation of any ambient air quality standard, as designated in 326 IAC 1-3, now also apply to the 2006 PM<sub>2.5</sub> NAAQS, as codified in 40 CFR 50.13. Therefore, Indiana has met the PSD program source impact analysis requirements for sections 110(a)(2)(C), 110(a)(2)(D)(ii), and 110(a)(2)(J) of the CAA with respect to the 2006 PM<sub>2.5</sub> NAAQS.

**III. What action is EPA taking?**

For the reasons discussed above, EPA is taking final action to approve portions of Indiana’s infrastructure SIP

submissions for the 2006 PM<sub>2.5</sub> NAAQS with respect to sections 110(a)(2)(C), 110(a)(2)(D)(i)(II), and 110(a)(2)(J) of the CAA. Specifically, we are finalizing approval of the relevant portions of Indiana's submissions because the state's SIP-approved PSD program now requires a source impact analysis for the Federally promulgated 2006 PM<sub>2.5</sub> NAAQS codified at 40 CFR 50.13.

**IV. Statutory and Executive Order Reviews**

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA 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 located in the State, and EPA notes that it will not impose substantial direct costs on Tribal governments or preempt Tribal law.

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

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 September 9, 2013. 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. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the Proposed Rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. 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, Ozone, Particulate matter, Reporting and recordkeeping requirements.

Dated: June 25, 2013.

**Susan Hedman,**  
Regional Administrator, Region 5.

40 CFR part 52 is amended as follows:

**PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS**

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

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

- 2. In § 52.770 the table in paragraph (e) is amended by revising the entry for "Section 110(a)(2) Infrastructure Requirements for the 2006 24-Hour PM<sub>2.5</sub> NAAQS".

The revised text reads as follows:

**§ 52.770 Identification of plan.**

\* \* \* \* \*

(e) \* \* \*

**EPA-APPROVED INDIANA NONREGULATORY AND QUASI-REGULATORY PROVISIONS**

Title	Indiana date	EPA approval	Explanation
* Section 110(a)(2) Infrastructure Requirements for the 2006 24-Hour PM <sub>2.5</sub> NAAQS.	* 10/20/2009, 6/25/2012, 7/12/2012.	* 7/10/2013 [INSERT PAGE NUMBER WHERE THE DOCUMENT BEGINS].	* This action addresses the following CAA elements: 110(a)(2)(A), (B), (C), (D)(i)(II), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M). We are finalizing approval of the PSD source impact analysis requirements of section 110(a)(2)(C), (D)(i)(II), and (J), but are not finalizing action on the visibility protection requirements of (D)(i)(II), and the state board requirements of (E)(ii). We will address these requirements in a separate action.

EPA-APPROVED INDIANA NONREGULATORY AND QUASI-REGULATORY PROVISIONS—Continued

Title	Indiana date	EPA approval	Explanation
<p>[FR Doc. 2013–16512 Filed 7–9–13; 8:45 am]                      BILLING CODE 6560–50–P</p> <hr/> <p><b>FEDERAL COMMUNICATIONS COMMISSION</b></p> <p><b>47 CFR Parts 1 and 25</b></p> <p><b>[IB Docket No. 11–133; FCC 13–50]</b></p> <p><b>Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees</b></p> <p><b>AGENCY:</b> Federal Communications Commission.</p> <p><b>ACTION:</b> Final rule.</p> <hr/> <p><b>SUMMARY:</b> In this document, the Federal Communications Commission (Commission) modifies the policies and procedures that apply to foreign ownership of common carrier, aeronautical en route and aeronautical fixed radio station licensees. The Commission found that the new measures will reduce regulatory costs and burdens imposed on wireless common carrier and aeronautical applicants, licensees and spectrum lessees, provide greater transparency and more predictability with respect to the Commission’s foreign ownership filing requirements and review process, facilitate investment in U.S. telecommunications infrastructure and capacity, while continuing to protect important interests related to national security, law enforcement, foreign policy, and trade policy.</p> <p><b>DATES:</b> Effective August 9, 2013.</p> <p><b>FOR FURTHER INFORMATION CONTACT:</b> Susan O’Connell or James Ball, Policy Division, International Bureau, FCC, (202) 418–1460 or via the Internet at <a href="mailto:Susan.OConnell@fcc.gov">Susan.OConnell@fcc.gov</a> and <a href="mailto:James.Ball@fcc.gov">James.Ball@fcc.gov</a>.</p> <p><b>SUPPLEMENTARY INFORMATION:</b> This is a summary of the Commission’s Second Report and Order, IB Docket No. 11–133, FCC 13–50, adopted April 18, 2013, and released April 18, 2013. The full text of the Second Report and Order is available for inspection and copying during normal business hours in the FCC Reference Center, 445 12th Street SW., Washington, DC 20554. The document also is available for download over the Internet at <a 165="" 361="" 635="" 935"="" href="http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db0418/FCC-13-&lt;/a&gt;&lt;/p&gt; &lt;/td&gt; &lt;td data-bbox="> <p><i>50A1.pdf</i>. The complete text also may be purchased from the Commission’s copy contractor, Best Copy and Printing, Inc. (BCPI), located in Room CY–B402, 445 12th Street SW., Washington, DC 20554. Customers may contact BCPI at its Web site: <a href="http://www.bcpweb.com">http://www.bcpweb.com</a> or call 1–800–378–3160.</p> <p><b>Summary of Second Report and Order</b></p> <p>1. In the Second Report and Order, the Federal Communications Commission (Commission) revises its regulatory framework for authorizing foreign ownership of common carrier radio station licensees—<i>i.e.</i>, companies that provide fixed or mobile telecommunications service over networks that employ spectrum-based technologies, either in whole or in part—pursuant to sections 310(b)(3) and 310(b)(4) of the Communications Act of 1934, as amended (the Act), 47 U.S.C. 310(b)(3), (4). These new measures will also apply to foreign ownership of aeronautical en route and aeronautical fixed (hereinafter, “aeronautical”) radio station licensees pursuant to section 310(b)(4). The new rules will be codified in 47 CFR 1.907, 1.990–1.994 and 25.105. For ease of reference, the Second Report and Order refers to common carrier and aeronautical radio station applicants, licensees, and spectrum lessees collectively as “licensees” unless the context warrants otherwise. “Spectrum lessees” are defined in 47 CFR 1.9003. The Second Report and Order does not address Commission policies with respect to the application of section 310(b)(4) to broadcast licensees.</p> <p>2. Section 310(b)(4) of the Act establishes a 25 percent benchmark for investment by foreign individuals, governments, and corporations in U.S.-organized entities that directly or indirectly control a U.S. broadcast, common carrier, or aeronautical radio station licensee. This section also grants the Commission discretion to allow higher levels of foreign ownership of a controlling U.S.-organized parent company—up to and including 100 percent of its equity and voting interests—unless the Commission finds that such ownership is inconsistent with the public interest. Section 310(b)(3) of the Act prohibits foreign individuals, governments, and corporations from owning more than 20 percent of the capital stock of a</p> </a></p>	<p>broadcast, common carrier, or aeronautical radio station licensee. In the First Report and Order in this docket (77 FR 50628, August 22, 2012) the Commission determined to forbear, under section 10 of the Act, 47 U.S.C. 160, from applying the 20 percent foreign ownership limit in section 310(b)(3) to the class of common carrier licensees in which the foreign investment is held through U.S.-organized entities that do not control the licensee, to the extent the Commission determines such foreign ownership is consistent with the public interest under the policies and procedures the Commission uses for assessing foreign ownership under section 310(b)(4). The Commission deferred to this second phase of the proceeding a decision whether to apply any changes it adopts to the section 310(b)(4) regulatory framework to its analysis of petitions for declaratory ruling or similar filings under the Commission’s section 310(b)(3) forbearance approach. The Commission’s forbearance authority under 47 U.S.C. 160 does not extend to broadcast or aeronautical radio stations licensees.</p> <p>3. The Second Report and Order adopts a comprehensive set of rules that will apply to common carrier and aeronautical radio station licensees that seek approval for the foreign ownership of their controlling U.S.-organized parent companies to exceed the 25 percent foreign ownership benchmark in section 310(b)(4) and to common carrier radio station licensees subject to the section 310(b)(3) forbearance approach that seek Commission approval to exceed the 20 percent foreign ownership limit in section 310(b)(3). The Commission estimates that the new rules will reduce the number of section 310(b) petitions for declaratory ruling filed with the Commission annually in the range of 40 to 70 percent as compared to the current regulatory framework. The Commission also concludes that the new rules will reduce substantially the number of hours that licensees will have to spend in preparing and submitting the petitions that they will need to file under the new rules.</p> <p>4. The Second Report and Order adopts several of the proposals set forth in the Notice of Proposed Rulemaking</p>		

(NPRM) as well as other measures that respond to comments filed in this proceeding on the various options and questions raised in the NPRM. The Commission has revised certain of its initial proposals in light of the views of the Executive Branch agencies that filed comments, in order to ensure their continued ability to review proposed foreign investment in advance (through either section 310(b) petitions or license or spectrum lease applications) and assess whether such investment is consistent with national security, law enforcement, foreign policy, and trade policy concerns. Under the new rules, the Commission will continue to coordinate with the relevant Executive Branch agencies all petitions for declaratory ruling and applications for licenses and spectrum leases, and for transfers and assignments thereof, where the applicant has foreign ownership exceeding the limits in section 310(b)(3) and/or section 310(b)(4), and continue to accord deference to the agencies' views on matters related to national security, law enforcement, foreign policy, and trade policy that may be raised by a particular petition for declaratory ruling or application. The Commission will also maintain its ability to condition or disallow foreign investment that may pose a risk of harm to important national policies.

#### **WTO and Non-WTO Investment**

5. The Second Report and Order eliminates the current distinction between foreign investment from World Trade Organization (WTO) Member countries and non-WTO Member countries for purposes of reviewing foreign investment in common carrier and aeronautical licensees. Instead, the Commission will apply an "open entry standard" in its public interest assessment of all foreign investment under the Commission's section 310(b)(3) forbearance approach and under its section 310(b)(4) review. The Second Report and Order finds that, on balance, the costs of maintaining the distinction between WTO and non-WTO Member investment in common carrier and aeronautical licensees outweigh any remaining benefits.

#### **Revised and Codified Standards for Public Interest Determinations**

6. Prior Approval of Foreign Ownership Under section 310(b)(3) Forbearance and section 310(b)(4). The Second Report and Order adopts the NPRM proposal to retain and codify the Commission's long-standing policy that requires common carrier and aeronautical radio station licensees to

seek and obtain Commission approval before their U.S. parents' foreign ownership exceeds the 25 percent benchmark in section 310(b)(4) of the Act. The Second Report and Order also codifies the same requirement for common carrier licensees subject to section 310(b)(3) forbearance to obtain prior Commission approval before foreign ownership in the subject licensee exceeds the 20 percent limit in section 310(b)(3).

7. Issuing section 310(b)(3) and (b)(4) Rulings to Named Licensees. The Commission determined in the Second Report and Order to continue its practice of issuing foreign ownership rulings in the name of the licensee that is the subject of a petition for declaratory ruling, regardless of whether the ruling authorizes the licensee to have foreign ownership in excess of the 20 percent limit in section 310(b)(3) or authorizes foreign ownership of the licensee's controlling U.S. parent to exceed the 25 percent benchmark in section 310(b)(4). The NPRM had proposed to issue section 310(b)(4) rulings in the name of the licensee's lowest-tier, controlling U.S. parent. The Second Report and Order finds that issuing section 310(b)(3) and section 310(b)(4) rulings in the name of the licensee will help to provide the consistency sought by commenters in the Commission's public interest review of foreign ownership under section 310(b)(3) forbearance and section 310(b)(4).

8. Approval of Named Foreign Investors. The rules adopted in the Second Report and Order will require common carrier and aeronautical licensees to identify and request specific approval in their section 310(b)(4) petitions for declaratory ruling for any foreign individual or entity, or "group" of foreign individuals or entities, that holds or would hold directly, and/or indirectly through one or more intervening U.S.- or foreign-organized entities, more than five percent of the U.S. parent's total outstanding capital stock (equity) and/or voting stock, or a controlling interest in the U.S. parent. (See § 1.991(i)(1).) The Second Report and Order also adopts a five percent identification and specific approval requirement for common carrier licensees subject to section 310(b)(3) forbearance. (See § 1.991(i)(2).) In certain limited circumstances, however, the Commission will presumptively require identification and specific approval of a foreign investor's non-controlling interest only when it would exceed, directly and/or indirectly, ten percent of the equity and/or voting interests of a U.S. parent (for section

310(b)(4) petitions) or licensee (for petitions filed under section 310(b)(3) forbearance). The Commission will presume, subject to rebuttal in a particular case, that a non-controlling foreign interest of ten percent or less in a U.S. parent or licensee is exempt from the five percent specific approval requirement in the circumstances specified in § 1.991(i)(3)(ii)(A)–(C).

9. The Non-Controlling 49.99 Percent Approval Option for Named Foreign Investors. The Second Report and Order adopts the proposed non-controlling 49.99 percent approval option with certain modifications to accommodate the Commission's forbearance decision in the First Report and Order. Section 1.991(k) of the new rules will allow common carrier and aeronautical licensees to request advance approval for any named foreign investor to increase, at some future time, its equity and/or voting interest held directly or indirectly in the licensee's controlling U.S. parent from existing levels (or levels that would exist upon closing of any transactions contemplated by the petition) up to any non-controlling amount, not to exceed 49.99 percent. Section 1.991(k) will similarly permit common carrier licensees subject to section 310(b)(3) forbearance to request specific approval of any named foreign investor to increase, at some future time its equity and/or voting interest in the licensee, held through intervening U.S. entities that do not control the licensee, from existing levels (or levels that would exist upon closing of any transactions contemplated by the petition) up to any non-controlling amount, not to exceed 49.99 percent. As proposed, the rule will permit the licensee to request such approval for named foreign investors to acquire on a going-forward basis up to and including a non-controlling 49.99 percent interest—even if the aggregate of such interests would exceed 100 percent.

10. The 100 Percent Approval Option for Controlling Foreign Investors. The Second Report and Order adopts the proposed 100 percent approval option for foreign investors that seek to hold a controlling interest in the controlling U.S. parent of a common carrier or aeronautical radio licensee. The Commission clarifies that the rule, as adopted, will apply only to section 310(b)(4) petitions filed in connection with applications for an initial license or spectrum leasing arrangement as well as applications for consent to assign or transfer control of a license or spectrum leasing arrangement. Thus, where the controlling U.S. parent of the licensee or spectrum lessee named in the application is controlled (in the case of

an initial application), or would be controlled (in the case of a transfer/assignment application) by a foreign individual, entity or "group," § 1.991(k) will allow the petitioner to request advance approval for the controlling foreign investor or group to increase its equity and/or voting interests at some future time, up to any amount, including 100 percent, to the extent the controlling foreign investor's interests at the time of filing the petition and application are less than 100 percent.

11. The Aggregate Allowance for Unnamed Foreign Investors. Section 1.994(a) of the new rules will provide that, in addition to the foreign ownership interests approved specifically in the licensee's section 310(b)(4) ruling, the controlling U.S. parent named in the ruling (or a U.S.-organized successor-in-interest formed as part of a *pro forma* reorganization) may be 100 percent owned directly, and/or indirectly through one or more U.S.- or foreign-organized entities, on a going-forward basis (*i.e.*, after issuance of the ruling) by other foreign investors without prior Commission approval. The aggregate allowance for unnamed foreign investors will be subject to the requirement that the licensee seek and obtain Commission approval before any foreign individual, entity, or "group" not previously approved acquires, directly and/or indirectly, more than five percent of the U.S. parent's outstanding capital stock (equity) and/or voting stock (or more than ten percent, where the criteria for exclusion in § 1.991(i)(3)(ii)(A)–(C) are satisfied), or a controlling interest.

12. Similarly, for common carrier licensees that have received a ruling under the Commission's section 310(b)(3) forbearance approach, § 1.994(b) will provide that, in addition to the foreign ownership interests approved specifically in the licensee's ruling, the licensee may be 100 percent owned on a going forward basis by other foreign investors holding interests in the licensee through U.S.-organized entities that do not control the licensee without prior Commission approval. The aggregate allowance for unnamed investors will be subject to the requirement that the licensee seek and obtain Commission approval before any foreign individual, entity, or "group" not previously approved acquires directly, and/or indirectly through one or more U.S.-organized entities that do not control the licensee, more than five percent of the licensee's outstanding capital stock (equity) and/or voting stock. The five percent prior approval requirement will not apply to any foreign investor that acquires an equity

and/or voting interest of ten percent or less, provided that the interest satisfies the criteria for exclusion in § 1.991(i)(3)(ii)(A)–(C). Section 1.994(a)(2) specifies that foreign ownership interests held directly in the licensee shall not be permitted to exceed an aggregate 20 percent of the licensee's equity and/or voting interests.

13. The Commission also determined in the Second Report and Order that licensees may find it necessary or desirable to file a petition to exceed the foreign ownership limits in sections 310(b)(3) and/or (b)(4) in circumstances where no foreign investor holds or proposes to acquire, at the time the petition is filed, an interest that would require specific approval under the new rules—particularly where the licensee or U.S. parent is, or is owned in whole or in part, by a public company. Accordingly, the new rules will permit licensees to file petitions for declaratory ruling requesting approval to exceed the foreign ownership limits in section 310(b)(3) and/or section 310(b)(4) in circumstances where the licensee is not required to, and otherwise does not choose to, request specific approval for any named foreign investor. The standard terms and conditions in § 1.994 of the new rules, including the 100 percent aggregate allowance, will apply to Commission grant of such petitions unless the Commission finds it necessary to specify otherwise in a particular ruling.

14. The Commission emphasizes that, under the new rules, licensees that have received a foreign ownership ruling will still have an obligation to monitor and stay ahead of changes in foreign ownership to ensure that the licensee obtains Commission approval before such a change renders the licensee out of compliance with its ruling(s) or the Commission's rules. Thus, as is the case under the current regulatory framework, licensees, their controlling parent companies, and other entities in the licensee's vertical ownership chain may also need to place restrictions in their bylaws or other organizational documents to enable the licensee to ensure such continued compliance with the terms of its ruling. The Commission notes that stock ownership restrictions are a common means of ensuring compliance with the foreign ownership limitations in section 310(b) of the Act and other federal statutory provisions that restrict foreign ownership of U.S. companies and assets. (*See* § 1.994(a), Note to paragraph (a)).

15. Expanding Beyond Carrier-Specific Rulings. The Commission will issue foreign ownership rulings to cover all of the petitioning licensee's

subsidiaries and affiliates, whether existing at the time the ruling is issued or formed or acquired subsequently, provided that foreign ownership of the licensee and its subsidiaries and affiliates that are relying on the licensee's ruling remains within the parameters of the ruling and the new rules. (*See* § 1.994(b).)

16. Section 1.990(d)(10) of the new rules will define "subsidiary" as any entity in which the licensee holds, directly or indirectly, more than 50 percent of the total voting power of the outstanding voting stock of the entity, where no other individual or entity has *de facto* control. Section 1.990(d)(2) will define "affiliate" as any entity that is under common control with the licensee, again defined by reference to the holder, directly or indirectly, of more than 50 percent of total voting power, where no other individual or entity has *de facto* control. Once a licensee has received a foreign ownership ruling, any "subsidiary" or "affiliate" of the licensee, as so defined, will not be required to file a petition for declaratory ruling in connection with its own common carrier or aeronautical license applications, but can instead rely on the licensee's ruling, provided that the foreign ownership of the licensee and its subsidiary or affiliate complies with the terms and conditions of the licensee's foreign ownership ruling and the new rules. Compliance will require that the licensee and any subsidiary or affiliate obtain Commission approval before any previously unapproved foreign investor acquires an ownership interest in the licensee or subsidiary/affiliate in excess of the five percent (or ten percent) limits established in the new rules. The rules will require the subsidiary or affiliate to state in its application the name of the affiliated licensee that has received a ruling(s), provide a citation to the ruling(s), and attach to the application a certification, signed by the applicant and licensee (or by a controlling parent company), stating that the applicant and licensee are in compliance with the terms and conditions of the licensee's foreign ownership ruling(s) and the requirements of the rules.

17. Section 1.990(c)(2) will require that all affiliated entities that contemporaneously hold, or are filing applications for, common carrier or aeronautical licenses or common carrier spectrum leasing arrangements, and that would have foreign ownership exceeding the limits in section 310(b)(3) and/or section 310(b)(4), be named as joint petitioners in a petition for declaratory ruling seeking approval for the affiliated entities' foreign

ownership. To the extent an affiliated entity does not contemporaneously hold, or is not filing an application for, a covered license or spectrum leasing arrangement, it need not be named as a joint petitioner. If the entity later files a covered application—after issuance of a ruling to an affiliate—§ 1.994(b) will permit the entity to rely on the affiliate's ruling for purposes of filing its own applications.

18. Introducing New Foreign-Organized Entities into the Vertical Ownership Chain. The Commission will issue foreign ownership rulings to permit, without prior Commission approval, the insertion of new, controlling foreign-organized companies in the vertical ownership chain above the controlling U.S. parent of a common carrier or aeronautical radio station licensee, under section 310(b)(4), or above a U.S.-organized entity that does not control the common carrier licensee, under section 310(b)(3) forbearance. (See § 1.994(c).) Authorization under this rule will require any new foreign-organized companies to be under 100 percent common ownership and control with the controlling foreign parent of the licensee's controlling U.S. parent, under section 310(b)(4), or with the controlling foreign parent of the U.S.-organized entity that does not control the licensee, under section 310(b)(3) forbearance, for which the licensee has received prior approval.

19. The Commission will also issue foreign ownership rulings to permit, without prior Commission approval, the insertion of new, non-controlling foreign-organized companies in the vertical ownership chain above the controlling U.S. parent of a common carrier or aeronautical radio station licensee, under section 310(b)(4), or above a U.S.-organized entity that does not control the common carrier licensee, under section 310(b)(3) forbearance. (See § 1.994(d).) Authorization under this rule will require any new, foreign-organized companies to be under 100 percent common ownership and control with a previously approved foreign investor. To the extent a licensee subject to section 310(b)(3) forbearance obtains specific approval in its ruling of a foreign investor's direct ownership interest in the licensee (subject to the 20 percent aggregate limit on direct foreign investment), the rules will also permit the licensee to insert, without prior Commission approval, a new foreign-organized entity in the vertical ownership chain of the approved foreign investor, provided that any new foreign-organized entity is under 100 percent common ownership and control

with the approved foreign investor. (See § 1.994(d), Note to paragraph (d)(1).)

20. The Second Report and Order finds it reasonable to allow these internal reorganizations to proceed without requiring the licensee to return to the Commission for specific approval to insert the new, foreign-organized company in the previously approved vertical ownership chain. The new, foreign-organized company will remain under 100 percent common ownership and control with the previously approved foreign investor. Under other circumstances, the Commission has acknowledged that non-substantial changes in corporate organization merit streamlined treatment. The Commission cautions, however, that while it has previously streamlined or forborne in many situations from enforcement of the separate requirement under section 310(d) of the Act for prior Commission approval of such internal reorganizations that do not involve "a substantial change in ownership or control," the Commission's action in the Second Report and Order extends only to its requirements in enforcing the foreign ownership restrictions of section 310(b) and does not eliminate any continuing section 310(d) approval requirements.

21. The new rules will require that licensees file a letter to the attention of the Chief, International Bureau, within 30 days after introduction of a new, foreign-organized entity in the vertical ownership chain above the controlling U.S. parent or licensee certifying that the new, foreign-organized entity complies with the 100 percent common ownership and control requirement and referencing the underlying ruling by the International Bureau Filing System (IBFS) File No. and FCC Record citation, if available. (See §§ 1.994(c)(2), (d)(2).) The Commission believes that it is important to maintain complete and current records of approved foreign ownership, including the insertion of new, foreign-organized entities in the approved vertical ownership chain above the controlling U.S. parent or licensee. Section 1.994 of the rules will not require such separate notification if the ownership change is instead the subject of a *pro forma* application or *pro forma* notification already filed with the Commission via the Universal Licensing System (ULS) (for wireless licensees) or IBFS (for satellite radio licensees).

22. The Commission also stated that applications for consent to a spectrum leasing arrangement or for consent to a transfer of control or assignment of licenses or spectrum leasing arrangements filed by a licensee's subsidiaries or affiliates will not be

eligible for the Commission's immediate approval or immediate processing procedures in §§ 1.9020(e), 1.9030(e), 1.9035(e) and 1.948(j). The Commission noted that such procedures do not provide an opportunity for Commission or Executive Branch agency review prior to grant of an eligible application. The applications are granted upon filing and, thus, there is no public notice of the application or opportunity for the filing of comments or oppositions.

23. Service- and Geographic-Specific Rulings. The Second Report and Order eliminates the current practice of issuing foreign ownership rulings on a service-specific and geographic-specific basis. This change in practice will apply to petitions filed under the Commission's section 310(b)(3) forbearance approach and under section 310(b)(4). Under the current regulatory framework, foreign ownership rulings typically cover only the particular wireless service(s) referenced in the petition for declaratory ruling, and the scope of the ruling may also be limited to the geographic service area of the licenses or spectrum leasing arrangements referenced in the petition. As a result, although the ruling authorizes the foreign ownership of the licensee, the licensee is required to file additional petitions for declaratory ruling to "extend" its existing ruling to cover licenses or spectrum leasing arrangements in different services and/or in different geographic service areas. Industry commenters supported eliminating service- and geographic-specific rulings, while the Department of Justice (DOJ) and the Department of Homeland Security (DHS) supported continuing the practice.

24. In determining to eliminate the practice, the Commission finds that it and the relevant Executive Branch agencies will have sufficient opportunities during the licensing process to consider whether a licensee's proposed expansion of service or coverage area raises concerns with respect to national security, law enforcement, foreign policy and trade policy due to the licensee's foreign ownership. The agencies will have the opportunity to raise any concerns with respect to a licensee's acquisition of new licenses during the section 308 licensing process (see 47 U.S.C. 308) or, in the case of the acquisition of licenses by assignment or transfer of control, during the section 310(d) proceeding (see 47 U.S.C. 310(d)).

25. The Commission also stated that it will maintain the current requirement that applicants with foreign ownership exceeding the section 310(b) limits will qualify for the immediate approval and

immediate processing procedures in §§ 1.9020(e), 1.9030(e), 1.9035(e), and 1.948(j) only where the applicant is able to certify in its application that it has already received a service-specific and geographic-specific ruling that covers the spectrum leasing arrangements or licenses that are the subject of the application and that there has been no change in its foreign ownership in the meantime. Thus, unless an applicant has already received a foreign ownership ruling for the same wireless service in the same geographic service area specified in its application for consent to a spectrum leasing arrangement, or for consent to a transfer or assignment of licenses or spectrum leasing arrangements (*e.g.*, the application involves a request only for additional spectrum in the same service(s) and the same area(s)), the application will not be eligible for immediate approval or processing. The Commission makes no change to its rules in this respect because, as discussed above, such procedures do not provide an opportunity for Commission or Executive Branch review prior to grant of an eligible application. These applications are granted upon filing and, thus, there is no public notice of the application or opportunity for the filing of comments or oppositions.

#### Contents of Petitions for Declaratory Ruling

26. Information on Disclosable Interest Holders and Foreign Investor Interests. The Second Report and Order adopts the ten percent ownership disclosure threshold proposed in the NPRM. (*See* § 1.991(e), (f).) Specifically, all section 310(b)(4) petitions for declaratory ruling must contain the name, address, citizenship, and principal business(es) of any individual or entity, regardless of citizenship, that directly or indirectly holds or would hold, after effectuation of any planned ownership changes described in the petition, at least ten percent of the equity or voting interests in the controlling U.S. parent of a common carrier or aeronautical radio station licensee or a controlling interest. Petitions for declaratory ruling filed by common carrier licensees subject to section 310(b)(3) forbearance must contain the same information for any individual or entity, regardless of citizenship, that directly or indirectly holds or would hold, after effectuation of any planned ownership changes described in the petition, at least ten percent of the equity or voting interests in the common carrier licensee. Petitioners will also be required to

provide the percentage of equity and voting interest held or to be held by each such “disclosable interest holder” (to the nearest one percent). The ten percent ownership disclosure requirement is consistent with the ownership disclosure requirements that currently apply to most common carrier applicants under the Commission’s licensing rules. The Commission also finds that submission of such ownership information is necessary to verify the principal stakeholders and ultimate control of the U.S. parent company of a common carrier or aeronautical licensee, in the case of section 310(b)(4) review, and in a common carrier licensee, in the case of petitions filed under the Commission’s section 310(b)(3) forbearance approach, and that requiring its submission would impose a minimal burden on petitioners.

27. The Commission will also require petitions to include a percentage estimate of the licensee’s and/or U.S. parent’s aggregate direct and indirect foreign equity and voting interests, a general description of the methods used to determine the percentages, and a statement addressing the circumstances that prompted the filing of the petition for declaratory ruling and demonstrating that the public interest would be served by grant of the petition. (*See* § 1.991(h)(1).) The Commission will require petitioners to describe the ownership and control structure of the U.S. parent, under section 310(b)(4), and of the common carrier licensee, under its section 310(b)(3) forbearance approach, including an ownership diagram and identification of the real party-in-interest disclosed in any companion licensing or spectrum leasing applications. (*See* § 1.991(h)(2).) The Commission finds that requiring an ownership diagram will impose a minor burden on petitioners which will be more than offset by the significant benefits that will accrue to the Commission in processing petitions as expeditiously as possible.

28. The Commission also adopts the proposal in the NPRM that section 310(b)(4) petitions include ownership information for each foreign individual or entity for which the petition seeks specific approval: specifically, their names, citizenship, principal businesses, and the percentage of equity and/or voting interest held or to be held by the foreign investor (to the nearest one percent). This same requirement will apply to petitions for declaratory ruling filed by common carrier licensees subject to section 310(b)(3) forbearance. (*See* § 1.991(j).) Where the named foreign investor is a corporation or other business entity, the petition shall

identify each of the named foreign investor’s direct or indirect ten percent interest holders, specifying each by name, citizenship, principal businesses, and percentage of equity and/or voting interest held in the named foreign investor. This ownership information is necessary for the Commission to verify the identity and ultimate control of the foreign investor for which the petitioner seeks specific approval.

29. Methodology for Calculating Disclosable Interests and Foreign Investor Interests. The NPRM requested comment on whether the insulation standard used to calculate limited partnership interests in U.S. parents of common carrier and aeronautical licensees “is sufficient to support a presumption that an insulated limited partner will not be materially involved in managing partnership affairs.” It also sought comment on whether the same principles should govern its consideration of limited liability companies (LLCs) and limited liability partnerships (LLPs). No comments were submitted on either of these issues, and, in the absence of any comments, the Commission declined to revise its current insulation standard, which applies to limited partnership interests held in a common carrier or aeronautical licensee or its U.S. parent, or in any intermediate entity in their vertical chains of ownership.

30. The Commission clarifies in the Second Report and Order, however, the insulation, or “active involvement,” standard. The Commission will treat an interest as insulated only where the governance documents of the limited partnership prohibit the limited partner from becoming actively involved in the management or operation of the partnership and limit the limited partner’s voting or consent rights to the investor protections set forth in § 1.993 of the new rules. Notwithstanding the inclusion of such limitations, a petitioner shall not treat a limited partner as insulated if the U.S. parent or licensee has actual knowledge of material involvement by the limited partner. The Commission will maintain the current policy that treats an insulated limited partner as having a voting interest in the limited partnership that is equal to its equity interest.

31. The Commission will apply to LLCs and LLPs the same principles that it is adopting for the calculation of voting interests in limited partnerships. Thus, for example, where a foreign investor holds an interest indirectly in the U.S. parent of a common carrier or aeronautical licensee through an intervening LLC, and the investor is

effectively insulated from active involvement in the affairs of the LLC, the U.S. parent may apply the multiplier in calculating the foreign investor's voting interest as well as its equity interest in the U.S. parent. An ownership interest in an LLC or LLP will be treated as insulated where the governance documents of the LLC or LLP prohibit the interest holder from becoming actively involved in the management or operation of the LLC or LLP and limit the holder's voting or consent rights to the investor protections in § 1.993 of the new rules. Notwithstanding the inclusion of such limitations, a petitioner shall not treat the interest holder as insulated if the U.S. parent or licensee has actual knowledge of material involvement by the interest holder. Consistent with the media ownership rules, the Commission finds no basis in the record of this proceeding to differentiate between these alternative forms of business association for purposes of calculating voting interests held in common carrier and aeronautical licensees and their U.S. parent companies.

32. The Commission further finds it reasonable to rely on a petitioner's certification that the petitioner has calculated the ownership interests disclosed in its petition based upon its review of the Commission's rules and that the interests disclosed satisfy each of the pertinent standards and criteria required by the rules. The Commission relies on certifications of compliance with its rules in numerous licensing and related contexts, including compliance with the foreign ownership limitations in section 310(b), reporting of disclosable interest holders under common carrier licensing rules, and disclosure of attributable interests under the media ownership rules. The Commission therefore includes in § 1.991 of the new rules a provision allowing petitioners to certify to compliance with the Commission's ownership disclosure rules in their section 310(b) petitions for declaratory ruling.

33. Other Content Requirements. As discussed above, § 1.990(c)(2) will require applicants, licensees, and spectrum lessees to file a joint petition for declaratory ruling where the entities are under common control and contemporaneously hold, or are contemporaneously filing applications for, common carrier or aeronautical licenses or spectrum leasing arrangements. This rule also provides that, where the joint petitioners have different disclosable interest holders and/or request specific approval for different foreign investors, such

information should be set out separately for each joint petitioner. In addition, § 1.991(d) will require all petitioners to state whether they request a ruling under the Commission's section 310(b)(3) forbearance policy and/or under section 310(b)(4). The Commission also modified § 1.991, as proposed in the NPRM, to eliminate the requirement that petitions list all of a petitioning licensee's or lessee's call signs and spectrum leasing file numbers.

#### **Filing and Processing of Petitions for Declaratory Rulings**

34. The Second Report and Order maintains the Commission's current "streamlined" procedures for processing section 310(b)(4) petitions and the existing categories of section 310(b)(4) petitions subject to streamlined processing. The Commission will also apply the same procedures to the processing of petitions for declaratory ruling under its section 310(b)(3) forbearance approach. Thus, petitions for declaratory ruling that also involve an assignment of license or a transfer of control or any initial licensing applications, which involve service-specific rules and other portions of Title III of the Act, will not be eligible for "streamlined" processing. In addition, Commission staff retains the discretion to deem a petition ineligible for streamlined processing either because it raises market power concerns or because an Executive Branch agency raises concerns with respect to issues within its expertise. Petitions that are eligible for streamlined processing have a 14-day public notice period and, unless a formal opposition is filed or the petition is removed from streamlined processing at the discretion of Commission staff, they are granted automatically, effective on the 15th day after public notice. Petitions that are not eligible for streamlined processing have a 28-day public notice period. Non-streamlined petitions and petitions that are removed from streamlined processing within the 14-day public notice period are granted by public notice or order.

35. The Second Report and Order additionally provides guidance as to a licensee's obligation to obtain a section 310(b)(3) ruling when it has already received a section 310(b)(4) ruling and vice versa. The Commission stated that, where a common carrier licensee obtains a section 310(b)(4) ruling to allow foreign ownership of its U.S. parent to exceed 25 percent, but then seeks to accept foreign investment that would be held in the licensee through U.S.-organized entities that do not

control the licensee, the licensee must file a petition for declaratory ruling under its section 310(b)(3) forbearance approach before such additional foreign interests, aggregated with any foreign interests held directly in the licensee, exceed 20 percent of the licensee's equity and/or voting interests. Conversely, where the licensee first obtains a foreign ownership ruling under the Commission's section 310(b)(3) forbearance approach and then, for example, a foreign-organized company seeks to acquire all of the capital stock of the licensee's controlling U.S. parent, the licensee must file (in conjunction with a section 310(d) transfer of control application) a petition to obtain prior approval for its U.S. parent's foreign ownership under section 310(b)(4). (See also § 1.990(a), Example 3.)

#### **Continued Compliance With Section 310(b) Declaratory Rulings**

36. The Commission will not require periodic certification of compliance with section 310(b) declaratory rulings, but will require certification whenever a licensee files an application with the Commission for a new license, a transfer of control, or an assignment of license that does not also require the filing of a section 310(b) petition for declaratory ruling. The Commission will also require certification in renewal applications. Such a requirement is sufficient to remind licensees of their obligations, ensure accountability, and inform the Commission and licensees of any potential divergences from their rulings.

37. In addition, the Commission will give deference to requests from DOJ and DHS that the Commission require more frequent certifications as a condition on the granting of a license on a case-by-case basis, where appropriate to address law enforcement or national security concerns. The Commission will make changes to the relevant FCC Forms (Forms 312, 601, 603, and 608) to the extent necessary so that this aspect of the applicant's certification to the information in the application is clear. The Commission also reminded licensees that they have a continuing obligation to monitor their foreign ownership and ensure that they remain compliant with the requirements of the Act, the rules the Commission adopted in the Second Report and Order, and a licensee's particular foreign ownership ruling.

#### **Transition Issues**

38. In the Second Report and Order, the Commission did not adopt a rule that changes the terms and conditions of

existing foreign ownership rulings issued prior to the effective date of the rules adopted in this proceeding. The Commission stated that, given the scope of the changes being made to its foreign ownership rules and policies, it is important to afford the Commission and the relevant Executive Branch agencies the opportunity to evaluate the potential effect of applying the new rules in each case where a licensee has already received a ruling. Accordingly, the Commission will permit licensees that have received a ruling prior to the effective date of the new rules to file a new petition for declaratory ruling under the new rules, but the Commission will not require them to do so. The Commission will continue to apply its existing foreign ownership policies and procedures to such licensees within the parameters of their existing rulings. The Commission will also afford them flexibility in the manner in which they request a new ruling from the Commission, should they decide to do so. For example, a licensee could request a new ruling as part of an application for a new license or spectrum leasing arrangement, or an application for consent to a transfer of control or assignment of license. Alternatively, the licensee could file a stand-alone petition for declaratory ruling at any time. The Commission believes this flexibility, and the modified content requirements in the new rules, will minimize the costs and burdens associated with any new filing.

#### Other Issues

39. Several commenters asked the Commission to amend FCC Form 312 to relieve non-common carrier space station applicants from the requirement to respond to the section 310(b)-related questions in FCC Form 312, because section 310(b) does not apply to non-common carrier radio station licenses. The Commission does not address this issue in the Second Report and Order because the rules applicable to non-common carrier space station applicants are outside the scope of this proceeding.

#### Paperwork Reduction Act of 1995 Analysis

40. The Second Report and Order does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13. The information collection requirements for the section 310(b) foreign ownership approval process are contained in OMB Control No. 3060-1163.<sup>1</sup> In addition,

therefore, this document does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

#### Final Regulatory Flexibility Certification

41. The Regulatory Flexibility Act of 1980, as amended (RFA),<sup>2</sup> requires that a final regulatory flexibility analysis be prepared for notice-and-comment rule making proceedings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”<sup>3</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>4</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>5</sup> A “small business concern” is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).<sup>6</sup>

42. The Second Report and Order adopts rules that will apply to foreign ownership of common carrier and certain aeronautical radio station applicants, licensees and spectrum lessees (hereinafter referred to collectively as “licensees”). These rules will simplify the policies and procedures the Commission currently applies in reviewing foreign ownership of these licensees’ controlling U.S. parent companies under the discretionary provisions in section 310(b)(4) of the Act, 47 U.S.C. 310(b)(4), while continuing to ensure that we have

requirements at the NPRM stage of this proceeding, and the information collection requirements are adopted with nonsubstantial modification in this Second Report and Order.

<sup>2</sup> See 5 U.S.C. 603. The RFA, *see* 5 U.S.C. 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Public Law 104-121, Title II, 110 Stat. 857 (1996).

<sup>3</sup> 5 U.S.C. 605(b).

<sup>4</sup> 5 U.S.C. 601(6).

<sup>5</sup> 5 U.S.C. 601(3) (incorporating by reference the definition of “small business concern” in the Small Business Act, 15 U.S.C. 632). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**.”

<sup>6</sup> 15 U.S.C. 632.

the information we need to carry out our statutory duties. The new rules will simplify to the same extent the policies and procedures that currently apply to Commission review of foreign ownership in common carrier licensees pursuant to the section 310(b)(3) forbearance policy that the Commission adopted in the First Report and Order in this proceeding. The rules are designed to reduce to the extent possible the regulatory costs and burdens that our current foreign ownership policies and procedures impose on common carrier and aeronautical licensees, including those that are small entities; provide greater transparency and more predictability with respect to the Commission’s filing requirements and review process; and facilitate investment in U.S. carriers from new sources of capital, while continuing to protect important interests related to national security, law enforcement, foreign policy, and trade policy.

43. The Commission estimates that the rule changes will reduce the number of section 310(b) petitions for declaratory ruling filed with the Commission annually in the range of 40 to 70 percent as compared to the current regulatory framework. This estimate is based on two reviews done by International Bureau staff. In the first review, based on the 21 section 310(b)(4) petitions filed with the Commission during a randomly-selected period (September 1, 2007 through August 31, 2008), staff concluded that adoption of the proposals and other options discussed in the NPRM would result in a more than 70 percent reduction in the number of petitions for declaratory ruling filed with the Commission annually, as compared to the current regulatory framework. In the second review, based on the 13 section 310(b)(4) petitions filed between January 1, 2011 and October 1, 2012, staff concluded that the rules adopted in the Second Report and Order would result in at least a 40 percent reduction. The Second Report and Order notes that a large proportion of the filings during the first review period involved requests by licensees with existing foreign ownership rulings for approval, under section 310(b)(4), to acquire licenses in new wireless services being auctioned. In the second review period, these auctions had been completed and no auction-related petitions were filed. The lack of auction-related filings by licensees with existing foreign ownership rulings during the second review period accounts in large part for the difference between the higher 70 percent reduction figure and the 40

<sup>1</sup> The Office of Management and Budget preapproved the information collection

percent reduction figure for the two review periods. Significantly, industry commenters in this proceeding broadly supported elimination of the requirement that licensees with existing rulings return to the Commission for a new ruling when they apply for a license in a new service or geographic service area.

44. The Commission also anticipates a significant reduction in the time and expense associated with filing petitions. For example, licensees filing petitions for declaratory ruling under our section 310(b)(3) forbearance approach or under section 310(b)(4) will no longer be required to demonstrate the percentage of their equity and voting interests that are, or may be, held by investors from non-WTO Member countries. The United States Trade Representative (USTR) commented that this requirement imposes a “non-trivial burden on applicants by requiring them to demonstrate whether foreign investors are from a WTO or non-WTO Member.” USTR noted that the requirement “also imposes a not insignificant burden on FCC staff to evaluate the information.” As another example, under the new rules licensees filing petitions will no longer be required to include requests for specific approval of named foreign investors unless a foreign investor would hold, in the licensee (in the case of a petition filed under section 310(b)(3)

forbearance) or in the U.S. parent (in the case of a petition filed under section 310(b)(4)), an interest exceeding five percent, subject to an exception for certain ten percent interests. Industry commenters generally agree that, under current requirements, companies face significant difficulties and costs in trying to ascertain the citizenship and principal places of business of their investors, which often hold their interests indirectly through multiple investment vehicles and holding companies. USTelecom, for example, describes the Commission’s current requirement as a “tortuous process of identifying each ultimate shareholder.”

45. Although the commenters in this proceeding did not quantify the extent to which current costs and burdens would be reduced by the proposals and other options raised in the NPRM, the qualitative descriptions they provided in the record, and the sheer volume of information that petitioners have had to produce in particular proceedings (and which the Commission has had to analyze in its decisions), leave no doubt that the current requirements impose significant costs and burdens that the new rules will reduce.

46. In summary, the Commission believes that the new rules will reduce costs and burdens currently imposed on licensees, including those licensees that are small entities, and accelerate the foreign ownership review process, while continuing to ensure that the Commission has the information it needs to carry out its statutory duties. Therefore, the Commission certifies that the rules adopted in the Second Report and Order will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of this Order, including a copy of this Final Regulatory Flexibility Certification (FRFC), to the Chief Counsel for Advocacy of the SBA.<sup>7</sup> This final certification will also be published in the **Federal Register**.<sup>8</sup>

#### Report to Congress

47. The Commission will send a copy of the Second Report and Order, including this FRFC, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional review Act.<sup>9</sup> In addition, the Commission will send a copy of the Second Report and Order, including a copy of this FRFC, to the Chief Counsel for Advocacy of the SBA. A copy of the Second Report and Order and FRFC (or summaries thereof) will also be published in the **Federal Register**.<sup>10</sup>

#### Ordering Clauses

48. Accordingly, *it is ordered*, pursuant to the authority contained in sections 1, 2, 4(i), 4(j), 10, 303(r), 309, 310, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i), 154(j), 160, 303(r), 309, 310 and 403, that this Second Report and Order is adopted and parts 1 and 25 of the Commission rules *are amended* as set forth in this Second Report and Order. The rule revisions will take effect 30 days after a summary of this Second Report and Order is published in the **Federal Register**.

49. *It is further ordered* that the Commission’s Consumer and Governmental Affairs Bureau, Reference Information Center *shall send* a copy of this Second Report and Order, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*

<sup>7</sup> 5 U.S.C. 605(b).

<sup>8</sup> *Id.*

<sup>9</sup> See 5 U.S.C. 801(a)(1)(A).

<sup>10</sup> See 5 U.S.C. 604(b).

50. *It is further ordered* that this proceeding, IB Docket No. 11–133, *is hereby terminated*.

#### List of Subjects in 47 CFR Parts 1 and 25

Communications common carriers, Radio, Reporting and recordkeeping requirements, Satellites, Telecommunications.

Federal Communications Commission.

**Marlene H. Dortch**,  
*Secretary*.

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 1 and 25 as follows:

#### PART 1—PRACTICE AND PROCEDURE

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

**Authority:** 15 U.S.C. 79 *et seq.*; 47 U.S.C. 151, 154(i), 154(j), 155, 157, 225, 227, 303(r), 309 and 310, Cable Landing License Act of 1921, 47 U.S.C. 35–39, and the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112–96.

■ 2. Section 1.907 is amended by adding definitions for *Spectrum leasing arrangement* and *Spectrum lessee* to read as follows:

#### § 1.907 Definitions.

\* \* \* \* \*

*Spectrum leasing arrangement.* An arrangement between a licensed entity and a third-party entity in which the licensee leases certain of its spectrum usage rights to a spectrum lessee, as set forth in subpart X of this part (47 CFR 1.9001 *et seq.*). Spectrum leasing arrangement is defined in § 1.9003.

*Spectrum lessee.* Any third party entity that leases, pursuant to the spectrum leasing rules set forth in subpart X of this part (47 CFR 1.9001 *et seq.*), certain spectrum usage rights held by a licensee. Spectrum lessee is defined in § 1.9003.

\* \* \* \* \*

■ 3. Subpart F is amended by adding §§ 1.990 through 1.994 and an undesignated center heading to read as follows:

#### Subpart F—Wireless Radio Services Applications and Proceedings

\* \* \* \* \*

Sec.

#### Foreign Ownership of U.S.-Organized Entities That Control Common Carrier, Aeronautical en Route, and Aeronautical Fixed Radio Station Licensees

1.990 Filing requirements under the Communications Act of 1934.

- 1.991 Contents of petitions for declaratory ruling under the Communications Act of 1934.
- 1.992 How to calculate indirect equity and voting interests.
- 1.993 Insulation criteria for interests in limited partnerships, limited liability partnerships, and limited liability companies.
- 1.994 Routine terms and conditions.

**Foreign Ownership of U.S.-Organized Entities That Control Common Carrier, Aeronautical en Route, and Aeronautical Fixed Radio Station Licensees**

**§ 1.990 Citizenship and filing requirements under the Communications Act of 1934.**

These rules establish the requirements and conditions for obtaining the Commission's prior approval of foreign ownership in common carrier, aeronautical en route, and aeronautical fixed radio station licensees and common carrier spectrum lessees that would exceed the 25 percent benchmark in section 310(b)(4) of the Communications Act of 1934, as amended (47 U.S.C. 310(b)(4)). These rules also establish the requirements and conditions for obtaining the Commission's prior approval of foreign ownership in common carrier (but not aeronautical en route or aeronautical fixed) radio station licensees and spectrum lessees that would exceed the 20 percent limit in section 310(b)(3) of the Act (47 U.S.C. 310(b)(3)).

(a)(1) A common carrier, aeronautical en route or aeronautical fixed radio station licensee or common carrier spectrum lessee shall file a petition for declaratory ruling to obtain Commission approval under section 310(b)(4) of the Act, and obtain such approval, before the aggregate foreign ownership of any controlling, U.S.-organized parent company exceeds, directly and/or indirectly, 25 percent of the U.S. parent's equity interests and/or 25 percent of its voting interests. An applicant for a common carrier, aeronautical en route or aeronautical fixed radio station license or common carrier spectrum leasing arrangement shall file the petition for declaratory ruling required by this paragraph at the same time that it files its application.

Note 1 to paragraph (a)(1): Paragraph (a)(1) of this section implements the Commission's foreign ownership policies under section 310(b)(4) of the Act (47 U.S.C. 310(b)(4)), for common carrier, aeronautical en route, and aeronautical fixed radio station licensees and common carrier spectrum lessees. It applies to foreign equity and/or voting interests that are held, or would be held, directly and/or

indirectly in a U.S.-organized entity that itself directly or indirectly controls a common carrier, aeronautical en route, or aeronautical fixed radio station licensee or common carrier spectrum lessee. A foreign individual or entity that seeks to hold a controlling interest in such a licensee or spectrum lessee must hold its controlling interest indirectly, in a U.S.-organized entity that itself directly or indirectly controls the licensee or spectrum lessee. Such controlling interests are subject to section 310(b)(4) and the requirements of paragraph (a)(1) of this section. The Commission assesses foreign ownership interests subject to section 310(b)(4) separately from foreign ownership interests subject to section 310(b)(3).

(2) A common carrier radio station licensee or spectrum lessee shall file a petition for declaratory ruling to obtain approval under the Commission's section 310(b)(3) forbearance approach, and obtain such approval, before aggregate foreign ownership, held through one or more intervening U.S.-organized entities that hold non-controlling equity and/or voting interests in the licensee, along with any foreign interests held directly in the licensee or spectrum lessee, exceeds 20 percent of its equity interests and/or 20 percent of its voting interests. An applicant for a common carrier radio station license or spectrum leasing arrangement shall file the petition for declaratory ruling required by this paragraph at the same time that it files its application. Foreign interests held directly in a licensee or spectrum lessee, or other than through U.S.-organized entities that hold non-controlling equity and/or voting interests in the licensee or spectrum lessee, shall not be permitted to exceed 20 percent.

**Note to paragraph (a)(2):** Paragraph (a)(2) of this section implements the Commission's section 310(b)(3) forbearance approach adopted in the First Report and Order in IB Docket No. 11-133, FCC 12-93 (released August 17, 2012), 77 FR 50628 (Aug. 22, 2012). The section 310(b)(3) forbearance approach applies only to foreign equity and voting interests that are held, or would be held, in a common carrier licensee or spectrum lessee through one or more intervening U.S.-organized entities that do not control the licensee or spectrum lessee. Foreign equity and/or voting interests that are held, or would be held, directly in a licensee or spectrum lessee, or indirectly other than through an intervening U.S.-organized entity, are not subject to the Commission's section 310(b)(3) forbearance approach and shall not be permitted to exceed the 20 percent limit in section 310(b)(3) of the Act (47 U.S.C. 310(b)(3)).

Example 1. U.S.-organized Corporation A is preparing an

application to acquire a common carrier radio license by assignment from another licensee. U.S.-organized Corporation A is wholly owned and controlled by U.S.-organized Corporation B. U.S.-organized Corporation B is 51 percent owned and controlled by U.S.-organized Corporation C, which is, in turn, wholly owned and controlled by foreign-organized Corporation D. The remaining non-controlling 49 percent equity and voting interests in U.S.-organized Corporation B are held by U.S.-organized Corporation X, which is, in turn, wholly owned and controlled by U.S. citizens. Paragraph (a)(1) of this section requires that U.S.-organized Corporation A file a petition for declaratory ruling to obtain Commission approval of the 51 percent foreign ownership of its controlling, U.S.-organized parent, Corporation B, by foreign-organized Corporation D, which exceeds the 25 percent benchmark in section 310(b)(4) of the Act for both equity interests and voting interests. Corporation A is also required to identify and request specific approval in its petition for any foreign individual or entity, or "group," as defined in paragraph (d) of this section, that holds directly and/or indirectly more than five percent of Corporation B's total outstanding capital stock (equity) and/or voting stock, or a controlling interest in Corporation B, unless the foreign investment is exempt under § 1.991(i)(3).

Example 2. U.S.-organized Corporation A is preparing an application to acquire a common carrier radio license by assignment from another licensee. U.S.-organized Corporation A is 51 percent owned and controlled by U.S.-organized Corporation B, which is, in turn, wholly owned and controlled by U.S. citizens. The remaining non-controlling 49 percent equity and voting interests in U.S.-organized Corporation A are held by U.S.-organized Corporation X, which is, in turn, wholly owned and controlled by foreign-organized Corporation Y. Paragraph (a)(2) of this section requires that U.S.-organized Corporation A file a petition for declaratory ruling to obtain Commission approval of the non-controlling 49 percent foreign ownership of U.S.-organized Corporation A by foreign-organized Corporation Y through U.S.-organized Corporation X, which exceeds the 20 percent limit in section 310(b)(3) of the Act for both equity interests and voting interests. U.S.-organized Corporation A is also required to identify and request specific approval in its petition for any

foreign individual or entity, or "group," as defined in paragraph (d) of this section, that holds an equity and/or voting interest in foreign-organized Corporation Y that, when multiplied by 49 percent, would exceed five percent of U.S.-organized Corporation A's equity and/or voting interests, unless the foreign investment is exempt under § 1.991(i)(3).

Example 3. U.S.-organized Corporation A is preparing an application to acquire a common carrier radio license by assignment from another licensee. U.S.-organized Corporation A is 51 percent owned and controlled by U.S.-organized Corporation B, which is, in turn, wholly owned and controlled by foreign-organized Corporation C. The remaining non-controlling 49 percent equity and voting interests in U.S.-organized Corporation A are held by U.S.-organized Corporation X, which is, in turn, wholly owned and controlled by foreign-organized Corporation Y. Paragraphs (a)(1) and (2) of this section require that U.S.-organized Corporation A file a petition for declaratory ruling to obtain Commission approval of foreign-organized Corporation C's 100 percent ownership interest in U.S.-organized parent, Corporation B, and of foreign-organized Corporation Y's non-controlling, 49 percent foreign ownership interest in U.S.-organized Corporation A through U.S.-organized Corporation X, which exceed the 25 percent benchmark and 20 percent limit in sections 310(b)(4) and 310(b)(3) of the Act, respectively, for both equity interests and voting interests. U.S.-organized Corporation A's petition also must identify and request specific approval for ownership interests held by any foreign individual, entity, or "group," as defined in paragraph (d) of this section, to the extent required by § 1.991(i).

(b) The petition for declaratory ruling required by paragraph (a) of this section shall be filed electronically on the Internet through the International Bureau Filing System (IBFS). For information on filing your petition through IBFS, see part 1, subpart Y and the IBFS homepage at <http://www.fcc.gov/ib>.

(c)(1) Each applicant, licensee, or spectrum lessee filing a petition for declaratory ruling required by paragraph (a) of this section shall certify to the information contained in the petition in accordance with the provisions of § 1.16 and the requirements of this paragraph. The certification shall include a statement that the applicant, licensee and/or spectrum lessee has calculated the ownership interests disclosed in its

petition based upon its review of the Commission's rules and that the interests disclosed satisfy each of the pertinent standards and criteria set forth in the rules.

(2) Multiple applicants and/or licensees shall file jointly the petition for declaratory ruling required by paragraph (a) of this section where the entities are under common control and contemporaneously hold, or are contemporaneously filing applications for, common carrier licenses, common carrier spectrum leasing arrangements, or aeronautical en route or aeronautical fixed radio station licenses. Where joint petitioners have different responses to the information required by § 1.991, such information should be set out separately for each joint petitioner, except as otherwise permitted in § 1.991(h)(2).

(i) Each joint petitioner shall certify to the information contained in the petition in accordance with the provisions of § 1.16 of this part with respect to the information that is pertinent to that petitioner. Alternatively, the controlling parent of the joint petitioners may certify to the information contained in the petition.

(ii) Where the petition is being filed in connection with an application for consent to transfer control of licenses or spectrum leasing arrangements, the transferee or its ultimate controlling parent may file the petition on behalf of the licensees or spectrum lessees that would be acquired as a result of the proposed transfer of control and certify to the information contained in the petition.

(3) Multiple applicants and licensees shall not be permitted to file a petition for declaratory ruling jointly unless they are under common control.

(d) The following definitions shall apply to this section and §§ 1.991 through 1.994.

(1) *Aeronautical radio* licenses refers to aeronautical en route and aeronautical fixed radio station licenses only. It does not refer to other types of aeronautical radio station licenses.

(2) *Affiliate* refers to any entity that is under common control with a licensee, defined by reference to the holder, directly and/or indirectly, of more than 50 percent of total voting power, where no other individual or entity has *de facto* control.

(3) *Control* includes actual working control in whatever manner exercised and is not limited to majority stock ownership. *Control* also includes direct or indirect control, such as through intervening subsidiaries.

(4) *Entity* includes a partnership, association, estate, trust, corporation,

limited liability company, governmental authority or other organization.

(5) *Group* refers to two or more individuals or entities that have agreed to act together for the purpose of acquiring, holding, voting, or disposing of their equity and/or voting interests in the relevant licensee, controlling U.S. parent, or entity holding a direct and/or indirect equity and/or voting interest in the licensee or U.S. parent.

(6) *Individual* refers to a natural person as distinguished from a partnership, association, corporation, or other organization.

(7) *Licensee* as used in §§ 1.990 through 1.994 of this part includes a *spectrum lessee* as defined in § 1.9003.

(8) *Privately held* company refers to a U.S.- or foreign-organized company that has not issued a class of equity securities for which beneficial ownership reporting is required by security holders and other beneficial owners under section 13(d) or 13(g) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. 78a *et seq.* (Exchange Act), and corresponding Exchange Act Rule 13d-1, 17 CFR 240.13d-1, or a substantially comparable foreign law or regulation.

(9) *Public company* refers to a U.S.- or foreign-organized company that has issued a class of equity securities for which beneficial ownership reporting is required by security holders and other beneficial owners under section 13(d) or 13(g) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. 78a *et seq.* (Exchange Act) and corresponding Exchange Act Rule 13d-1, 17 CFR 240.13d-1, or a substantially comparable foreign law or regulation.

(10) *Subsidiary* refers to any entity in which a licensee owns or controls, directly and/or indirectly, more than 50 percent of the total voting power of the outstanding voting stock of the entity, where no other individual or entity has *de facto* control.

(11) *Voting stock* refers to an entity's corporate stock, partnership or membership interests, or other equivalents of corporate stock that, under ordinary circumstances, entitles the holders thereof to elect the entity's board of directors, management committee, or other equivalent of a corporate board of directors.

(12) *Would hold* as used in §§ 1.990 through 1.994 includes equity and/or voting interests that an individual or entity proposes to hold in an applicant, licensee, or spectrum lessee, or their controlling U.S. parent, upon consummation of any transactions described in the petition for declaratory ruling filed under § 1.990(a)(1) or (2) of this part.

**§ 1.991 Contents of petitions for declaratory ruling under the Communications Act of 1934.**

The petition for declaratory ruling required by § 1.990(a)(1) and/or § 1.990(a)(2) shall contain the following information:

(a) With respect to each petitioning applicant or licensee, provide its name; FCC Registration Number (FRN); mailing address; place of organization; telephone number; facsimile number (if available); electronic mail address (if available); type of business organization (e.g., corporation, unincorporated association, trust, general partnership, limited partnership, limited liability company, trust, other (include description of legal entity)); name and title of officer certifying to the information contained in the petition.

(b) If the petitioning applicant or licensee is represented by a third party (e.g., legal counsel), specify that individual's name, the name of the firm or company, mailing address and telephone number/electronic mail address.

(c)(1) For each named licensee, list the type(s) of radio service authorized (e.g., cellular radio telephone service; microwave radio service; mobile satellite service; aeronautical fixed service).

(2) If the petition is filed in connection with an application for a radio station license or a spectrum leasing arrangement, or an application to acquire a license or spectrum leasing arrangement by assignment or transfer of control, specify for each named applicant:

(i) The File No(s) of the associated application(s), if available at the time the petition is filed; otherwise, specify the anticipated filing date for each application; and

(ii) The type(s) of radio services covered by each application (e.g., cellular radio telephone service; microwave radio service; mobile satellite service; aeronautical fixed service).

(d) With respect to each petitioner, include a statement as to whether the petitioner is requesting a declaratory ruling under § 1.990(a)(1) and/or § 1.990(a)(2).

(e)(1) *Direct U.S. or foreign interests of ten percent or more or a controlling interest.* With respect to petitions filed under § 1.990(a)(1), provide the name of any individual or entity that holds, or would hold, directly 10 percent or more of the equity interests and/or voting interests, or a controlling interest, in the controlling U.S. parent of the petitioning common carrier or aeronautical radio station applicant(s) or

licensee(s) as specified in paragraphs (e)(1)(i) through (e)(4)(iv) of this section.

(2) *Direct U.S. or foreign interests of ten percent or more or a controlling interest.* With respect to petitions filed under § 1.990(a)(2), provide the name of any individual or entity that holds, or would hold, directly 10 percent or more of the equity interests and/or voting interests, or a controlling interest, in each petitioning common carrier applicant or licensee as specified in paragraphs (e)(1)(i) through (e)(4)(ii) of this section.

(3) Where no individual or entity holds, or would hold, directly 10 percent or more of the equity interests and/or voting interests, or a controlling interest, in the controlling U.S. parent (for petitions filed under § 1.990(a)(1)) or in the applicant or licensee (for petitions filed under § 1.990(a)(2)), the petition shall state that no individual or entity holds or would hold directly 10 percent or more of the equity interests and/or voting interests, or a controlling interest, in the U.S. parent, applicant or licensee.

(4)(i) Where a named U.S. parent, applicant, or licensee is organized as a corporation, provide the name of any individual or entity that holds, or would hold, 10 percent or more of the outstanding capital stock and/or voting stock, or a controlling interest.

(ii) Where a named U.S. parent, applicant, or licensee is organized as a general partnership, provide the names of the partnership's constituent general partners.

(iii) Where a named U.S. parent, applicant, or licensee is organized as a limited partnership or limited liability partnership, provide the name(s) of the general partner(s) (in the case of a limited partnership), any uninsulated partner(s), and any insulated partner(s) with an equity interest in the partnership of at least 10 percent (calculated according to the percentage of the partner's capital contribution). With respect to each named partner (other than a named general partner), the petitioner shall state whether the partnership interest is insulated or uninsulated, based on the insulation criteria specified in § 1.993.

(iv) Where a named U.S. parent, applicant, or licensee is organized as a limited liability company, provide the name(s) of each uninsulated member, regardless of its equity interest, any insulated member with an equity interest of at least 10 percent (calculated according to the percentage of its capital contribution), and any non-equity manager(s). With respect to each named member, the petitioner shall state whether the interest is insulated or

uninsulated, based on the insulation criteria specified in § 1.993, and whether the member is a manager.

Note to paragraph (e): The Commission presumes that a general partner of a general partnership or limited partnership has a controlling interest in the partnership. A general partner shall in all cases be deemed to hold an uninsulated interest in the partnership.

(f)(1) *Indirect U.S. or foreign interests of ten percent or more or a controlling interest.* With respect to petitions filed under § 1.990(a)(1), provide the name of any individual or entity that holds, or would hold, indirectly, through one or more intervening entities, 10 percent or more of the equity interests and/or voting interests, or a controlling interest, in the controlling U.S. parent of the petitioning common carrier or aeronautical radio station applicant(s) or licensee(s). Equity interests and voting interests held indirectly shall be calculated in accordance with the principles set forth in § 1.992.

(2) *Indirect U.S. or foreign interests of ten percent or more or a controlling interest.* With respect to petitions filed under § 1.990(a)(2), provide the name of any individual or entity that holds, or would hold, indirectly, through one or more intervening entities, 10 percent or more of the equity interests and/or voting interests, or a controlling interest, in the petitioning common carrier radio station applicant(s) or licensee(s). Equity interests and voting interests held indirectly shall be calculated in accordance with the principles set forth in § 1.992.

(3) Where no individual or entity holds, or would hold, indirectly 10 percent or more of the equity interests and/or voting interests, or a controlling interest, in the controlling U.S. parent (for petitions filed under § 1.990(a)(1)) or in the petitioning applicant(s) or licensee(s) (for petitions filed under § 1.990(a)(2)), the petition shall specify that no individual or entity holds indirectly 10 percent or more of the equity interests and/or voting interests, or a controlling interest, in the U.S. parent, applicant(s), or licensee(s).

Note to paragraph (f): The Commission presumes that a general partner of a general partnership or limited partnership has a controlling interest in the partnership. A general partner shall in all cases be deemed to hold an uninsulated interest in the partnership.

(g) For each 10 percent interest holder named in response to paragraphs (e) and (f) of this section, specify the equity interest held and the voting interest held (each to the nearest one percent);

in the case of an individual, his or her citizenship; and in the case of a business organization, its place of organization, type of business organization (e.g., corporation, unincorporated association, trust, general partnership, limited partnership, limited liability company, trust, other (include description of legal entity)), and principal business(es).

(h)(1) *Estimate of aggregate foreign ownership.* For petitions filed under § 1.990(a)(1), attach an exhibit that provides a percentage estimate of the controlling U.S. parent's aggregate direct and/or indirect foreign equity interests and its aggregate direct and/or indirect foreign voting interests. For petitions filed under § 1.990(a)(2), attach an exhibit that provides a percentage estimate of the aggregate foreign equity interests and aggregate foreign voting interests held directly in the petitioning applicant(s) and/or licensee(s), if any, and the aggregate foreign equity interests and aggregate foreign voting interests held indirectly in the petitioning applicant(s) and/or licensee(s). The exhibit required by this paragraph must also provide a general description of the methods used to determine the percentages; and a statement addressing the circumstances that prompted the filing of the petition and demonstrating that the public interest would be served by grant of the petition.

(2) *Ownership and control structure.* Attach an exhibit that describes the ownership and control structure of the applicant(s) and/or licensee(s) that are the subject of the petition, including an ownership diagram and identification of the real party-in-interest disclosed in any companion applications. The ownership diagram should illustrate the petitioner's vertical ownership structure, including the controlling U.S. parent named in the petition (for petitions filed under § 1.990(a)(1)) and the direct and indirect ownership (equity and voting) interests held by the individual(s) and/or entity(ies) named in response to paragraphs (e) and (f) of this section. Each such individual or entity shall be depicted in the ownership diagram and all controlling interests labeled as such. Where the petition includes multiple petitioners, the ownership of all petitioners may be depicted in a single ownership diagram or in multiple diagrams.

(i) *Requests for specific approval.* Provide, as required or permitted by this paragraph, the name of each foreign individual and/or entity for which each petitioner requests specific approval, if any, and the respective percentages of equity and/or voting interests (to the

nearest one percent) that each such foreign individual or entity holds, or would hold, directly and/or indirectly, in the controlling U.S. parent of the petitioning common carrier or aeronautical radio station applicant(s) or licensee(s) for petitions filed under § 1.990(a)(1), and in each petitioning common carrier applicant or licensee for petitions filed under § 1.990(a)(2).

(1) Each petitioning common carrier or aeronautical radio station applicant or licensee filing under § 1.990(a)(1) shall identify and request specific approval for any foreign individual, entity, or group of such individuals or entities that holds, or would hold, directly and/or indirectly, more than 5 percent of the equity and/or voting interests, or a controlling interest, in the petitioner's controlling U.S. parent unless the foreign investment is exempt under paragraph (i)(3) of this section. Equity and voting interests shall be calculated in accordance with the principles set forth in paragraphs (e) and (f) of this section and in § 1.992.

(2) Each petitioning common carrier radio station applicant or licensee filing under § 1.990(a)(2) shall identify and request specific approval for any foreign individual, entity, or group of such individuals or entities that holds, or would hold, directly, and/or indirectly through one or more intervening U.S.-organized entities that do not control the applicant or licensee, more than 5 percent of the equity and/or voting interests in the applicant or licensee unless the foreign investment is exempt under paragraph (i)(3) of this section. Equity and voting interests shall be calculated in accordance with the principles set forth in paragraphs (e) and (f) of this section and in § 1.992.

Note to paragraphs (i)(1) and (2): Two or more individuals or entities will be treated as a "group" when they have agreed to act together for the purpose of acquiring, holding, voting, or disposing of their equity and/or voting interests in the licensee and/or controlling U.S. parent of the licensee or in any intermediate company(ies) through which any of the individuals or entities holds its interests in the licensee and/or controlling U.S. parent of the licensee.

(3) A foreign investment is exempt from the specific approval requirements of paragraphs (i)(1) and (2) of this section where:

(i) The foreign individual or entity holds, or would hold, directly and/or indirectly, no more than 10 percent of the equity and/or voting interests of the U.S. parent (for petitions filed under § 1.990(a)(1)) or the petitioning

applicant or licensee (for petitions filed under § 1.990(a)(2)); and

(ii) The foreign individual or entity does not hold, and would not hold, a controlling interest in the petitioner or any controlling parent company, does not plan or intend to change or influence control of the petitioner or any controlling parent company, does not possess or develop any such purpose, and does not take any action having such purpose or effect. The Commission will presume, in the absence of evidence to the contrary, that the following interests satisfy this criterion for exemption from the specific approval requirements in paragraphs (i)(1) and (i)(2) of this section:

(A) Where the relevant licensee, controlling U.S. parent, or entity holding a direct or indirect equity and/or voting interest in the licensee or U.S. parent is a "public company," as defined in § 1.990(d)(9), *provided that* the foreign holder is an institutional investor that is eligible to report its beneficial ownership interests in the company's voting, equity securities in excess of 5 percent (not to exceed 10 percent) pursuant to Exchange Act Rule 13d-1(b), 17 CFR 240.13d-1(b), or a substantially comparable foreign law or regulation. This presumption shall not apply if the foreign individual, entity or group holding such interests is obligated to report its holdings in the company pursuant to Exchange Act Rule 13d-1(a), 17 CFR 240.13d-1(a), or a substantially comparable foreign law or regulation.

Example. Common carrier applicant ("Applicant") is preparing a petition for declaratory ruling to request Commission approval for foreign ownership of its controlling, U.S.-organized parent ("U.S. Parent") to exceed the 25 percent benchmark in section 310(b)(4) of the Act. Applicant does not currently hold any FCC licenses. Shares of U.S. Parent trade publicly on the New York Stock Exchange. Based on a shareholder survey and a review of its shareholder records, U.S. Parent has determined that its aggregate foreign ownership on any given day may exceed an aggregate 25 percent, including a six percent common stock interest held by a foreign-organized mutual fund ("Foreign Fund"). U.S. Parent has confirmed that Foreign Fund is not currently required to report its interest pursuant to Exchange Act Rule 13d-1(a) and instead is eligible to report its interest pursuant to Exchange Act Rule 13d-1(b). U.S. Parent also has confirmed that Foreign Fund does not hold any other interests in U.S. Parent's equity securities, whether of a class of

voting or non-voting securities. Applicant may, but is not required to, request specific approval of Foreign Fund's six percent interest in U.S. Parent.

Note to paragraph (i)(3)(ii)(A): Where an institutional investor holds voting, equity securities that are subject to reporting under Exchange Act Rule 13d-1, 17 CFR 240.13d-1, or a substantially comparable foreign law or regulation, and equity securities that are not subject to such reporting the investor's total capital stock interests may be aggregated and treated as exempt from the 5 percent specific approval requirement in paragraphs (i)(1) and (2) of this section so long as the aggregate amount of the institutional investor's holdings does not exceed ten percent of the company's total capital stock or voting rights and the investor is eligible to certify under Exchange Act Rule 13d-1(b), 17 CFR 240.13d-1(b), or a substantially comparable foreign law or regulation that it has acquired its capital stock interests in the ordinary course of business and not with the purpose nor with the effect of changing or influencing the control of the company. In calculating foreign equity and voting interests, the Commission does not consider convertible interests such as options, warrants and convertible debentures until converted, unless specifically requested by the petitioner, *i.e.*, where the petitioner is requesting approval so those rights can be exercised in a particular case without further Commission approval.

(B) Where the relevant licensee, controlling U.S. parent, or entity holding a direct and/or indirect equity and/or voting interest in the licensee or U.S. parent is a "privately held" corporation, as defined in § 1.990(d)(8), *provided that* a shareholders' agreement, or similar voting agreement, prohibits the foreign holder from becoming actively involved in the management or operation of the corporation and limits the foreign holder's voting and consent rights, if any, to the minority shareholder protections listed in paragraph (i)(5) of this section.

(C) Where the relevant licensee, controlling U.S. parent, or entity holding a direct and/or indirect equity and/or voting interest in the licensee or U.S. parent is "privately held," as defined in § 1.990(d)(8), and is organized as a limited partnership, limited liability company ("LLC"), or limited liability partnership ("LLP"), *provided that* the foreign holder is "insulated" in accordance with the criteria specified in § 1.993.

(4) A petitioner may, but is not required to, request specific approval for any other foreign individual or entity that holds, or would hold, a direct and/or indirect equity and/or voting interest in the controlling U.S. parent (for petitions filed under § 1.990(a)(1)) or in the petitioning applicant or licensee (for petitions filed under § 1.990(a)(2)).

(5) The minority shareholder protections referenced in paragraph (i)(3)(ii)(B) of this section consist of the following rights:

(i) The power to prevent the sale or pledge of all or substantially all of the assets of the corporation or a voluntary filing for bankruptcy or liquidation;

(ii) The power to prevent the corporation from entering into contracts with majority shareholders or their affiliates;

(iii) The power to prevent the corporation from guaranteeing the obligations of majority shareholders or their affiliates;

(iv) The power to purchase an additional interest in the corporation to prevent the dilution of the shareholder's *pro rata* interest in the event that the corporation issues additional instruments conveying shares in the company;

(v) The power to prevent the change of existing legal rights or preferences of the shareholders, as provided in the charter, by-laws or other operative governance documents;

(vi) The power to prevent the amendment of the charter, by-laws or other operative governance documents of the company with respect to the matters described in paragraphs (i)(5)(i) through (v) of this section.

(6) The Commission reserves the right to consider, on a case-by-case basis, whether voting or consent rights over matters other than those listed in paragraph (i)(5) of this section shall be considered permissible minority shareholder protections in a particular case.

(j) For each foreign individual or entity named in response to paragraph (i) of this section, provide the following information:

(1) In the case of an individual, his or her citizenship and principal business(es);

(2) In the case of a business organization:

(i) Its place of organization, type of business organization (*e.g.*, corporation, unincorporated association, trust, general partnership, limited partnership, limited liability company, trust, other (include description of legal entity)), and principal business(es);

(ii) The name of any individual or entity that holds, or would hold,

directly and/or indirectly, through one or more intervening entities, 10 percent or more of the equity interests and/or voting interests, or a controlling interest, in the foreign entity for which the petitioner requests specific approval. Specify for each such interest holder, his or her citizenship (for individuals) or place of legal organization (for entities). Equity interests and voting interests held indirectly shall be calculated in accordance with the principles set forth in § 1.992.

(iii) Where no individual or entity holds, or would hold, directly and/or indirectly, 10 percent or more of the equity interests and/or voting interests, or a controlling interest, the petition shall specify that no individual or entity holds, or would hold, directly and/or indirectly, 10 percent or more of the equity interests and/or voting interests, or a controlling interest, in the foreign entity for which the petitioner requests specific approval.

(k) *Requests for advance approval.* The petitioner may, but is not required to, request advance approval in its petition for any foreign individual or entity named in response to paragraph (i) of this section to increase its direct and/or indirect equity and/or voting interests in the controlling U.S. parent of the common carrier or aeronautical radio station licensee, for petitions filed under § 1.990(a)(1), and/or in the common carrier licensee, for petitions filed under § 1.990(a)(2), above the percentages specified in response to paragraph (i) of this section. Requests for advance approval shall be made as follows:

(1) *Petitions filed under § 1.990(a)(1).* Where a foreign individual or entity named in response to paragraph (i) of this section holds, or would hold upon consummation of any transactions described in the petition, a *de jure* or *de facto* controlling interest in the controlling U.S. parent, the petitioner may request advance approval in its petition for the foreign individual or entity to increase its interests, at some future time, up to any amount, including 100 percent of the direct and/or indirect equity and/or voting interests in the U.S. parent. The petitioner shall specify for the named controlling foreign individual(s) or entity(ies) the maximum percentages of equity and/or voting interests for which advance approval is sought or, in lieu of a specific amount, state that the petitioner requests advance approval for the named controlling foreign individual or entity to increase its interests up to and including 100 percent of the U.S. parent's direct and/or indirect equity and/or voting interests.

(2) *Petitions filed under § 1.990(a)(1) and/or § 1.990(a)(2)*. Where a foreign individual or entity named in response to paragraph (i) of this section holds, or would hold upon consummation of any transactions described in the petition, a non-controlling interest in the controlling U.S. parent of the licensee, for petitions filed under § 1.990(a)(1), or in the licensee, for petitions filed under § 1.990(a)(2), the petitioner may request advance approval in its petition for the foreign individual or entity to increase its interests, at some future time, up to any non-controlling amount not to exceed 49.99 percent. The petitioner shall specify for the named foreign individual(s) or entity(ies) the maximum percentages of equity and/or voting interests for which advance approval is sought or, in lieu of a specific amount, shall state that the petitioner requests advance approval for the named foreign individual(s) or entity(ies) to increase their interests up to and including a non-controlling 49.99 percent equity and/or voting interest in the licensee, for petitions filed under § 1.990(a)(2), or in the controlling U.S. parent of the licensee, for petitions filed under § 1.990(a)(1).

**§ 1.992 How to calculate indirect equity and voting interests.**

(a) The criteria specified in this section shall be used for purposes of calculating indirect equity and voting interests under § 1.991.

(b)(1) *Equity interests held indirectly in the licensee and/or controlling U.S. parent*. Equity interests that are held by an individual or entity indirectly through one or more intervening entities shall be calculated by successive multiplication of the equity percentages for each link in the vertical ownership chain, regardless of whether any particular link in the chain represents a controlling interest in the company positioned in the next lower tier.

*Example*. Assume that a foreign individual holds a non-controlling 30 percent equity and voting interest in U.S.-organized Corporation A which, in turn, holds a non-controlling 40 percent equity and voting interest in U.S.-organized Parent Corporation B. The foreign individual's equity interest in U.S.-organized Parent Corporation B would be calculated by multiplying the foreign individual's equity interest in U.S.-organized Corporation A by that entity's equity interest in U.S.-organized Parent Corporation B. The foreign individual's equity interest in U.S.-organized Parent Corporation B would be calculated as 12 percent ( $30\% \times 40\% = 12\%$ ). The result would be the same even if U.S.-organized Corporation A

held a *de facto* controlling interest in U.S.-organized Parent Corporation B.

(2) *Voting interests held indirectly in the licensee and/or controlling U.S. parent*. Voting interests that are held by any individual or entity indirectly through one or more intervening entities will be determined depending upon the type of business organization(s) in which the individual or entity holds a voting interest as follows:

(i) Voting interests that are held through one or more intervening corporations shall be calculated by successive multiplication of the voting percentages for each link in the vertical ownership chain, except that wherever the voting interest for any link in the chain is equal to or exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest.

*Example*. Assume that a foreign individual holds a non-controlling 30 percent equity and voting interest in U.S.-organized Corporation A which, in turn, holds a controlling 70 percent equity and voting interest in U.S.-organized Parent Corporation B. Because U.S.-organized Corporation A's 70 percent voting interest in U.S.-organized Parent Corporation B constitutes a *controlling* interest, it is treated as a 100 percent interest. The foreign individual's 30 percent voting interest in U.S.-organized Corporation A would flow through in its entirety to U.S. Parent Corporation B and thus be calculated as 30 percent ( $30\% \times 100\% = 30\%$ ).

(ii) Voting interests that are held through one or more intervening partnerships shall be calculated depending upon whether the individual or entity holds a general partnership interest, an uninsulated partnership interest, or an insulated partnership interest as specified in paragraphs (b)(2)(ii)(A) and (B) of this section.

(A) *General partnership and other uninsulated partnership interests*. A general partner and uninsulated partner shall be deemed to hold the same voting interest as the partnership holds in the company situated in the next lower tier of the vertical ownership chain. A partner shall be treated as uninsulated unless the limited partnership agreement, limited liability partnership agreement, or other operative agreement satisfies the insulation criteria specified in § 1.993.

Note to paragraph (b)(2)(ii)(A): The Commission presumes that a general partner of a general partnership or limited partnership has a controlling interest in the partnership. A general partner shall in all cases be deemed to

hold an unincorporated interest in the partnership.

(B) *Insulated partnership interests*. A partner of a limited partnership (other than a general partner) or partner of a limited liability partnership that satisfies the insulation criteria specified in § 1.993 shall be treated as an insulated partner and shall be deemed to hold a voting interest in the partnership that is equal to the partner's equity interest.

(iii) Voting interests that are held through one or more intervening limited liability companies shall be calculated depending upon whether the individual or entity is a non-member manager, an unincorporated member or an insulated member as specified in paragraphs (b)(2)(iii)(A) and (B) of this section.

(A) *Non-member managers and unincorporated membership interests*. A non-member manager and an unincorporated member of a limited liability company shall be deemed to hold the same voting interest as the limited liability company holds in the company situated in the next lower tier of the vertical ownership chain. A member shall be treated as unincorporated unless the limited liability company agreement satisfies the insulation criteria specified in § 1.993.

(B) *Insulated membership interests*. A member of a limited liability company that satisfies the insulation criteria specified in § 1.993 shall be treated as an insulated member and shall be deemed to hold a voting interest in the limited liability company that is equal to the member's equity interest.

**§ 1.993 Insulation criteria for interests in limited partnerships, limited liability partnerships, and limited liability companies.**

(a) A limited partner of a limited partnership and a partner of a limited liability partnership shall be treated as unincorporated within the meaning of § 1.992(b)(2)(ii)(A) unless the partner is prohibited by the limited partnership agreement, limited liability partnership agreement, or other operative agreement from, and in fact is not engaged in, active involvement in the management or operation of the partnership and only the usual and customary investor protections are contained in the partnership agreement or other operative agreement. These criteria apply to any relevant limited partnership or limited liability partnership, whether it is the licensee, a controlling U.S.-organized parent, or any partnership situated above them in the vertical chain of ownership.

(b) A member of a limited liability company shall be treated as unincorporated

for purposes of § 1.992(b)(2)(iii)(A) unless the member is prohibited by the limited liability company agreement from, and in fact is not engaged in, active involvement in the management or operation of the company and only the usual and customary investor protections are contained in the agreement. These criteria apply to any relevant limited liability company, whether it is the licensee, a controlling U.S.-organized parent, or any limited liability company situated above them in the vertical chain of ownership.

(c) The usual and customary investor protections referred to in paragraphs (a) and (b) of this section shall consist of:

(1) The power to prevent the sale or pledge of all or substantially all of the assets of the limited partnership, limited liability partnership, or limited liability company or a voluntary filing for bankruptcy or liquidation;

(2) The power to prevent the limited partnership, limited liability partnership, or limited liability company from entering into contracts with majority investors or their affiliates;

(3) The power to prevent the limited partnership, limited liability partnership, or limited liability company from guaranteeing the obligations of majority investors or their affiliates;

(4) The power to purchase an additional interest in the limited partnership, limited liability partnership, or limited liability company to prevent the dilution of the partner's or member's *pro rata* interest in the event that the limited partnership, limited liability partnership, or limited liability company issues additional instruments conveying interests in the partnership or company;

(5) The power to prevent the change of existing legal rights or preferences of the partners, members, or managers as provided in the limited partnership agreement, limited liability partnership agreement, or limited liability company agreement, or other operative agreement;

(6) The power to vote on the removal of a general partner, managing partner, managing member, or other manager in situations where such individual or entity is subject to bankruptcy, insolvency, reorganization, or other proceedings relating to the relief of debtors; adjudicated insane or incompetent by a court of competent jurisdiction (in the case of a natural person); convicted of a felony; or otherwise removed for cause, as determined by an independent party;

(7) The power to prevent the amendment of the limited partnership agreement, limited liability partnership agreement, or limited liability company agreement, or other organizational documents of the partnership or limited liability company with respect to the matters described in paragraphs (c)(1) through (6) of this section.

(d) The Commission reserves the right to consider, on a case-by-case basis, whether voting or consent rights over matters other than those listed in paragraph (c) of this section shall be considered usual and customary investor protections in a particular case.

#### § 1.994 Routine terms and conditions.

Foreign ownership rulings issued pursuant to § 1.990 *et seq.* shall be subject to the following terms and conditions, except as otherwise specified in a particular ruling:

(a)(1) *Aggregate allowance for rulings issued under § 1.990(a)(1).* In addition to the foreign ownership interests approved specifically in a licensee's declaratory ruling issued pursuant to § 1.990(a)(1), the controlling U.S.-organized parent named in the ruling (or a U.S.-organized successor-in-interest formed as part of a *pro forma* reorganization) may be 100 percent owned, directly and/or indirectly through one or more U.S.- or foreign-organized entities, on a going-forward basis (*i.e.*, after issuance of the ruling) by other foreign investors without prior Commission approval. This "100 percent aggregate allowance" is subject to the requirement that the licensee seek and obtain Commission approval before any foreign individual, entity, or "group" not previously approved acquires, directly and/or indirectly, more than five percent of the U.S. parent's outstanding capital stock (equity) and/or voting stock, or a controlling interest, with the exception of any foreign individual, entity, or "group" that acquires an equity and/or voting interest of ten percent or less, *provided that* the interest is exempt under § 1.991(i)(3).

(2) *Aggregate allowance for rulings issued under § 1.990(a)(2).* In addition to the foreign ownership interests approved specifically in a licensee's declaratory ruling issued pursuant to § 1.990(a)(2), the licensee(s) named in the ruling (or a U.S.-organized successor-in-interest formed as part of a *pro forma* reorganization) may be 100 percent owned on a going forward basis (*i.e.*, after issuance of the ruling) by other foreign investors holding interests in the licensee indirectly through U.S.-organized entities that do not control the licensee, without prior Commission

approval. This "100 percent aggregate allowance" is subject to the requirement that the licensee seek and obtain Commission approval before any foreign individual, entity, or "group" not previously approved acquires directly and/or indirectly, through one or more U.S.-organized entities that do not control the licensee, more than five percent of the licensee's outstanding capital stock (equity) and/or voting stock, with the exception of any foreign individual, entity, or "group" that acquires an equity and/or voting interest of ten percent or less, *provided that* the interest is exempt under § 1.991(i)(3). Foreign ownership interests held directly in a licensee shall not be permitted to exceed an aggregate 20 percent of the licensee's equity and/or voting interests.

Note to paragraph (a): Licensees have an obligation to monitor and stay ahead of changes in foreign ownership of their controlling U.S.-organized parent companies (for rulings issued pursuant to § 1.990(a)(1)) and/or in the licensee itself (for rulings issued pursuant to § 1.990(a)(2)), to ensure that the licensee obtains Commission approval before a change in foreign ownership renders the licensee out of compliance with the terms and conditions of its declaratory ruling(s) or the Commission's rules. Licensees, their controlling parent companies, and other entities in the licensee's vertical ownership chain may need to place restrictions in their bylaws or other organizational documents to enable the licensee to ensure compliance with the terms and conditions of its declaratory ruling(s) and the Commission's rules.

*Example 1 (for rulings issued under § 1.990(a)(1)).* U.S. Corp. files an application for a common carrier license. U.S. Corp. is wholly owned and controlled by U.S. Parent, which is a newly formed, privately held Delaware corporation in which no single shareholder has *de jure* or *de facto* control. A shareholders' agreement provides that a five-member board of directors shall govern the affairs of the company; five named shareholders shall be entitled to one seat and one vote on the board; and all decisions of the board shall be determined by majority vote. The five named shareholders and their respective equity interests are as follows: Foreign Entity A, which is wholly owned and controlled by a foreign citizen (5 percent); Foreign Entity B, which is wholly owned and controlled by a foreign citizen (10 percent); Foreign Entity C, a foreign public company with no controlling shareholder (20 percent); Foreign Entity D, a foreign pension fund that is

controlled by a foreign citizen and in which no individual or entity has a pecuniary interest exceeding one percent (21 percent); and U.S. Entity E, a U.S. public company with no controlling shareholder (25 percent). The remaining 19 percent of U.S. Parent's shares are held by three foreign-organized entities as follows: F (4 percent), G (6 percent), and H (9 percent). Under the shareholders' agreement, voting rights of F, G, and H are limited to the minority shareholder protections listed in § 1.991(i)(5). Further, the agreement expressly prohibits G and H from becoming actively involved in the management or operation of U.S. Parent and U.S. Corp.

As required by the rules, U.S. Corp. files a section 310(b)(4) petition concurrently with its application. The petition identifies and requests specific approval for the ownership interests held in U.S. Parent by Foreign Entity A and its sole shareholder (5 percent equity and 20 percent voting interest); Foreign Entity B and its sole shareholder (10 percent equity and 20 percent voting interest), Foreign Entity C (20 percent equity and 20 percent voting interest), and Foreign Entity D (21 percent equity and 20 percent voting interest) and its fund manager (20 percent voting interest). The Commission's ruling specifically approves these foreign interests. The ruling also provides that, on a going-forward basis, U.S. Parent may be 100 percent owned in the aggregate, directly and/or indirectly, by other foreign investors, subject to the requirement that U.S. Corp. seek and obtain Commission approval before any previously unapproved foreign investor acquires more than five percent of U.S. Parent's equity and/or voting interests, or a controlling interest, with the exception of any foreign investor that acquires an equity and/or voting interest of ten percent or less, *provided that* the interest is exempt under § 1.991(i)(3).

In this case, foreign entities F, G, and H would each be considered a previously unapproved foreign investor (along with any new foreign investors). However, prior approval for F, G and H would only apply to an increase of F's interest above five percent (because the ten percent exemption under § 1.991(i)(3) does not apply to F) or to an increase of G's or H's interest above ten percent (because G and H do qualify for this exemption). U.S. Corp. would also need Commission approval before Foreign Entity D appoints a new fund manager that is a non-U.S. citizen and before Foreign Entities A, B, C, or D increase their respective equity and/or voting interests in U.S. Parent, unless

the petition previously sought and obtained Commission approval for such increases (up to non-controlling 49.99 percent interests). (See § 1.991(k)(2).) Foreign shareholders of Foreign Entity C and U.S. Entity E would also be considered previously unapproved foreign investors. Thus, Commission approval would be required before any foreign shareholder of Foreign Entity C or U.S. Entity E acquires (1) a controlling interest in either company; or (2) a non-controlling equity and/or voting interest in either company that, when multiplied by the company's equity and/or voting interests in U.S. Parent, would exceed 5 percent of U.S. Parent's equity and/or voting interests, unless the interest is exempt under § 1.991(i)(3).

*Example 2 (for rulings issued under § 1.990(a)(2)).* Assume that the following three U.S.-organized entities hold non-controlling equity and voting interests in common carrier Licensee, which is a privately held corporation organized in Delaware: U.S. corporation A (30 percent); U.S. corporation B (30 percent); and U.S. corporation C (40 percent). Licensee's shareholders are wholly owned by foreign individuals X, Y, and Z, respectively. Licensee has received a declaratory ruling under § 1.990(a)(2) specifically approving the 30 percent foreign ownership interests held in Licensee by each of X and Y (through U.S. corporation A and U.S. corporation B, respectively) and the 40 percent foreign ownership interest held in Licensee by Z (through U.S. corporation C). On a going-forward basis, Licensee may be 100 percent owned in the aggregate by X, Y, Z, and other foreign investors holding interests in Licensee indirectly, through U.S.-organized entities that do not control Licensee, subject to the requirement that Licensee obtain Commission approval before any previously unapproved foreign investor acquires more than five percent of Licensee's equity and/or voting interests, with the exception of any foreign investor that acquires an equity and/or voting interest of ten percent or less, *provided that* the interest is exempt under § 1.991(i)(3). In this case, any foreign investor other than X, Y, and Z would be considered a previously unapproved foreign investor. Licensee would also need Commission approval before X, Y, or Z increases its equity and/or voting interests in Licensee unless the petition previously sought and obtained Commission approval for such increases (up to non-controlling 49.99 percent interests). (See § 1.991(k)(2).)

(b) *Subsidiaries and affiliates.* A foreign ownership ruling issued to a

licensee shall cover it and any U.S.-organized subsidiary or affiliate, as defined in § 1.990(d), whether the subsidiary or affiliate existed at the time the ruling was issued or was formed or acquired subsequently, *provided that* the foreign ownership of the licensee named in the ruling, and of the subsidiary and/or affiliate, remains in compliance with the terms and conditions of the licensee's ruling and the Commission's rules.

(1) The subsidiary or affiliate of a licensee named in a foreign ownership ruling issued under § 1.990(a)(1) may rely on that ruling for purposes of filing its own application for an initial common carrier or aeronautical license or spectrum leasing arrangement, or an application to acquire such license or spectrum leasing arrangement by assignment or transfer of control *provided that* the subsidiary or affiliate, and the licensee named in the ruling, each certifies in the application that its foreign ownership is in compliance with the terms and conditions of the foreign ownership ruling and the Commission's rules.

(2) The subsidiary or affiliate of a licensee named in a foreign ownership ruling issued under § 1.990(a)(2) may rely on that ruling for purposes of filing its own application for an initial common carrier radio station license or spectrum leasing arrangement, or an application to acquire such license or spectrum leasing arrangement by assignment or transfer of control *provided that* the subsidiary or affiliate, and the licensee named in the ruling, each certifies in the application that its foreign ownership is in compliance with the terms and conditions of the foreign ownership ruling and the Commission's rules.

(3) The certifications required by paragraphs (b)(1) and (b)(2) of this section shall also include the citation(s) of the relevant ruling(s) (*i.e.*, the DA or FCC Number, FCC Record citation when available, and release date).

(c) *Insertion of new controlling foreign-organized companies.* (1) Where a licensee's foreign ownership ruling specifically authorizes a named, foreign investor to hold a controlling interest in the licensee's controlling U.S.-organized parent, for rulings issued under § 1.990(a)(1), or in an intervening U.S.-organized entity that does not control the licensee, for rulings issued under § 1.990(a)(2), the ruling shall permit the insertion of new, controlling foreign-organized companies in the vertical ownership chain above the controlling U.S. parent, for rulings issued under § 1.990(a)(1), or above an intervening U.S.-organized entity that does not

control the licensee, for rulings issued under § 1.990(a)(2), without prior Commission approval *provided that* any new foreign-organized company(ies) are under 100 percent common ownership and control with the foreign investor approved in the ruling.

(2) Where a previously unapproved foreign-organized entity is inserted into the vertical ownership chain of a licensee, or its controlling U.S.-organized parent, without prior Commission approval pursuant to paragraph (c)(1) of this section, the licensee shall file a letter to the attention of the Chief, International Bureau, within 30 days after the insertion of the new, foreign-organized entity. The letter must include the name of the new, foreign-organized entity and a certification by the licensee that the entity complies with the 100 percent common ownership and control requirement in paragraph (c)(1) of this section. The letter must also reference the licensee's foreign ownership ruling(s) by IBFS File No. and FCC Record citation, if available. This letter notification need not be filed if the ownership change is instead the subject of a *pro forma* application or *pro forma* notification already filed with the Commission pursuant to the relevant wireless radio service rules or satellite radio service rules applicable to the licensee.

(3) Nothing in this section is intended to affect any requirements for prior approval under 47 U.S.C. 310(d) or conditions for forbearance from the requirements of 47 U.S.C. 310(d) pursuant to 47 U.S.C. 160.

*Example (for rulings issued under § 1.990(a)(1)).* Licensee receives a foreign ownership ruling under § 1.990(a)(1) that authorizes its controlling, U.S.-organized parent ("U.S. Parent A") to be wholly owned and controlled by a foreign-organized company ("Foreign Company"). Foreign Company is minority owned (20 percent) by U.S.-organized Corporation B, with the remaining 80 percent controlling interest held by Foreign Citizen C. After issuance of the ruling, Foreign Company forms a wholly-owned, foreign-organized subsidiary ("Foreign Subsidiary") to hold all of Foreign Company's shares in U.S. Parent A. There are no other changes in the direct or indirect foreign ownership of U.S. Parent A. The insertion of Foreign Subsidiary into the vertical ownership chain between Foreign Company and U.S. Parent A would not require prior Commission approval, except for any approval otherwise required pursuant to section 310(d) of the Communications Act and not

exempt therefrom as a *pro forma* transfer of control under § 1.948(c)(1).

*Example (for rulings issued under § 1.990(a)(2)).* An applicant for a common carrier license receives a foreign ownership ruling under § 1.990(a)(2) that authorizes a foreign-organized company ("Foreign Company") to hold a non-controlling 44 percent equity and voting interest in the applicant through Foreign Company's wholly-owned, U.S.-organized subsidiary, U.S. Corporation A, which holds the non-controlling 44 percent interest directly in the applicant. The remaining 56 percent of the applicant's equity and voting interests are held by its controlling U.S.-organized parent, which has no foreign ownership. After issuance of the ruling, Foreign Company forms a wholly-owned, foreign-organized subsidiary to hold all of Foreign Company's shares in U.S. Corporation A. There are no other changes in the direct or indirect foreign ownership of U.S. Corporation A. The insertion of the foreign-organized subsidiary into the vertical ownership chain between Foreign Company and U.S. Corporation A would not require prior Commission approval.

(d) *Insertion of new non-controlling foreign-organized companies.* (1) Where a licensee's foreign ownership ruling specifically authorizes a named, foreign investor to hold a non-controlling interest in the licensee's controlling U.S.-organized parent, for rulings issued under § 1.990(a)(1), or in an intervening U.S.-organized entity that does not control the licensee, for rulings issued under § 1.990(a)(2), the ruling shall permit the insertion of new, foreign-organized companies in the vertical ownership chain above the controlling U.S. parent, for rulings issued under § 1.990(a)(1), or above an intervening U.S.-organized entity that does not control the licensee, for rulings issued under § 1.990(a)(2), without prior Commission approval *provided that* any new foreign-organized company(ies) are under 100 percent common ownership and control with the foreign investor approved in the ruling.

Note to paragraph (d)(1): Where a licensee has received a foreign ownership ruling under § 1.990(a)(2) and the ruling specifically authorizes a named, foreign investor to hold a non-controlling interest directly in the licensee (subject to the 20 percent aggregate limit on direct foreign investment), the ruling shall permit the insertion of new, foreign-organized companies in the vertical ownership chain of the approved foreign investor without prior Commission approval *provided that* any new foreign-

organized companies are under 100 percent common ownership and control with the approved foreign investor.

*Example (for rulings issued under § 1.990(a)(1)).* Licensee receives a foreign ownership ruling under § 1.990(a)(1) that authorizes a foreign-organized company ("Foreign Company") to hold a non-controlling 30 percent equity and voting interest in Licensee's controlling, U.S.-organized parent ("U.S. Parent A"). The remaining 70 percent equity and voting interests in U.S. Parent A are held by U.S.-organized entities which have no foreign ownership. After issuance of the ruling, Foreign Company forms a wholly-owned, foreign-organized subsidiary ("Foreign Subsidiary") to hold all of Foreign Company's shares in U.S. Parent A. There are no other changes in the direct or indirect foreign ownership of U.S. Parent A. The insertion of Foreign Subsidiary into the vertical ownership chain between Foreign Company and U.S. Parent A would not require prior Commission approval.

*Example (for rulings issued under § 1.990(a)(2)).* Licensee receives a foreign ownership ruling under § 1.990(a)(2) that authorizes a foreign-organized entity ("Foreign Company") to hold approximately 24 percent of Licensee's equity and voting interests, through Foreign Company's non-controlling 48 percent equity and voting interest in a U.S.-organized entity, U.S. Corporation A, which holds a non-controlling 49 percent equity and voting interest directly in Licensee. (A U.S. citizen holds the remaining 52 percent equity and voting interests in U.S. Corporation A, and the remaining 51 percent equity and voting interests in Licensee are held by its U.S.-organized parent, which has no foreign ownership. After issuance of the ruling, Foreign Company forms a wholly-owned, foreign-organized subsidiary ("Foreign Subsidiary") to hold all of Foreign Company's shares in U.S. Corporation A. There are no other changes in the direct or indirect foreign ownership of U.S. Corporation A. The insertion of Foreign Subsidiary into the vertical ownership chain between Foreign Company and U.S. Corporation A would not require prior Commission approval.

(2) Where a previously unapproved foreign-organized entity is inserted into the vertical ownership chain of a licensee, or its controlling U.S.-organized parent, without prior Commission approval pursuant to paragraph (d)(1) of this section, the licensee shall file a letter to the attention of the Chief, International Bureau, within 30 days after the insertion of the new, foreign-organized

entity. The letter must include the name of the new, foreign-organized entity and a certification by the licensee that the entity complies with the 100 percent common ownership and control requirement in paragraph (d)(1) of this section. The letter must also reference the licensee's foreign ownership ruling(s) by IBFS File No. and FCC Record citation, if available. This letter notification need not be filed if the ownership change is instead the subject of a *pro forma* application or *pro forma* notification already filed with the Commission pursuant to the relevant wireless radio service rules or satellite radio service rules applicable to the licensee.

(e) *New petition for declaratory ruling required.* A licensee that has received a foreign ownership ruling, including a U.S.-organized successor-in-interest to such licensee formed as part of a *pro forma* reorganization, or any subsidiary or affiliate relying on such licensee's ruling pursuant to paragraph (b) of this section, shall file a new petition for declaratory ruling under § 1.990 to obtain Commission approval before its foreign ownership exceeds the routine terms and conditions of this section, and/or any specific terms or conditions of its ruling.

(f)(1) *Continuing compliance.* If at any time the licensee, including any successor-in-interest and any subsidiary or affiliate as described in paragraph (b) of this section, knows, or has reason to know, that it is no longer in compliance with its foreign ownership ruling or the Commission's rules relating to foreign ownership, it shall file a statement with the Commission explaining the circumstances within 30 days of the date it knew, or had reason to know, that it was no longer in compliance therewith. Subsequent actions taken by or on behalf of the licensee to remedy its non-compliance shall not relieve it of the obligation to notify the Commission of the circumstances (including duration) of non-compliance. Such licensee and any controlling companies, whether U.S.- or foreign-organized, shall be subject to enforcement action by the Commission for such non-compliance, including an order requiring divestiture of the investor's direct and/or indirect interests in such entities.

(2) Any individual or entity that, directly or indirectly, creates or uses a trust, proxy, power of attorney, or any other contract, arrangement, or device with the purpose or effect of divesting itself, or preventing the vesting, of an equity interest or voting interest in the licensee, or in a controlling U.S. parent company, as part of a plan or scheme to

evade the application of the Commission's rules or policies under section 310(b) shall be subject to enforcement action by the Commission, including an order requiring divestiture of the investor's direct and/or indirect interests in such entities.

## PART 25—SATELLITE COMMUNICATIONS

■ 4. The authority citation for part 25 is revised to read as follows:

**Authority:** 47 U.S.C. 701–744. Interprets or applies Sections 4, 301, 302, 303, 307, 309, 310 and 332 of the Communications Act, as amended, 47 U.S.C. Sections 154, 301, 302, 303, 307, 309, 310 and 332, unless otherwise noted.

■ 5. Section 25.105 is added to read as follows:

### § 25.105 Citizenship.

The rules that establish the requirements and conditions for obtaining the Commission's prior approval of foreign ownership in common carrier licensees that would exceed the 20 percent limit in section 310(b)(3) of the Communications Act (47 U.S.C. 310(b)(3)) and/or the 25 percent benchmark in section 310(b)(4) of the Act (47 U.S.C. 310(b)(4)) are set forth in §§ 1.990 through 1.994 of this chapter.

[FR Doc. 2013–15314 Filed 7–9–2013; 8:45 am]

BILLING CODE 6712–01–P

## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 5 and 15

#### Federal Acquisition Regulation; Publicizing Contract Actions; Contracting by Negotiation

##### CFR Correction

In Title 48 of the Code of Federal Regulations, Chapter 1 (Parts 1 to 51), revised as of October 1, 2012, on page 115, in section 5.601, in paragraph (b)(2), reinstate the end of the paragraph to read “that were awarded before July 24, 2003.”; and on page 311, in section 15.404–1, reinstate paragraph (c)(2)(vi) to read as follows:

#### 15.404–1 Proposal analysis techniques.

\* \* \* \* \*

(c) \* \* \*

(2) \* \* \*

(vi) Analysis of the results of any make-or-buy program reviews, in evaluating subcontract costs (see 15.407–2).

\* \* \* \* \*

[FR Doc. 2013–16642 Filed 7–9–13; 8:45 am]

BILLING CODE 1505–01–D

## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

#### 48 CFR Part 225

#### Defense Federal Acquisition Regulation Supplement; Technical Amendments

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Final rule.

**SUMMARY:** DoD is making technical amendment to the Defense Federal Acquisition Regulation Supplement (DFARS) to insert a hyperlink and direct contracting officers to the DFARS Procedures, Guidance, and Information.

**DATES:** *Effective date:* July 10, 2013.

**FOR FURTHER INFORMATION CONTACT:** Mr. Manuel Quinones, Defense Acquisition Regulations System, OUSD(AT&L)DPAP(DARS), Room 3B855, 3060 Defense Pentagon, Washington, DC 20301–3060. Telephone 571–372–6088; facsimile 571–372–6094.

**SUPPLEMENTARY INFORMATION:** This final rule amends the DFARS at 225.7703–3 to add a hyperlink and to direct contracting officers to PGI 225.7703–3 for additional guidance on acquisitions in support of USCENTCOM.

#### List of Subjects in 48 CFR Part 225

Government procurement.

Manuel Quinones,  
*Editor, Defense Acquisition Regulations System.*

Therefore, 48 CFR part 225 is amended as follows:

■ 1. The authority citation for 48 CFR part 225 continues to read as follows:

**Authority:** 41 U.S.C. 1303 and 48 CFR chapter 1.

#### PART 225—FOREIGN ACQUISITION

■ 2. Amend section 225.7703–3 by adding paragraph (c) to read as follows:

#### 225.7703–3 Evaluating offers.

\* \* \* \* \*

(c) For acquisitions in support of USCENTCOM, see PGI 225.7703-3.

[FR Doc. 2013-16565 Filed 7-9-13; 8:45 am]

BILLING CODE 5001-06-P

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 679**

**Fisheries of the Exclusive Economic Zone Off Alaska**

*CFR Correction*

In Title 50 of the Code of Federal Regulations, Part 660 to End, revised as of October 1, 2012, on page 556, in

§ 679.5, paragraph (e)(8)(iii)(D)(2) is added to read as follows:

**§ 679.5 Recordkeeping and reporting (R&R)**

\* \* \* \* \*

(e) \* \* \*

(8) \* \* \*

(iii) \* \* \*

(D) \* \* \*

(2) Number of observers aboard.

\* \* \* \* \*

[FR Doc. 2013-16646 Filed 7-9-13; 8:45 am]

BILLING CODE 1505-01-D

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 679**

**Fisheries of the Exclusive Economic Zone Off Alaska**

*CFR Correction*

■ In Title 50 of the Code of Federal Regulations, Part 660 to End, revised as of October 1, 2012, on page 561, in § 679.5, the last sentence is removed from paragraph (g)(1)(i) and is added to the end of paragraph (g)(1) introductory text.

[FR Doc. 2013-16650 Filed 7-9-13; 8:45 am]

BILLING CODE 1505-01-D

# Proposed Rules

Federal Register

Vol. 78, No. 132

Wednesday, July 10, 2013

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.

## DEPARTMENT OF ENERGY

### 10 CFR Part 431

[Docket No. EERE-2013-BT-STD-0022]

RIN 1904-AD00

#### Energy Efficiency Program for Commercial and Industrial Equipment: Public Meeting and Availability of the Framework Document for Refrigerated Beverage Vending Machines

**AGENCY:** Office of Energy Efficiency and Renewable Energy, Department of Energy.

**ACTION:** Extension of public comment period.

**SUMMARY:** The comment period for the notice of public meeting and availability of the Framework Document pertaining to the development of energy conservation standards for refrigerated beverage vending machines published on June 4, 2013, is extended to August 16, 2013.

**DATES:** The comment period for the notice of public meeting and availability of the Framework Document relating to refrigerated beverage vending machines published June 4, 2013 (78 FR 33262) is extended to August 16, 2013.

**ADDRESSES:** Any comments submitted must identify the framework document for refrigerated beverage vending machines and provide docket number EERE-2013-BT-STD-0022 and/or RIN number 1904-AD00. Comments may be submitted using any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Email:* [BVM2013STD0022@EE.Doe.Gov](mailto:BVM2013STD0022@EE.Doe.Gov). Include EERE-2013-BT-STD-0022 in the subject line of the message.

- *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE-2J, Framework Document for Refrigerated Beverage Vending Machines, Docket No. EERE-2013-BT-STD-0022, 1000 Independence Avenue SW.,

Washington, DC 20585-0121. Phone: (202) 586-2945. Please submit one signed paper original.

- *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 6th Floor, 950 L'Enfant Plaza SW., Washington, DC 20024. Phone: (202) 586-2945. Please submit one signed paper original.

*Docket:* For access to the docket to read background documents, or comments received, go to the Federal eRulemaking Portal at <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Mr. Charles Llenza, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE-2J, 1000 Independence Avenue SW., Washington, DC 20585-0121. Telephone: (202) 586-2192. Email: [refrigerated\\_beverage\\_vending\\_machinescommat;ee.doe.gov](mailto:refrigerated_beverage_vending_machinescommat;ee.doe.gov).

In the office of the General Counsel, contact Mr. Ari Altman, U.S. Department of Energy, Office of the General Counsel, GC-71, 1000 Independence Avenue SW., Washington, DC 20585-0121. Telephone: (202) 287-6307. Email: [Ari.Altman@hq.doe.gov](mailto:Ari.Altman@hq.doe.gov).

**SUPPLEMENTARY INFORMATION:** The Energy Policy and Conservation Act of 1975 (EPCA), as amended, directed the U.S. Department of Energy (DOE) to prescribe energy conservation standards for beverage vending machines (42 U.S.C. 6295(v)). DOE published a final rule establishing standards for beverage vending machines on August 31, 2009. (74 FR at 44914). Within 6 years after issuance of any final rule establishing or amending a standard, EPCA also requires DOE to publish a notice determining whether to amend such standards. If DOE determines that amendment is warranted, DOE must also issue a notice of proposed rulemaking (NPR) including new proposed energy conservation standards by that same date. (42 U.S.C. 6295(m)(1))

On June 4, 2013, DOE published a notice of public meeting and availability of Framework Document to consider amending the energy conservation standards for refrigerated beverage vending machines (78 FR 33262). The notice requested public comment from interested parties and provided for the

submission of comments by July 19, 2013. Thereafter, Royal Vendors, Inc. requested an extension of the public comment period by 90 days to October 10, 2013, in order to allow small manufacturers to evaluate the wide range of topics on which comments have been requested by DOE.

DOE believes that extending the comment period by 30 days to allow additional time for interested parties to submit comments is appropriate. Therefore, DOE is extending the comment period until August 16, 2013 to provide interested parties additional time to prepare and submit comments. Accordingly, DOE will consider any comments received by August 16, 2013 to be timely submitted.

Issued in Washington, DC, on July 3, 2013.

**Kathleen B. Hogan,**

*Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy.*

[FR Doc. 2013-16567 Filed 7-9-13; 8:45 am]

**BILLING CODE 6450-01-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 71

[Docket No. FAA-2013-0434; Airspace Docket No. 13-ANM-1]

#### Proposed Amendment of Class E Airspace; Everett, WA

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

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This action proposes to modify Class E airspace at Everett, WA, to accommodate aircraft departing and arriving under Instrument Flight Rules (IFR) at Snohomish County Airport (Paine Field), WA. A minor adjustment would also be made to the geographic coordinates of the Airport. This action, initiated by the biennial review of the Snohomish County airspace area, would enhance the safety and management of aircraft operations at the airport.

**DATES:** Comments must be received on or before August 26, 2013.

**ADDRESSES:** Send comments on this proposal 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; telephone (202) 366-9826. You must identify FAA Docket No. FAA-2013-0434; Airspace Docket No. 13-ANM-1, at the beginning of your comments. You may also submit comments through the Internet at <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:**

Richard Roberts, Federal Aviation Administration, Operations Support Group, Western Service Center, 1601 Lind Avenue SW., Renton, WA 98057; telephone (425) 203-4517.

**SUPPLEMENTARY INFORMATION:**

**Comments Invited**

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA 2013-0434 and Airspace Docket No. 13-ANM-1) and be submitted in triplicate to the Docket Management System (see **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at <http://www.regulations.gov>.

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed stamped postcard on which the following statement is made: "Comments to FAA Docket No. FAA-2013-0434 and Airspace Docket No. 13-ANM-1". The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

**Availability of NPRMs**

An electronic copy of this document may be downloaded through the Internet at <http://www.regulations.gov>.

Recently published rulemaking documents can also be accessed through the FAA's Web page at [http://www.faa.gov/airports\\_airtraffic/air\\_traffic/publications/airspace\\_amendments/](http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/).

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for the address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined during normal business hours at the Northwest Mountain Regional Office of the Federal Aviation Administration, Air Traffic Organization, Western Service Center, Operations Support Group, 1601 Lind Avenue SW., Renton, WA 98057.

Persons interested in being placed on a mailing list for future NPRM's should contact the FAA's Office of Rulemaking, (202) 267-9677, for a copy of Advisory Circular No. 11-2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

**The Proposal**

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) Part 71 by modifying Class E airspace designated as an extension to Class D surface area at Snohomish County Airport, Everett, WA. A segment would extend from the 4.5-mile radius of the airport to 8 miles northwest of the airport. This action was initiated by a biennial review of the airspace and is necessary for the safety and management of aircraft departing and arriving under IFR operations at the airport. Also, the geographic coordinates of the airport would be updated to coincide with the FAA's aeronautical database.

Class E airspace designations are published in paragraph 6004 of FAA Order 7400.9W, dated August 8, 2012, and effective September 15, 2012, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in this Order.

The FAA has determined this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this proposed regulation; (1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated

impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified this proposed rule, when promulgated, would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106, describes the authority for the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This proposed regulation is within the scope of that authority as it would modify controlled airspace at Snohomish County Airport (Paine Field), WA.

**List of Subjects in 14 CFR Part 71**

Airspace, Incorporation by reference, Navigation (air).

**The Proposed Amendment**

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR Part 71 as follows:

**PART 71—DESIGNATION OF CLASS A, B, C, D AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS**

■ 1. The authority citation for 14 CFR Part 71 continues to read as follows:

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

**§ 71.1 [Amended]**

■ 2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9W, Airspace Designations and Reporting Points, dated August 8, 2012, and effective September 15, 2012 is amended as follows:

*Paragraph 6004 Class E Airspace Areas Designated as an Extension to Class D Surface Area*

\* \* \* \* \*

**ANM WA E4 Everett, WA [Modified]**

Everett, Snohomish County Airport (Paine Field), WA  
(Lat. 47°54'25" N, long. 122°16'54" W)

That airspace extending upward from the surface within 2.4 miles each side of the Snohomish County Airport (Paine Field) 341° bearing extending from the 4.5-mile radius of the airport to 8 miles northwest of the airport. This Class E airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Airport/Facility Directory.

Issued in Seattle, Washington, on June 26, 2013.

**Rex MacLean,**

*Acting Manager, Operations Support Group,  
Western Service Center.*

[FR Doc. 2013-16572 Filed 7-9-13; 8:45 am]

**BILLING CODE 4910-13-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 71

[Docket No. FAA-2013-0530; Airspace  
Docket No. 13-AWP-9]

#### Proposed Establishment of Class E Airspace; Battle Mountain, NV

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

**ACTION:** Notice of proposed rulemaking  
(NPRM).

**SUMMARY:** This action proposes to establish Class E airspace at the Battle Mountain VHF Omni-Directional Radio Range Tactical Air Navigational Aid (VORTAC) navigation aid, Battle Mountain, NV, to facilitate vectoring of Instrument Flight Rules (IFR) aircraft under control of Salt Lake City, Oakland, and Los Angeles Air Route Traffic Control Centers (ARTCCs). The FAA is proposing this action to enhance the safety and management of aircraft operations within the National Airspace System.

**DATES:** Comments must be received on or before August 26, 2013.

**ADDRESSES:** Send comments on this proposal 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; telephone (202) 366-9826. You must identify FAA Docket No. FAA-2013-0530; Airspace Docket No. 13-AWP-9, at the beginning of your comments. You may also submit comments through the Internet at <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Eldon Taylor, Federal Aviation Administration, Operations Support Group, Western Service Center, 1601 Lind Avenue SW., Renton, WA 98057; telephone (425) 203-4537.

#### SUPPLEMENTARY INFORMATION:

##### Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA-2013-0530 and Airspace Docket No. 13-AWP-9) and be submitted in triplicate to the Docket Management System (see **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at <http://www.regulations.gov>.

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed stamped postcard on which the following statement is made: "Comments to FAA Docket No. FAA-2013-0530 and Airspace Docket No. 13-AWP-9". The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

##### Availability of NPRM's

An electronic copy of this document may be downloaded through the Internet at <http://www.regulations.gov>. Recently published rulemaking documents can also be accessed through the FAA's Web page at [http://www.faa.gov/airports\\_airtraffic/air\\_traffic/publications/airspace\\_amendments/](http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/).

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for the address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined during

normal business hours at the Northwest Mountain Regional Office of the Federal Aviation Administration, Air Traffic Organization, Western Service Center, Operations Support Group, 1601 Lind Avenue SW., Renton, WA 98057.

Persons interested in being placed on a mailing list for future NPRM's should contact the FAA's Office of Rulemaking, (202) 267-9677, for a copy of Advisory Circular No. 11-2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

##### The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) Part 71 by establishing Class E en route domestic airspace extending upward from 1,200 feet above the surface at the Battle Mountain VORTAC navigation aid, Battle Mountain, NV. This action would contain aircraft while in IFR conditions under control of Salt Lake City, Oakland, and Los Angeles ARTCCs by vectoring aircraft from en route airspace to terminal areas.

Class E airspace designations are published in paragraph 6006, of FAA Order 7400.9W, dated August 8, 2012, and effective September 15, 2012, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in this Order.

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

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106, describes the authority for the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that

section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This proposed regulation is within the scope of that authority as it would establish controlled airspace at the Battle Mountain VORTAC, Battle Mountain, NV.

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1E, "Environmental Impacts: Policies and Procedures" prior to any FAA final regulatory action.

#### List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

#### The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR Part 71 as follows:

#### PART 71—DESIGNATION OF CLASS A, B, C, D AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for 14 CFR Part 71 continues to read as follows:

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

##### § 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9W, Airspace Designations and Reporting Points, dated August 8, 2012, and effective September 15, 2012 is amended as follows:

*Paragraph 6006 En Route Domestic Airspace Areas.*

\* \* \* \* \*

#### ANM NV E6 Battle Mountain, NV [New]

Battle Mountain VORTAC, NV  
(Lat. 40°34'09" N., long. 116°55'20" W.)

That airspace extending upward from 1,200 feet above the surface within an area bounded by lat. 41°08'22" N., long. 114°57'44" W.; to lat. 40°40'40" N., long. 114°28'45" W.; to lat. 40°06'57" N., long. 114°37'44" W.; to lat. 39°38'25" N., long. 114°42'19" W.; to lat. 38°28'04" N., long. 114°21'28" W.; to lat. 38°19'56" N., long. 114°09'07" W.; to lat. 38°23'43" N., long. 113°12'48" W.; to lat. 37°48'00" N., long. 113°30'00" W.; to lat. 37°49'25" N., long. 113°42'01" W.; to lat. 37°53'44" N., long. 113°42'03" W.; to lat. 38°01'00" N., long. 114°12'03" W.; to lat. 38°01'00" N., long. 114°30'03" W.; to lat. 37°59'59" N., long. 114°42'06" W.; to lat. 37°53'00" N., long. 116°11'03" W.; to lat. 37°53'00" N., long. 116°26'03" W.; to lat. 37°53'00" N., long. 116°50'00" W.; to lat. 38°13'30" N., long.

117°00'00" W.; to lat. 38°13'30" N., long. 117°16'30" W.; to lat. 37°55'11" N., long. 117°53'37" W.; to lat. 39°39'28" N., long. 117°59'55" W.; to lat. 40°04'38" N., long. 118°49'42" W., thence to the point of beginning.

Issued in Seattle, Washington, on June 26, 2013.

**Rex MacLean,**

*Acting Manager, Operations Support Group,  
Western Service Center*

[FR Doc. 2013–16573 Filed 7–9–13; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 71

[Docket No. FAA–2013–0528; Airspace Docket No. 13–ANM–16]

#### Proposed Establishment of Class E Airspace; Wasatch, UT

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

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This action proposes to establish Class E airspace at the Wasatch VHF Omni-Directional Radio Range Tactical Air Navigational Aid (VORTAC) navigation aid, Wasatch, UT, to facilitate vectoring of Instrument Flight Rules (IFR) aircraft under control of Salt Lake City Air Route Traffic Control Center (ARTCC). The FAA is proposing this action to enhance the safety and management of aircraft operations within the National Airspace System.

**DATES:** Comments must be received on or before August 26, 2013.

**ADDRESSES:** Send comments on this proposal 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; telephone (202) 366–9826. You must identify FAA Docket No. FAA–2013–0528; Airspace Docket No. 13–ANM–16, at the beginning of your comments. You may also submit comments through the Internet at <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Eldon Taylor, Federal Aviation Administration, Operations Support Group, Western Service Center, 1601 Lind Avenue SW., Renton, WA 98057; telephone (425) 203–4537.

#### SUPPLEMENTARY INFORMATION:

##### Comments Invited

Interested parties are invited to participate in this proposed rulemaking

by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA 2013–0528 and Airspace Docket No. 13–ANM–16) and be submitted in triplicate to the Docket Management System (see **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at <http://www.regulations.gov>.

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed stamped postcard on which the following statement is made: "Comments to FAA Docket No. FAA–2013–0528 and Airspace Docket No. 13–ANM–16". The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

#### Availability of NPRM's

An electronic copy of this document may be downloaded through the Internet at <http://www.regulations.gov>. Recently published rulemaking documents can also be accessed through the FAA's Web page at [http://www.faa.gov/airports\\_airtraffic/air\\_traffic/publications/airspace\\_amendments/](http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/).

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for the address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined during normal business hours at the Northwest Mountain Regional Office of the Federal Aviation Administration, Air Traffic Organization, Western Service Center,

Operations Support Group, 1601 Lind Avenue SW., Renton, WA 98057.

Persons interested in being placed on a mailing list for future NPRM's should contact the FAA's Office of Rulemaking, (202) 267-9677, for a copy of Advisory Circular No. 11-2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

### The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 by establishing Class E en route domestic airspace extending upward from 1,200 feet above the surface at the Wasatch VORTAC navigation aid, Wasatch, UT. This action would contain aircraft while in IFR conditions under control of Salt Lake City ARTCC by vectoring aircraft from en route airspace to terminal areas.

Class E airspace designations are published in paragraph 6006, of FAA Order 7400.9W, dated August 8, 2012, and effective September 15, 2012, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in this Order.

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

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106, describes the authority for the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the

scope of that authority as it would establish controlled airspace the Wasatch VORTAC, Wasatch, UT.

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1E, "Environmental Impacts: Policies and Procedures" prior to any FAA final regulatory action.

### List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

### The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

### PART 71—DESIGNATION OF CLASS A, B, C, D AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

- 1. The authority citation for 14 CFR part 71 continues to read as follows:

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

#### § 71.1 [Amended]

- 2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9W, Airspace Designations and Reporting Points, dated August 8, 2012, and effective September 15, 2012 is amended as follows:

*Paragraph 6006 En Route Domestic Airspace Areas*

\* \* \* \* \*

#### ANM UT E6 Wasatch, UT [New]

Wasatch VORTAC, UT  
(Lat. 40°51'10" N., long. 111°58'55" W.)

That airspace extending upward from 1,200 feet above the surface within an area bounded by lat. 42°27'00" N., long. 113°22'00" W.; to lat. 41°41'49" N., long. 109°29'35" W.; to lat. 41°26'15" N., long. 109°19'46" W.; to lat. 41°10'22" N., long. 109°42'26" W.; to lat. 40°21'23" N., long. 109°42'25" W.; to lat. 39°59'03" N., long. 110°43'27" W.; to lat. 39°37'44" N., long. 111°07'28" W.; to lat. 39°03'55" N., long. 110°37'49" W.; to lat. 38°28'51" N., long. 110°38'05" W.; to lat. 38°10'56" N., long. 111°24'19" W.; to lat. 37°50'39" N., long. 112°24'51" W.; to lat. 37°30'00" N., long. 112°03'30" W.; to lat. 37°30'00" N., long. 113°00'00" W.; to lat. 37°32'02" N., long. 113°07'15" W.; to lat. 37°48'00" N., long. 113°30'00" W.; to lat. 38°23'43" N., long. 113°12'48" W.; to lat. 38°19'56" N., long. 114°09'07" W.; to lat. 38°28'04" N., long. 114°21'28" W.; to lat. 39°38'25" N., long. 114°42'19" W.; to lat. 40°06'57" N., long. 114°37'44" W.; to lat. 40°40'40" N., long. 114°28'45" W.; to lat. 41°08'22" N., long. 114°57'44" W.; to lat. 42°00'00" N., long.

114°42'42" W., thence to the point of beginning.

Issued in Seattle, Washington, on June 26, 2013.

**Rex MacLean,**

*Acting Manager, Operations Support Group, Western Service Center.*

[FR Doc. 2013-16568 Filed 7-9-13; 8:45 am]

**BILLING CODE 4910-13-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 71

[Docket No. FAA-2013-0529; Airspace Docket No. 13-ANM-17]

#### Proposed Establishment of Class E Airspace; Glasgow, MT

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

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This action proposes to establish Class E airspace at the Glasgow VHF Omni-Directional Radio Range/Distance Measuring Equipment (VOR/DME) navigation aid, Glasgow, MT, to facilitate vectoring of Instrument Flight Rules (IFR) aircraft under control of Salt Lake City and Minneapolis Air Route Traffic Control Centers (ARTCCs). The FAA is proposing this action to enhance the safety and management of aircraft operations within the National Airspace System.

**DATES:** Comments must be received on or before August 26, 2013.

**ADDRESSES:** Send comments on this proposal 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; telephone (202) 366-9826. You must identify FAA Docket No. FAA-2013-0529; Airspace Docket No. 13-ANM-17, at the beginning of your comments. You may also submit comments through the Internet at <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Eldon Taylor, Federal Aviation Administration, Operations Support Group, Western Service Center, 1601 Lind Avenue SW., Renton, WA 98057; telephone (425) 203-4537.

#### SUPPLEMENTARY INFORMATION:

##### Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis

supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA 2013-0529 and Airspace Docket No. 13-ANM-17) and be submitted in triplicate to the Docket Management System (see **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at <http://www.regulations.gov>.

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed stamped postcard on which the following statement is made: "Comments to FAA Docket No. FAA-2013-0529 and Airspace Docket No. 13-ANM-17". The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

#### Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at <http://www.regulations.gov>. Recently published rulemaking documents can also be accessed through the FAA's Web page at [http://www.faa.gov/airports\\_airtraffic/air\\_traffic/publications/airspace\\_amendments/](http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/).

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for the address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined during normal business hours at the Northwest Mountain Regional Office of the Federal Aviation Administration, Air Traffic Organization, Western Service Center, Operations Support Group, 1601 Lind Avenue SW., Renton, WA 98057.

Persons interested in being placed on a mailing list for future NPRM's should

contact the FAA's Office of Rulemaking, (202) 267-9677, for a copy of Advisory Circular No. 11-2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

#### The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 by establishing Class E en route domestic airspace extending upward from 1,200 feet above the surface at the Glasgow VOR/DME navigation aid, Glasgow, MT. This action would contain aircraft while in IFR conditions under control of Salt Lake City and Minneapolis ARTCCs by vectoring aircraft from en route airspace to terminal areas.

Class E airspace designations are published in paragraph 6006, of FAA Order 7400.9W, dated August 8, 2012, and effective September 15, 2012, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in this Order.

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

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106, describes the authority for the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This proposed regulation is within the scope of that authority as it would establish controlled airspace the Glasgow VOR/DME, Glasgow, MT.

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1E, "Environmental Impacts: Policies and Procedures" prior to any FAA final regulatory action.

#### List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

#### The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR Part 71 as follows:

#### PART 71—DESIGNATION OF CLASS A, B, C, D AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

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

#### § 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9W, Airspace Designations and Reporting Points, dated August 8, 2012, and effective September 15, 2012 is amended as follows:

*Paragraph 6006 En Route Domestic Airspace Areas.*

\* \* \* \* \*

#### ANM MT E6 Glasgow, MT [New]

Glasgow VOR/DME, MT  
(Lat. 48°12'55" N., long. 106°37'32" W.)

That airspace extending upward from 1,200 feet above the surface within an area bounded by lat. 49°00'00" N., long. 109°11'00" W.; to lat. 49°00'00" N., long. 108°00'00" W.; to lat. 49°00'00" N., long. 107°00'00" W.; to lat. 49°00'00" N., long. 106°00'00" W.; to lat. 49°00'00" N., long. 105°30'00" W.; to lat. 48°21'00" N., long. 104°15'00" W.; to lat. 46°45'10" N., long. 103°00'00" W.; to lat. 45°27'21" N., long. 103°00'00" W.; to lat. 45°28'48" N., long. 103°10'00" W.; to lat. 45°36'35" N., long. 104°05'26" W.; to lat. 45°48'16" N., long. 106°34'25" W.; to lat. 46°00'00" N., long. 106°58'05" W.; to lat. 46°54'00" N., long. 108°49'30" W., thence to the point of beginning.

Issued in Seattle, Washington, on June 27, 2013.

**Rex MacLean,**

*Acting Manager, Operations Support Group, Western Service Center.*

[FR Doc. 2013-16571 Filed 7-9-13; 8:45 am]

**BILLING CODE 4910-13-P**

**DEPARTMENT OF ENERGY****Federal Energy Regulatory Commission****18 CFR Part 40****[Docket No. RM13–8–000]****Electric Reliability Organization Proposal To Retire Requirements in Reliability Standards****AGENCY:** Federal Energy Regulatory Commission.**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This document contains corrections to the proposed rule (RM13–8–000) which was published in the **Federal Register** of Friday, June 28, 2013 (78 FR 38851). The proposed regulations would approve the retirement of 34 requirements within 19 Reliability Standards identified by the North American Electric Reliability Corporation (NERC), the Commission-certified Electric Reliability Organization.

**FOR FURTHER INFORMATION CONTACT:**

Kevin Ryan (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, Telephone: (202) 502–6840.  
 Michael Gandolfo (Technical Information), Office of Electric Reliability, Division of Reliability Standards and Security, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, Telephone: (202) 502–6817.

**SUPPLEMENTARY INFORMATION:****Errata Notice**

On June 20, 2013, the Commission issued a “Notice of Proposed Rulemaking” in the above-captioned proceeding, *Electric Reliability Organization Proposal to Retire Requirements in Reliability Standards*, 143 FERC ¶ 61,251 (2013).

This errata notice serves to correct P 90 and the associated table. Specifically, in P 90, the estimate “\$535,500” in the first sentence is changed to “\$518,220.”

In the table in P 90, the “Estimated Total Annual Reduction in Burden (in hours)” for FAC–013–2, R3 and INT–007–1, R1.2 is changed from “1,600” to “640” and from “448” to “1,120,” respectively, and the Total is changed from “8,925” to “8,637.”

In addition, in the table in P 90, the “Estimated Total Annual Reduction in Cost” for FAC–013–2, R3 and INT–007–1, R1.2 is changed from “\$96,000” to “\$38,400” and from “\$26,880” to “\$67,200,” respectively, and the Total is

changed from “\$535,500” to “\$518,220.”

In FR Doc. 2013–15433 appearing on page 38851 in the **Federal Register** of Friday, June 28, 2013, the same corrections are made:

1. On page 38860, in P 90, the estimate “\$535,500” in the first sentence is changed to “\$518,220.”

2. On page 38860, in the table in P 90, the “Estimated Total Annual Reduction in Burden (in hours)” for FAC–013–2, R3 and INT–007–1, R1.2 is changed from “1,600” to “640” and from “448” to “1,120,” respectively, and the Total is changed from “8,925” to “8,637.”

3. On page 38860, in the table in P 90, the “Estimated Total Annual Reduction in Cost” for FAC–013–2, R3 and INT–007–1, R1.2 is changed from “\$96,000” to “\$38,400” and from “\$26,880” to “\$67,200,” respectively, and the Total is changed from “\$535,500” to “\$518,220.”

Dated: July 3, 2013.

**Kimberly D. Bose,**

Secretary.

[FR Doc. 2013–16495 Filed 7–9–13; 8:45 am]

**BILLING CODE 6717–01–P****DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT****24 CFR Part 207****[Docket No. FR–5583–P–01]****RIN 2502–AJ16****Federal Housing Administration (FHA) Multifamily Mortgage Insurance; Capturing Excess Claim Proceeds****AGENCY:** Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would amend HUD’s regulations covering the contract rights and obligations of mortgagees participating in FHA multifamily mortgage insurance programs, to address reimbursement to FHA of excess claim proceeds. When a mortgagee finances mortgages through the issuance and sale of bonds or through bond anticipation notes, the mortgagee uses the FHA insurance claim funds to pay off the remaining bond debts. At times, the amount paid by the FHA insurance claim is greater than the remaining bond debts. This proposed rule would require mortgagees to return to FHA the excess bond funds that remain after FHA’s payment is used to satisfy the bonds. HUD requires similar payments of excess bond funds

on obligations of public housing agencies and, thus, the proposed rule would provide consistency in the administration of HUD’s bond financing programs.

**DATES:** *Comment Due Date:* September 9, 2013.**ADDRESSES:** Interested persons are invited to submit comments regarding this proposed rule to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410–0500. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. *Submission of Comments by Mail.* Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410–0500.

2. *Electronic Submission of Comments.* Interested persons may submit comments electronically through the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov). HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the [www.regulations.gov](http://www.regulations.gov) Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

**Note:** To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.

*No Facsimile Comments.* Facsimile (FAX) comments are not acceptable.

*Public Inspection of Public Comments.* All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m., weekdays, at the above address. Due to security measures at the HUD Headquarters building, an appointment to review the public comments must be scheduled in advance by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service, at toll free,

800-877-8339. Copies of all comments submitted are available for inspection and downloading at [www.regulations.gov](http://www.regulations.gov).

**FOR FURTHER INFORMATION CONTACT:**

James Mitchell, Project Officer, Office of Multifamily Housing Programs, Office of Asset Management, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 7164, Washington, DC 20410; telephone number 202-708-2612 (this is not a toll-free number). Persons with hearing or speech impairments may access this number through TTY by calling the Federal Relay Service, toll free, at 800-877-8339.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

FHA provides mortgage insurance on loans made by FHA-approved lenders for single-family and multifamily homes. FHA mortgage insurance provides lenders with protection against losses as the result of single-family and multifamily project owners defaulting on their mortgage loans. By insuring loans made to FHA-approved lenders, FHA facilitates the availability of mortgage financing and helps to expand affordable housing. The FHA multifamily insurance program is authorized by section 207 of the National Housing Act (12 U.S.C. 1713). HUD's regulations implementing multifamily mortgage insurance eligibility requirements and contract rights and obligations can be found at 24 CFR part 207 (entitled "Multifamily Housing Mortgage Insurance").

Under part 207, upon an assignment of the mortgage or a conveyance of the property to FHA, FHA will pay insurance benefits to the mortgagee. When the loan is bond financed<sup>1</sup>, the lender remits the payment to the bond trustee who pays off the bond debts, debt services on the bond, and fees and expenses owed to parties (such as the trustee or the bond issuer). The amount of the claim is determined in compliance with a regulatory formula<sup>2</sup> and is meant to provide only the funds needed to settle the claim. Most of the factors in determining the proper claim amount are known. However, the bond trust indenture (contract) requires that certain reserves be held, including a debt service reserve, to maintain payments to bond holders prior to a

<sup>1</sup> HUD's regulation at 24 CFR 207.258 provides that mortgages may be funded with the proceeds of state or local bonds, Government National Mortgage Association (GNMA or Ginnie Mae) mortgage-backed securities, participation certificates, or other bond obligations, as may be specified by the FHA Commissioner.

<sup>2</sup> See 24 CFR 207.259.

default in the case where the mortgagor does not make proper payment. Funds in the reserve accounts earn interest and, given the passage of time and uncertainty of short-term interest rates, it is difficult to know how much more money will be in the reserves at the time the claim is settled and all the obligations are finally paid. As a result, the trustee is sometimes left with additional funds, also known as "excess bond funds."

Excess bond funds are then distributed by the bond trustee, according to the trust indenture agreement, to the mortgagor, the mortgagee, FHA, or other third parties. As a result, the mortgagor or the mortgagee may receive excess bond funds stemming from FHA's payment on the insurance claim. FHA's insurance payment is designed to make the mortgagee whole when the mortgagor defaults on the mortgage loan. Under the current distribution, a multifamily project owner and lender may benefit from the mortgage default, which is contrary to the intended results of FHA mortgage insurance to increase the availability of affordable housing.

**II. This Proposed Rule**

Through this proposed rule, HUD seeks to address this concern by requiring mortgagees to reimburse FHA for the excess bond funds that remain after the insurance claim payment is used to satisfy the bonds. HUD requires similar payments of excess bond funds on obligations of public housing agencies, under 24 CFR part 811, entitled "Tax Exemption of Obligations of Public Housing Agencies and Related Amendments" (see especially 24 CFR 811.108, which addresses debt service reserve). Accordingly, the proposed rule would not only rectify the possibility that a mortgagor or mortgagee benefits from the mortgage default, but would also provide consistency in the administration of HUD's bond financing programs. The specific regulatory amendments that would be made by this proposed rule are as follows:

This proposed rule would add a new § 207.261 that requires mortgagees that use the issuance and sale of bonds or bond anticipation notes to finance FHA-insured mortgages on multifamily housing to return excess bond funds to FHA.

New § 207.261 would require the mortgagee to do three things. First, the mortgagee must include in the bond trust indenture language that, upon a conveyance or assignment of the mortgage, the bond trustee must remit to the mortgagee all remaining excess bond funds after the issuance of the refunding

bond and other required payments. For purposes of § 207.261, "excess bond funds" would mean (1) money remaining in all funds and accounts other than a rebate fund,<sup>3</sup> and (2) any other funds remaining under the indenture after payment, or provision for payment, of debt service on the bonds and the fees and expenses of the credit enhancer, issuer, trustee, and other such parties unrelated to the mortgagor (other than funds originally deposited by the mortgagor or related parties on or before the date of issuance of the refunding bonds). Second, the mortgagee, upon FHA's payment of an insurance claim, must legally enforce the trust indenture to collect all of the remaining excess bond funds. Finally, the mortgagee must remit to FHA all excess bond funds that result from FHA's payment of an insurance claim after a conveyance or assignment of the mortgage to FHA, no later than 6 months following the date that FHA pays the mortgage insurance claim.

The proposed rule would also amend § 207.251, which is the definition section for the part 207, subpart B, regulations, to include a definition of "rebate fund" which is based on the definitions provided in footnote 3 of this preamble.

**III. Cost and Benefits of the Proposed Rule**

The proposed rule would amend HUD's regulations covering the contract rights and obligations of mortgagees participating in FHA multifamily insurance programs and using tax-exempt bonds under section 103 of the Internal Revenue Code (IRC),<sup>4</sup> to make explicit that proceeds remaining after bond debts have been paid off as the result of a claim must be returned to FHA. The existence and possible value of any excess bond funds to individual private entities cannot be precisely stated, as such measures are dependent on the following: the occurrence and timing of a default (which is by definition an unforeseen result of any nonfraudulent lending in the program); the current interest rate environment;<sup>5</sup>

<sup>3</sup> A rebate fund, also referred to as an arbitrage rebate fund is a fund typically established under the bond contract for tax-exempt bonds in which arbitrage earnings from investments in various funds and accounts holding bond proceeds are accumulated in order to make arbitrage rebate payments to the Federal Government. See [http://www.msrb.org/msrb1/glossary/view\\_def.asp?param=ARBITRAGEREBATEFUND](http://www.msrb.org/msrb1/glossary/view_def.asp?param=ARBITRAGEREBATEFUND). See also <http://www.irs.gov/pub/irs-tege/part2e02.pdf>.

<sup>4</sup> Under section 103, payments of interest on State or local bonds are excludable from gross income. (See 26 U.S.C. 103.)

<sup>5</sup> Reserve funds may grow more slowly due to low interest rates and the low rates on taxable financing

the bond indenture; and, then, on the independent actions that HUD and the trustee take. As a result, the value of any windfall is likely to be limited. Approximately 3 percent of total claims are financed by issuing section 103 tax-exempt bonds. In 2012, there were \$189 million in claims and 3 percent of this number, \$5.67 million, provides an estimate of the total claims for tax-exempt bond financed projects. HUD estimates that about 1.16 percent of outstanding balances are subject to recapture; therefore, in 2012 there was an estimated \$66,000 in excess claims that would be recaptured by this rule.

The transfer of excess claim funds to FHA as proposed by this rule makes explicit that FHA's payment of a claim for bond debts is not to result in either a windfall for the mortgagee, the mortgagor, or any third party. Given the inherently unexpected nature and

uncertain value of any excess claims, the proposed rule, if enacted, is not expected to have a significant impact on future mortgages or their interest or behavior in the program. If mortgagee participation in the program is unlikely to be affected, the proposed rule is also unlikely to affect how future mortgagors or others experience the program. It should be noted that, while the impact of the proposed rule on any individual entity is likely to be inconsequential, there is value to FHA from the proposed change. Across all of its borrowers, the occurrence of defaults and the payment of excess claims are statistically likely events, and the aggregate amount of program funds currently expended on such windfall payouts across all claims over time is sufficient to motivate the proposed rule. However, based on the 2012 data pertaining to claims for tax-exempt bond financed projects, as

discussed in the preceding paragraph, the aggregate amount of funds is well below the amount that would make this rule economically significant.

**IV. Findings and Certifications**

*Paperwork Reduction Act*

The information collection requirements contained in this proposed rule have been submitted to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). In accordance with the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a currently valid OMB control number.

The burden of the information collections in this proposed rule is estimated as follows:

**REPORTING AND RECORDKEEPING BURDEN**

[Office of Housing to provide matrix information]

Section reference	Number of respondents	Number of responses per respondent	Estimated average time for requirement (in hours)	Estimated annual burden (in hours)
§ 207.261(a) .....	15	1	.5	7.5
Totals .....	.....	.....	.....	7.5

In accordance with 5 CFR 1320.8(d)(1), HUD is soliciting comments from members of the public and affected agencies concerning this 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., through permitting electronic submission of responses.

Interested persons are invited to submit comments regarding the information collection requirements in this rule. Comments must refer to the

proposal by name and docket number and must be sent to:

HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503, Fax number: 202–395–6947

and

Reports Liaison Officer, Office of Housing, Department of Housing and Urban Development, Room 9128, 451 7th Street SW., Washington, DC 20410.

Interested persons may submit comments regarding the information collection requirements electronically through the Federal eRulemaking Portal at <http://www.regulations.gov>. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the

<http://www.regulations.gov> Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

*Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 605(b)) generally requires an agency to conduct regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The proposed rule would not impose any economic burdens on FHA-approved mortgagees. The proposed regulatory amendments would not modify the terms of FHA mortgage insurance through which mortgagees are made financially whole in the case of a mortgage default and filing of a mortgage insurance claim. Rather, the proposed rule seeks to rectify the possibility that a mortgagor and mortgagee may profit from a mortgage

have made tax-exempt financing less advantageous to developers.

default, which is inconsistent with HUD's public housing bond financing regulations, the purpose of the FHA programs, and the proper administration of the FHA mortgage insurance funds. Accordingly, the undersigned certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Notwithstanding HUD's determination that this rule will not have a significant economic impact on a substantial number of small entities, HUD specifically invites comments regarding less burdensome alternatives to this rule that will meet HUD's objectives as described in this preamble.

#### *Executive Order 13132, Federalism*

Executive Order 13132 (entitled "Federalism") prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This rule will not have federalism implications and would not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

#### *Environmental Review*

This final rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern, or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction, or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(1), this final rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

#### *Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and the private sector. This proposed rule does not impose any Federal mandates on any state, local, or tribal government, or the private sector within the meaning of UMRA.

#### *Catalog of Federal Domestic Assistance*

The Catalog of Federal Domestic Assistance number for FHA mortgage

insurance for the purchase or refinancing of existing multifamily housing projects is 14.155.

#### **List of Subjects in 24 CFR Part 207**

Manufactured homes, Mortgage insurance, Reporting and recordkeeping requirements, Solar energy.

Accordingly, for the reasons stated in the preamble, HUD proposes to revise 24 CFR part 207 as follows:

#### **PART 207—MULTIFAMILY HOUSING MORTGAGE INSURANCE**

■ 1. The authority citation for part 207 continues to read as follows:

**Authority:** 12 U.S.C. 1701z–11(e), 1709(c)(1), 1713, and 1715b; 42 U.S.C. 3535(d)

■ 2. Revise § 207.251 to read as follows:

##### **§ 207.251 Definitions.**

As used in this subpart:

*Act* means the National Housing Act, as amended.

*Commissioner* means the Federal Housing Commissioner.

*Contract of insurance* means the agreement evidenced by such endorsement and includes the terms, conditions and provisions of this part and of the National Housing Act.

*Insured mortgage* means a mortgage which has been insured by the endorsement of the credit instrument by the Commissioner, or his duly authorized representative.

*Mortgage* means such a first lien upon real estate and other property as is commonly given to secure advances on, or the unpaid purchase price of, real estate under the laws of the State, district or territory in which the real estate is located, together with the credit instrument or instruments, if any, secured thereby. In any instance where an operating loss loan is involved, the term shall include both the original mortgage and the instrument securing the operating loss loan.

*Mortgagee* means the original lender under a mortgage its successors and such of its assigns as are approved by the Commissioner, and includes the holders of the credit instruments issued under a trust indenture, mortgage or deed of trust pursuant to which such holders act by and through a trustee therein named.

*Mortgagor* means the original borrower under a mortgage and its successors and such of its assigns as are approved by the Commissioner.

*Rebate fund* means a separate fund established under a contract or agreement for tax-exempt bonds in which amounts (excess interest earnings from the tax-exempt bonds) must be

deposited to make rebate payments to the federal government under the Internal Revenue Code.

■ 3. Add § 207.261 to read as follows:

##### **§ 207.261 Rebate of excess claim proceeds.**

A mortgagee that finances housing insured under this part through the issuance and sale of bonds or bond anticipation notes shall:

(a) Include language in the trust indenture that states that in the event of an assignment or conveyance of the mortgage, subsequent to the issuance of the bonds, all money remaining in all funds and accounts other than the rebate fund, and any other funds remaining under the indenture after payment or provision for payment of debt service on the bonds and the fees and expenses of the credit enhancer, issuer, trustee, and other such parties unrelated to the mortgagor (other than funds originally deposited by the mortgagor or related parties on or before the date of issuance of the refunding bonds) shall be returned to the mortgagee; and

(b) Upon the Commissioner's payment of a mortgage insurance claim under § 207.258, the mortgagee shall take all legally entitled actions to enforce the clause required by paragraph (a) of this section and pay the Commissioner any remaining bond funds returned to the mortgagee by the bond trustee, no later than 6 months after the date of the Commissioner's payment of the mortgage insurance claim.

Dated: June 12, 2013.

**Carol J. Galante,**

*Assistant Secretary for Housing—Federal Housing Commissioner.*

[FR Doc. 2013–16456 Filed 7–9–13; 8:45 am]

**BILLING CODE 4210–67–P**

## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Part 52**

[EPA–R08–OAR–2010–0389; FRL–9831–9]

#### **Approval and Promulgation of Air Quality Implementation Plans; State of Colorado Second Ten-Year PM<sub>10</sub> Maintenance Plan for Cañon City**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing approval of the State Implementation Plan (SIP) revisions submitted by the State of Colorado. On June 18, 2009, the Governor of Colorado's designee

submitted to EPA a revised maintenance plan for the Cañon City area for the National Ambient Air Quality Standards (NAAQS) for particulate matter with an aerodynamic diameter less than or equal to 10 microns (PM<sub>10</sub>), which was adopted by the State on November 20, 2008. As required by Clean Air Act (CAA) section 175A(b), this revised maintenance plan addresses maintenance of the PM<sub>10</sub> standard for a second 10-year period beyond the area's original redesignation to attainment for the PM<sub>10</sub> NAAQS. In addition, EPA is also proposing approval of the revised maintenance plan's 2020 transportation conformity motor vehicle emissions budget for PM<sub>10</sub>. This action is being taken under sections 110 and 175A of the CAA.

**DATES:** Written comments must be received on or before August 9, 2013.

**ADDRESSES:** Submit your comments, identified by Docket number EPA-R08-OAR-2010-0389, by one of the following methods:

- <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.

- *Email:* [ostigaard.crystal@epa.gov](mailto:ostigaard.crystal@epa.gov).
- *Fax:* (303) 312-6064 (please alert the individual listed in the **FOR FURTHER INFORMATION CONTACT** if you are faxing comments).

- *Mail:* Carl Daly, Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P-AR, 1595 Wynkoop Street, Denver, Colorado 80202-1129.

- *Hand Delivery:* Carl Daly, Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P-AR, 1595 Wynkoop Street, Denver, Colorado 80202-1129. Such deliveries are only accepted Monday through Friday, 8:00 a.m. to 4:30 p.m., excluding Federal holidays. Special arrangements should be made for deliveries of boxed information.

Please see the direct final rule which is located in the Rules section of this **Federal Register** for detailed instruction on how to submit comments.

**FOR FURTHER INFORMATION CONTACT:** Crystal Ostigaard, Air Program, U.S. Environmental Protection Agency, Region 8, Mailcode 8P-AR, 1595 Wynkoop Street, Denver, Colorado 80202-1129, (303) 312-6602, [ostigaard.crystal@epa.gov](mailto:ostigaard.crystal@epa.gov).

**SUPPLEMENTARY INFORMATION:** In the Rules section of this **Federal Register**, EPA is approving the State's SIP revision through a direct final rule without prior proposal because the Agency views this as a noncontroversial SIP revision and anticipates no adverse comments. A detailed rationale for the

approval is set forth in the preamble to the direct final rule. If EPA receives no adverse comments, EPA will not take further action on this proposed rule. If EPA receives adverse comments, EPA will withdraw the direct final rule and it will not take effect. Then, EPA will address all public comments in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment. See the information provided in the direct final rule of the same title which is located in the Rules section of this **Federal Register**.

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

Dated: June 20, 2013.

**Shaun L. McGrath,**

*Regional Administrator, Region 8.*

[FR Doc. 2013-16507 Filed 7-9-13; 8:45 am]

**BILLING CODE 6560-50-P**

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Parts 2 and 22

[GN Docket No. 13-114; FCC 13-66]

#### Expanding Access to Broadband and Encouraging Innovation Through Establishment of an Air-Ground Mobile Broadband Secondary Service for Passengers Aboard Aircraft in the 14.0-14.5 GHz Band

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Federal Communications Commission (Commission) proposes an allocation in the 14.0-14.5 GHz band to permit operation of an air-ground mobile broadband service in the contiguous United States. The Commission proposes a secondary allocation for air-ground mobile broadband, and requires new air-ground mobile broadband licensees to avoid harmful interference to the Fixed-Satellite Service and prior-licensed Federal Fixed Service, Mobile Service, and Space Research Service users in the 14.0-14.5 GHz band, and to coordinate with the Radio Astronomy Service to avoid interference to radio astronomy observations. The Commission also proposes to license air-ground mobile broadband on a nationwide basis, and

seeks comment on whether it should license air-ground mobile broadband in two spectrum blocks of 250 megahertz each, one spectrum block of 500 megahertz, or some other spectrum block size. The Commission proposes to grant licenses by auction in the case of mutually exclusive applications.

**DATES:** Submit comments on or before August 26, 2013, and replies on or before September 23, 2013. Paperwork Reduction Act (PRA) comments should be on or before September 9, 2013.

**ADDRESSES:** Address comments concerning this proposed rule to the Secretary, Federal Communications Commission, 445 12th Street SW., Washington, DC 20554. U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street SW., Washington DC 20554.

Commercial overnight mail other than U.S. Postal Service Express Mail and Priority Mail must be sent to the Secretary, Federal Communications Commission, 9300 East Hampton Drive, Capitol Heights, MD 20743.

PRA comments should be submitted to Cathy Williams, Federal Communications Commission via email at [PRA@fcc.gov](mailto:PRA@fcc.gov) and [Cathy.Williams@fcc.gov](mailto:Cathy.Williams@fcc.gov) and Nicholas A. Fraser, Office of Management and Budget via fax at 202-395-5167 or via email to [Nicholas\\_A.\\_Fraser@omb.eop.gov](mailto:Nicholas_A._Fraser@omb.eop.gov).

**SUPPLEMENTARY INFORMATION:** This is a summary of the Notice of Proposed Rulemaking, GN Docket No. 13-114, FCC 13-66, adopted May 9, 2013, and released May 9, 2013. The full text of the Notice of Proposed Rulemaking is available for inspection and copying during normal business hours in the FCC Reference Center, 445 12th Street SW., Washington, DC 20554. The document also is available for download over the Internet at [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2011/db0513/FCC-11-76A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0513/FCC-11-76A1.pdf).

The complete text also may be purchased from the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), located in Room CY-B402, 445 12th Street SW., Washington, DC 20554. Customers may contact BCPI at its Web site: <http://www.bcpweb.com> or call 1-800-378-3160.

#### Comment Filing Procedures

Pursuant to 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated above. Comments may be filed electronically or by hand delivery. See Electronic Filing of

Documents in Rulemaking Proceedings, 63 FR 24121 (1998).

○ *Electronic Filers:* Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) at <http://fjallfoss.fcc.gov/ecfs2/>. See Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998).

○ *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

• *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St. SW., Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.

• *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by email: [FCC504@fcc.gov](mailto:FCC504@fcc.gov), phone: 202-418-0530 or TTY: 202-418-0432.

**FOR FURTHER INFORMATION CONTACT:**

Howard Griboff or Sean O'More, Policy Division, International Bureau, FCC, (202) 418-1460 or via the Internet at: [Howard.Griboff@fcc.gov](mailto:Howard.Griboff@fcc.gov) and [Sean.O'More@fcc.gov](mailto:Sean.O'More@fcc.gov). On PRA matters contact Cathy Williams, Office of the Managing Director, FCC, (202) 418-2918 or via the Internet at: [Cathy.Williams@fcc.gov](mailto:Cathy.Williams@fcc.gov).

*Paperwork Reduction Act Analysis*

The Notice of Proposed Rulemaking contains proposed new information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and the Budget to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-

13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), the Commission seeks comment on how it might further reduce the information collection burden for small business concerns with fewer than 25 employees.

Comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), we seek specific comment on how we might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

To view or obtain a copy of this information collection request (ICR) submitted to OMB: (1) Go to this OMB/GSA Web page: <http://www.reginfo.gov/public/do/PRAMain>, (2) look for the section of the Web page called "Currently Under Review," (3) click on the downward-pointing arrow in the "Select Agency" box below the "Currently Under Review" heading, (4) select "Federal Communications Commission" from the list of agencies presented in the "Select Agency" box, (5) click the "Submit" button to the right of the "Select Agency" box, and (6) when the list of FCC ICRs currently under review appears, look for the OMB control number of this ICR as shown in the Supplementary Information section below (or its title if there is no OMB control number) and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

*OMB Control Number:* 3060-XXXX.

*Title:* Air-Ground Mobile Broadband.

*Form Number:* Not Applicable.

*Type of Review:* New Information Collection.

*Respondents:* Business or other for-profit entities.

*Number of Respondents and Responses:* 15 respondents; 15 responses.

*Estimated Hours per Response:* 6 hours (average).

*Frequency of Response:* On occasion reporting requirement.

*Total Annual Burden:* 90 hours.

*Total Annual Costs:* \$8,250.

*Obligation to Respond:* Required to obtain or retain benefits. The statutory authority for this collection is contained in sections 4(i), 4(j), 7(a), 302(a), 303(c), 303(e), 303(f), 303(g), 303(j), 303(r) and 303(y) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 157(a), 302(a), 303(c), 303(e), 303(f), 303(g), 303(j), 303(r), 303(y).

*Confidentiality:* The Commission does not provide assurances of confidentiality to entities submitting their filings and applications. However, entities may request confidential treatment of their applications and filings under 47 CFR 0.459 of the Commission's rules. With regard to certifications filed pursuant to part 2 of the Commission's rules, parties receive minimal exemption from the Freedom of Information Act (FOIA).

*Privacy Impact Assessment:* No impact(s).

*Needs and Uses:* The purpose of this new information collection is to address the Paperwork Reduction Act (PRA) requirements proposed in the Commission's NPRM (FCC 13-66) to establish rules for the licensing of the air-ground broadband service. In the NPRM, the Commission proposes new information collection requirements applicable to potential air-ground broadband service licensees. The proposed rule changes include applying the information requirements and procedures currently in part 1 of the Commission's rules to applications for air-ground mobile broadband licenses. The Notice also proposes to require new air-ground mobile broadband licensees to complete coordination agreements with licensees in the National Aeronautics and Space Administration's Tracking and Data Relay Satellite Service and with radio astronomy observatories. Further, the Notice invites comment on whether to adopt interim reporting requirements to ensure that licensees are making timely and quantifiable progress on their obligations to construct and provide service. If the Commission adopted a rule requiring interim reporting requirements, the rule would presumably require the licensee to demonstrate in some manner that it has taken efforts to construct its air-ground mobile broadband system. In addition, the Notice proposes requiring licensees to file a notification within 15 days of the end of their ten-year license term demonstrating that they have met their build-out requirements. Specifically, each construction notification would include electronic coverage maps and supporting documentation, which must

be truthful and accurate and must not omit material information that is necessary for the Commission to determine compliance with its construction requirement. Also, the Notice proposes requiring applicants for renewal licenses to file a detailed renewal showing, demonstrating that they are providing service to the public or are using the spectrum for private, internal communication to the extent permitted by the Commission, and substantially complying with the Communications Act, and the Commission's rules and policies, including any applicable performance requirements.

### Summary of Notice of Proposed Rulemaking

In the Notice of Proposed Rulemaking (Notice), the Federal Communications Commission (Commission) continues to address consumer demand for more broadband access aboard aircraft. The Commission proposes to establish an air-ground mobile broadband service to help meet demand from travelers to connect to a full range of communications services while flying in the contiguous United States.

The Commission proposes to add a secondary allocation to the 14.0–14.5 GHz band for air-ground mobile broadband. The 14.0–14.5 GHz band is allocated on a primary basis to the Fixed-Satellite Service (FSS) for Earth-to-space communications, and is currently used by several geostationary-orbit (GSO) FSS systems. The 14.0–14.2 GHz sub-band is allocated on a secondary basis to the Space Research Service, and is used by the National Aeronautics and Space Administration's Tracking and Data Relay Satellite Service (TDRSS). The 14.4–14.5 GHz sub-band is allocated on a secondary basis to the Fixed Service and the Mobile Service for Federal government use. The 14.47–14.5 GHz sub-band is allocated to the Radio Astronomy Service (RAS) on a permissive basis.

Air-ground mobile broadband would use spatial diversity to avoid interference to the FSS, transmitting only northward from each base station, while GSO FSS satellites are all south of the United States. Airborne stations would avoid interference to the FSS by transmitting only downward. The Commission proposes to require air-ground mobile broadband licensees to coordinate with TDRSS licensees and RAS sites as a condition of beginning operations. The Commission also notes that air-ground mobile broadband licenses will be required to avoid causing harmful interference to prior-licensed Federal users, and seeks

comment on whether it should impose coordination requirements with Federal licensees on air-ground mobile broadband licensees.

The Commission proposes to license air-ground mobile broadband on a nationwide basis, and requests comment on whether air-ground mobile broadband should be licensed in two spectrum blocks of 250 megahertz each, one spectrum block of 500 megahertz, or some other spectrum block size. The Commission proposes to adopt a geographic area licensing approach for the 14.0–14.5 GHz band that would permit the filing and acceptance of mutually exclusive applications that it would be required to resolve through competitive bidding consistent with the mandate of section 309(j) of the Communications Act. Accordingly, the Commission seeks comment on a number of proposals relating to competitive bidding for licenses for spectrum in the 14.0–14.5 GHz band. The Commission proposes to conduct any auction for air-ground mobile broadband licenses in the 14.0–14.5 GHz band in conformity with the general competitive bidding rules set forth in part 1, subpart Q of the Commission's rules, 47 CFR 1.2101–1.2114, and substantially consistent with the competitive bidding procedures that it has employed in previous auctions. Specifically, the Commission proposes to employ the part 1 rules governing competitive bidding design, designated entity preferences, unjust enrichment, application and payment procedures, reporting requirements, and the prohibition on certain communications between auction applicants. Such rules would be subject to any modifications that the Commission may adopt for its part 1 general competitive bidding rules in the future. In addition, consistent with the Commission's long-standing approach, auction-specific matters such as the competitive bidding design and mechanisms, as well as minimum opening bids and/or reserve prices, would be determined by the Wireless Telecommunications Bureau pursuant to its delegated authority.

The Commission also proposes to make small business bidding credits available for the 14.0–14.5 GHz air-ground mobile broadband service. Its proposal to offer small business bidding credits is based on the belief that deployment and operational costs may be significantly lower than for other previously-authorized nationwide services such as the Direct Broadcast Satellite Service and Digital Audio Radio Satellite Service, because the necessary infrastructure may be less

costly. The Commission also suggests that the capital requirements of providing commercial air-ground mobile broadband service in the 14.0–14.5 GHz band may generally be similar to the capital requirements of providing commercial air-ground service in the 800 MHz band, a nationwide service for which the Commission decided to offer bidding credits. The Commission seeks comment on whether small businesses may be able to attract the necessary capital to provide air-ground mobile broadband service, particularly if they are assisted by bidding credits.

The Commission proposes to use the same small business definitions it has adopted for other capital-intensive services that serve large geographic areas. Specifically, it proposes to define a small business as an entity with average annual gross revenues for the three preceding years not exceeding \$40 million, and to define a very small business as an entity with average annual gross revenues for the three preceding years not exceeding \$15 million. The Commission also proposes a 15 percent bidding credit for small businesses and a 25 percent bidding credit for very small businesses, as set forth in its standardized schedule at 47 CFR 1.2110(f)(2). These are the same tiered small business definitions and bidding credits that the Commission adopted for licenses for the 800 MHz commercial Air-Ground Radiotelephone Service, and for EAG-based licenses in the upper and lower 700 MHz bands.

The Commission also seeks comment on whether its proposed designated entity provisions, if applied to an air-ground mobile broadband service, would promote participation by businesses owned by minorities and by women, as well as participation by rural telephone companies. To the extent that commenters propose additional provisions to enhance participation by minority-owned or women-owned businesses, commenters should address how the Commission should craft such provisions to meet the relevant standards of judicial review.

The Commission proposes technical standards to minimize the possibility of interference from air-ground mobile broadband to the FSS. The Commission also proposes to require that air-ground mobile broadband-equipped aircraft cease operations when flying in Canadian airspace. Finally, the Commission proposes to require air-ground mobile broadband licensees to adhere to the provisions of the Communications Assistance to Law Enforcement Act.

### Initial Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>1</sup> the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in the Notice of Proposed Rulemaking (Notice) in GN Docket No. 13–114. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines specified in the Notice for comments. The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).<sup>2</sup> In addition, the Notice and IRFA (or summaries thereof) will be published in the **Federal Register**.<sup>3</sup>

#### A. Need for, and Objectives of, the Notice

The Notice seeks to promote more intensive use of spectrum and spectrum sharing in order to provide passengers aboard aircraft flying over the United States with expanded access to broadband service. The air-ground mobile broadband service proposed would allow terrestrial-based air-ground mobile broadband systems to provide service in the 14.0–14.5 GHz band, while at the same time protecting Fixed-Satellite Service (FSS) operations in the band and accommodating other users of the band, including Federal government licensees in the Fixed and Mobile Services, the Space Research Service, and the Radio Astronomy Service (RAS).

#### B. Legal Basis

The proposed action is authorized pursuant to sections 4(i), 4(j), 7(a), 302(a), 303(c), 303(e), 303(f), 303(g), 303(j), 303(r), and 303(y) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 157(a), 302(a), 303(c), 303(e), 303(f), 303(g), 303(j), 303(r), 303(y).

#### C. Description and Estimate of the Number of Small Entities to Which Rules Will Apply

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the rules

adopted herein.<sup>4</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>5</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>6</sup> A small business concern is one that: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.<sup>7</sup> Below, we further describe and estimate the number of small entity licensees that may be affected by the adopted rules.

#### D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

The Notice proposes a number of rule changes that could affect the reporting, recordkeeping, and other compliance requirements for small businesses licensed to provide the contemplated new service. Among other things, these proposed rule changes include applying the information requirements and procedures currently in part 1 of the Commission’s rules to applications for air-ground mobile broadband licenses.

The Notice also proposes to require new air-ground mobile broadband licensees to complete coordination agreements with licensees in the National Aeronautics and Space Administration’s Tracking and Data Relay Satellite Service and with radio astronomy observatories.

Further, the Notice invites comment on whether to adopt interim reporting requirements to ensure that licensees are making timely and quantifiable progress on their obligations to construct and provide service. If the Commission adopted a rule requiring interim reporting requirements, the rule would presumably require the licensee to demonstrate in some manner that it has taken efforts to construct its air-ground mobile broadband system.

In addition, the Notice proposes requiring licensees to file a notification within 15 days of the end of their ten-year license term demonstrating that

they have met their build-out requirements. Specifically, each construction notification would include electronic coverage maps and supporting documentation, which must be truthful and accurate and must not omit material information that is necessary for the Commission to determine compliance with its construction requirement.

Also, the Notice proposes requiring applicants for renewal licenses to file a detailed renewal showing, demonstrating that they are providing service to the public or are using the spectrum for private, internal communication to the extent permitted by the Commission, and substantially complying with the Communications Act, and the Commission’s rules and policies, including any applicable performance requirements.

#### E. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

The RFA requires that, to the extent consistent with the objectives of applicable statutes, the analysis shall discuss significant alternatives such as: (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>8</sup>

The Notice solicits comment on alternatives to the proposed rules for air-ground mobile broadband in the 14.0–14.5 GHz band.

#### F. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

None.

#### Ordering Clauses

*It is ordered* that, pursuant to the authority contained in sections 4(i), 4(j), 7(a), 302(a), 303(c), 303(e), 303(f), 303(g), 303(j), 303(r), and 303(y) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 157(a), 302(a), 303(c), 303(e), 303(f), 303(g), 303(j), 303(r), 303(y), this Notice of Proposed Rulemaking in GN Docket No. 13–114 is adopted. It is further ordered pursuant to sections 4(i) and (j) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), (j), 303(r), and § 1.407 of the

<sup>4</sup> 5 U.S.C. 604(a)(3).

<sup>5</sup> 5 U.S.C. 601(6).

<sup>6</sup> 5 U.S.C. 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. 632). Pursuant to the RFA, the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after the opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**.” 5 U.S.C. 601(3).

<sup>7</sup> Small Business Act, 15 U.S.C. 632 (1996).

<sup>8</sup> 5 U.S.C. 603(c)(1), (c)(4).

<sup>1</sup> See 5 U.S.C. 603. The RFA, see 5 U.S.C. 601–612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996, (SBREFA) Public Law 104–121, Title II, 110 Stat. 857 (1996).

<sup>2</sup> See 5 U.S.C. 603(a).

<sup>3</sup> See 5 U.S.C. 603(a).

Commission's rules, 47 CFR 1.407, that the Petition for Rulemaking filed by Qualcomm, Inc. on July 7, 2011, is granted to the extent provided in this Notice.

**List of Subjects in 47 CFR Parts 2 and 22**

Communications, Satellites,  
Telecommunications.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR parts 2 and 22 as follows:

**PART 2—FREQUENCY ALLOCATIONS  
AND RADIO TREATY MATTERS;  
GENERAL RULES AND REGULATIONS**

■ 1. The authority citation for part 2 continues to read as follows:

**Authority:** 47 U.S.C. 154, 302a, 303, and 336, unless otherwise noted.

■ 2. Section 2.106, the Table of Frequency Allocations, is amended as follows:

■ a. Page 49 is revised.

■ b. In the list of United States (US) Footnotes, footnote US133 is revised.

The revisions read as follows:

**§ 2.106 Table of Frequency Allocations.**

\* \* \* \* \*

**BILLING CODE 6712-01-P**

Table of Frequency Allocations			14-17.7 GHz (SHF)		Page 49
International Table			United States Table		FCC Rule Part(s)
Region 1 Table	Region 2 Table	Region 3 Table	Federal Table	Non-Federal Table	
14-14.25 FIXED-SATELLITE (Earth-to-space) 5.457A 5.457B 5.484A 5.506 5.506B RADIONAVIGATION 5.504 Mobile-satellite (Earth-to-space) 5.504B 5.504C 5.506A Space research			14-14.2 Space research US133	14-14.2 FIXED-SATELLITE (Earth-to-space) NG54 NG183 NG187 Mobile-satellite (Earth-to-space) Space research Aeronautical mobile US133	Public Mobile (22) Satellite Communications (25)
5.504A 5.505 14.25-14.3 FIXED-SATELLITE (Earth-to-space) 5.457A 5.457B 5.484A 5.506 5.506B RADIONAVIGATION 5.504 Mobile-satellite (Earth-to-space) 5.504B 5.506A 5.508A Space research			14.2-14.4	14.2-14.47 FIXED-SATELLITE (Earth-to-space) NG54 NG183 NG187 Mobile-satellite (Earth-to-space) Aeronautical mobile	
5.504A 5.505 5.508 14.3-14.4 FIXED FIXED-SATELLITE (Earth-to-space) 5.457A 5.457B 5.484A 5.506 5.506B MOBILE except aeronautical mobile Mobile-satellite (Earth-to-space) 5.504B 5.506A 5.509A Radionavigation-satellite	14.3-14.4 FIXED-SATELLITE (Earth-to-space) 5.457A 5.484A 5.506 5.506B Mobile-satellite (Earth-to-space) 5.506A Radionavigation-satellite	14.3-14.4 FIXED FIXED-SATELLITE (Earth-to-space) 5.457A 5.484A 5.506 5.506B MOBILE except aeronautical mobile Mobile-satellite (Earth-to-space) 5.504B 5.506A 5.509A Radionavigation-satellite			
5.504A 14.4-14.47 FIXED FIXED-SATELLITE (Earth-to-space) 5.457A 5.457B 5.484A 5.506 5.506B MOBILE except aeronautical mobile Mobile-satellite (Earth-to-space) 5.504B 5.506A 5.509A Space research (space-to-Earth)	5.504A	5.504A	14.4-14.47 Fixed Mobile		
5.504A 14.47-14.5 FIXED FIXED-SATELLITE (Earth-to-space) 5.457A 5.457B 5.484A 5.506 5.506B MOBILE except aeronautical mobile Mobile-satellite (Earth-to-space) 5.504B 5.506A 5.509A Radio astronomy			14.47-14.5 Fixed Mobile	14.47-14.5 FIXED-SATELLITE (Earth-to-space) NG54 NG183 NG187 Mobile-satellite (Earth-to-space) Aeronautical mobile	
5.149 5.504A 14.5-14.8 FIXED FIXED-SATELLITE (Earth-to-space) 5.510 MOBILE Space research			US133 US203 US342 14.5-14.7145 FIXED Mobile Space research	US133 US203 US342 14.5-14.8	
14.8-15.35 FIXED MOBILE Space research			14.7145-14.8 MOBILE Fixed Space research		
			14.8-15.1365 MOBILE SPACE RESEARCH Fixed	14.8-15.1365	
			US310	US310	

\* \* \* \* \*

**United States (US) Footnotes**

\* \* \* \* \*

US133 In the bands 14.0–14.2 GHz and 14.47–14.5 GHz, the following provisions shall apply to the operations of Earth Stations Aboard Aircraft (ESAA) and to the Aeronautical Mobile Service (AMS):

(a) In the band 14.0–14.2 GHz, ESAA and AMS licensees planning to operate within radio line-of-sight of the coordinates specified in 47 CFR 25.227(c) are subject to prior coordination with NTIA in order to minimize harmful interference to the earth stations of NASA's Tracking and Data Relay Satellite System (TDRSS).

(b) In the band 14.47–14.5 GHz, operations within radio line-of-sight of the radio astronomy stations specified in 47 CFR 25.226(d)(2) are subject to coordination with the National Science Foundation in accordance with 47 CFR 25.227(d).

\* \* \* \* \*

**PART 22—PUBLIC MOBILE SERVICES**

■ 3. The authority citation for Part 22 continues to read as follows:

**Authority:** 47 U.S.C. 154, 222, 303, 309, and 332.

■ 4. Add § 22.232 to subpart B to read as follows:

**§ 22.232 14.0–14.5 GHz band subject to competitive bidding.**

Mutually exclusive initial applications for 14.0–14.5 GHz band licenses are subject to competitive bidding. The general competitive bidding procedures set forth in 47 CFR part 1, Subpart Q will apply unless otherwise provided in this subpart.

■ 5. Add § 22.233 to subpart B to read as follows:

**§ 22.233 Designated entities in the 14.0–14.5 GHz bands.**

(a) *Eligibility for small business provisions.* (1) A small business is an entity that, together with its affiliates, its controlling interests, the affiliates of its controlling interests, and the entities with which it has an attributable material relationship, has average gross revenues not exceeding \$40 million for the preceding three years.

(2) A very small business is an entity that, together with its affiliates, its controlling interests, the affiliates of its controlling interests, and the entities with which it has an attributable material relationship, has average gross revenues not exceeding \$15 million for the preceding three years.

(b) *Bidding credits.* A winning bidder that qualifies as a small business as

defined in this section or a consortium of small businesses may use the bidding credit specified in § 1.2110(f)(2)(iii) of this chapter. A winning bidder that qualifies as a very small business as defined in this section or a consortium of very small businesses may use the bidding credit specified in § 1.2110(f)(2)(ii) of this chapter.

■ 6. Add subpart K to read as follows:

**Subpart K—Air-Ground Mobile Broadband Service**

Sec.

- 22.1100 Scope.
- 22.1101 Definitions associated with air-ground mobile service.
- 22.1102 Permissible communications.
- 22.1104 Frequencies.
- 22.1106 Service areas.
- 22.1110 Regulatory status.
- 22.1111 Eligibility.
- 22.1112 License period.
- 22.1113 Construction requirements.
- 22.1114 Renewal criteria.
- 22.1115 Geographic partitioning and spectrum disaggregation.
- 22.1116 Initial authorization.
- 22.1118 Discontinuance of service.
- 22.1120 Protecting GSO satellite systems from harmful interference from air-ground mobile broadband.
- 22.1122 Out of band emissions (OOBE) requirement for two separate air-ground mobile broadband systems.

**§ 22.1100 Scope.**

This subpart governs the licensing and operation of the air-ground mobile broadband service in the 14.0–14.5 GHz band. The licensing and operation of these stations and systems is also subject to rules elsewhere in this part that apply generally to the public mobile services. However, in case of conflict, this subpart governs.

**§ 22.1101 Definitions associated with air-ground mobile service.**

*Air-Ground Mobile Broadband Equipped Aircraft.* Aircraft equipped with air-ground mobile broadband communications technology.

*Air-Ground Mobile Broadband Service.* An air-ground mobile broadband service that operates in the 14.0 to 14.5 GHz band and provides high-data-rate connectivity between terrestrial ground stations and aircraft stations flying above the contiguous United States (“CONUS”).

*Base Stations.* Fixed terrestrial-based air-ground mobile broadband communications stations that provide air-ground mobile broadband to air-ground mobile broadband equipped aircraft.

**§ 22.1102 Permissible communications.**

The 14.0–14.5 GHz band may be used to provide air-ground mobile

broadband. Such service shall be provided in a manner consistent with § 2.106 of this chapter.

**§ 22.1104 Frequencies.**

Two channel block(s) are available for assignment in the 14.0–14.5 GHz air-ground mobile broadband service:

- (a) A Block: 14.0–XX.XX GHz
- (b) [B Block: XX.XX–14.5 GHz]

**§ 22.1106 Service areas.**

Service areas for 14.0–14.5 GHz air-ground mobile broadband are available on a nationwide basis. For the purposes of this paragraph, “nationwide” refers to a geographic market area covering the contiguous United States, *i.e.* the United States excluding Alaska, Hawaii, and island territories.

**§ 22.1110 Regulatory status.**

(a) *Single authorization.* Authorization will be granted to provide any or a combination of the following services in a single license: Common carrier, non-common carrier, private internal communications, and broadcast services. A licensee may render any kind of communications service consistent with the regulatory status in its license and with the Commission's rules applicable to that service. An applicant or licensee may submit a petition at any time requesting clarification of the regulatory status for which authorization is required to provide a specific communications service.

(b) *Designation of regulatory status in initial application.* An applicant shall specify in its initial application if it is requesting authorization to provide common carrier, non-common carrier, private internal communications, or broadcast services, or a combination thereof.

(c) *Amendment of pending applications.* The following rules apply to amendments of a pending application.

(1) Any pending application may be amended to:

(i) Change the carrier regulatory status requested, or

(ii) Add to the pending request in order to obtain common carrier, non-common carrier, private internal communications, or broadcast services status, or a combination thereof, in a single license.

(2) Amendments to change, or add to, the carrier regulatory status in a pending application are minor amendments filed under § 1.927 of this chapter.

(d) *Modification of license.* The following rules apply to amendments of a license.

(1) A licensee may modify a license to:

(i) Change the regulatory status authorized, or

(ii) Add to the status authorized in order to obtain a combination of services of different regulatory status in a single license.

(2) Applications to change, or add to, the carrier status in a license are modifications not requiring prior Commission authorization. The licensee must notify the Commission within 30 days of the change. If the change results in the discontinuance, reduction, or impairment of an existing service, the licensee is subject to the provisions of § 22.1118.

#### § 22.1111 Eligibility.

Any entity other than those precluded by section 310 of the Communications Act of 1934, as amended, 47 U.S.C. 310, is eligible to hold a license under this part.

#### § 22.1112 License period.

Initial authorizations will have a term not to exceed ten years from the date of initial issuance or renewal.

#### § 22.1113 Construction requirements.

Licensees of 14.0–14.5 GHz air-ground mobile broadband, must, as a performance requirement, make a showing of “substantial service” in their license area within the prescribed license term set forth in § 22.1112.

(a) “Substantial service” is defined as service which is sound, favorable and substantially above a level of mediocre service which just might minimally warrant renewal. Failure by any licensee to meet this requirement will result in forfeiture of the license and the licensee will be ineligible to regain it.

(b) Each 14.0–14.5 GHz air-ground mobile broadband system subject to the requirements of this section must demonstrate substantial service within 10 years after grant of the authorization. Substantial service may be demonstrated by, but is not limited to, the following “safe harbor” provision: The construction and operation of ground stations that provides robust, uninterrupted service on routes serving at least 50 airports classified as large or medium hubs (as measured by the most recent Federal Aviation Administration data for annual passenger enplanements) within ten years of license grant.

#### § 22.1114 Renewal criteria.

Air-ground mobile broadband licensees in the 14.0–14.5 GHz band must file a renewal application in accordance with the provisions set forth in § 1.949, and must make a showing of substantial service, independent of its

performance requirements, as a condition for renewal at the end of each license term.

#### § 22.1115 Geographic partitioning and spectrum disaggregation.

(a) *Eligibility.* (1) Parties seeking approval for partitioning and disaggregation shall request from the Commission an authorization for partial assignment of a license pursuant to § 1.948.

(2) Licensees in 14.0–14.5 GHz air-ground mobile broadband may apply to partition their licensed geographic service area or disaggregate their licensed spectrum at any time following the grant of their licenses.

(b) *Filing requirements.* Parties seeking approval for geographic partitioning, spectrum disaggregation, or a combination of both must apply for a partial assignment of authorization by filing FCC Form 603 pursuant to § 1.948 of this chapter. Each request for geographic partitioning must include an attachment defining the perimeter of the partitioned area by geographic coordinates to the nearest second of latitude and longitude, based upon the 1983 North American Datum (NAD83). Alternatively, applicants may specify an FCC-recognized service area (e.g., Basic Trading Area, Economic Area, Major Trading Area, Metropolitan Service Area, or Rural Service Area), county, or county equivalent, in which case, applicants need only list the specific FCC-recognized service area, county, or county equivalent names comprising the partitioned area.

(c) *License term.* The license term for a partitioned license area or disaggregated spectrum license is the remainder of the original licensee’s license term.

(d) *Performance requirements.* Each party to a geographic partitioning, spectrum disaggregation, or a combination of both must individually meet any applicable performance requirements (i.e., construction and operation requirements). If a licensee fails to meet any performance requirements on or before the required date, its authorization will terminate automatically on that date without further Commission action pursuant to § 1.946 of this chapter.

(e) *Unjust enrichment.* Licensees making installment payments or that received a bidding credit, that partition their licenses or disaggregate their spectrum to entities that do not meet the eligibility standards for installment payments or bidding credits, are subject to the unjust enrichment requirements of § 1.2111 of this chapter.

#### § 22.1116 Initial authorization.

(a) An applicant must file a single application for an initial authorization for all markets won and frequency blocks desired. Initial authorizations shall be granted in accordance with §§ 22.1104, 22.1106 of this chapter. Applications for individual sites are not required and will not be accepted, except where required for environmental assessments, in accordance with §§ 1.1301 through 1.1319 of this chapter.

(b) Initial authorizations for 14.0–14.5 GHz air-ground mobile broadband shall be for the amount of spectrum in accordance with § 22.1104. Authorizations will be on a nationwide service area basis as defined in § 22.1106.

#### § 22.1118 Discontinuance of service.

(a) *Termination.* A 14.0–14.5 GHz air-ground mobile broadband licensee’s authorization will automatically terminate, without specific Commission action, if it permanently discontinues service. Permanent discontinuance of service is defined as 180 consecutive days during which a licensee is not providing service to aircraft or subscribers

(b) *Filing requirements.* A licensee that permanently discontinues service as defined in this section must notify the Commission of the discontinuance within 10 days by filing FCC Form 601 or 605 requesting license cancellation. An authorization will automatically terminate, without specific Commission action, if service is permanently discontinued as defined in this section, even if a licensee fails to file the required form requesting license cancellation.

(c) *Extension request.* A licensee may file a request for a longer discontinuance period for good cause. An extension request must be filed at least 30 days before the end of the 180-day discontinuance period. The filing of an extension request will automatically extend the discontinuance period a minimum of the latter of an additional 30 days or the date upon which the Wireless Telecommunications Bureau acts on the request.

#### § 22.1120 Protecting GSO satellite systems from harmful interference from air-ground mobile broadband.

The aggregate increase in interference ( $\Delta T/T$ ) from all air-ground mobile broadband aircraft and base stations into the uplink of GSO satellites shall not exceed one percent. This one percent  $\Delta T/T$  limit may be met by complying with paragraphs (a) through (c) of this section:

(a) For a baseline air-ground mobile broadband system consisting of 600 beams (e.g., 150 base station sites and 4 beams per site) operating on a given band of spectrum, the transmitted power spectral density from a single base station beam into the GSO arc must

not exceed  $-74.5$  dBW/Hz. If the number of base station beams is increased beyond 600, then the total transmitted power toward the GSO arc must be adjusted accordingly, such that the total transmitted power toward the GSO arc from all beams is not greater

than  $-46.7$  dBW/Hz. If the number of air-ground mobile broadband base stations increases from 150 to 250, the single beam EIRP density must be less than the value

$$-74.5 - 10 \text{Log}\left(\frac{n}{150}\right) \text{ dBW/Hz} \quad \text{for} \quad 150 \leq n \leq 250$$

and the aggregate EIRP density from all beams must be less than

$$-46.7 - 10 \text{Log}\left(\frac{n}{150}\right) \text{ dBW/Hz} \quad \text{for} \quad 150 \leq n \leq 250$$

where  $n$  is the number of base stations.

(b) Transmissions from an air-ground mobile broadband aircraft stations must not exceed an EIRP density of 3 dBW/2 megahertz. Furthermore, the aggregate EIRP from all air-ground mobile broadband aircraft stations toward the GSO arc must not exceed  $-47$  dBW/Hz. When deriving the aggregate EIRP density toward the GSO arc, the aircraft cruise level roll angle of  $\pm 5^\circ$  in elevation must be taken into account.

(c) Every air-ground mobile broadband base station may increase its transmit power by up to 6 dB to compensate for rain fade. In compensation for the increase in power, the air-ground mobile broadband base station must reduce the number of beams it transmits to maintain the same maximum transmitted power.

**§ 22.1122 Out of band emissions (OOBE) requirement for two separate air-ground mobile broadband systems.**

If two separate licensees deploy air-ground mobile broadband systems within distinct portions of the 14.0 to 14.5 GHz band, the power level of any emission outside an air-ground mobile broadband licensee's frequency band of operation shall be attenuated below the transmitter power of  $P$  watts (with averaging performed only during periods of transmission) within the licensee's band of operation by at least  $43 + 10 \log(P)$  dB. Compliance with this rule shall be measured via use of instrumentation employing a resolution bandwidth of 1 megahertz or greater, except that in the 1 megahertz bands immediately adjacent to the licensee's frequency band of operation, a

resolution bandwidth of at least 1 percent of the emission bandwidth of the fundamental emission of the transmitter may be employed. A narrower resolution bandwidth is permitted in all cases to improve measurement accuracy provided the measured power is integrated over the full required measurement bandwidth (that is, 1 megahertz or 1 percent of the emission bandwidth, as specified). The emission bandwidth is defined as the width of the signal between two points, one below the carrier center frequency and one above the carrier center frequency, outside of which all emissions are attenuated by at least 26 dB below the transmit power level.

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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.

## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### Adoption of Recommendations

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

**ACTION:** Notice.

**SUMMARY:** The Administrative Conference of the United States adopted four recommendations at its Fifty-eighth Plenary Session. The appended recommendations address ways to improve the adjudication of Social Security disability benefits, best practices for use of benefit-cost analysis in rulemaking by independent regulatory agencies, transparency in agencies' scientific decisionmaking, and best practices for agencies with respect to the administrative record in informal rulemaking.

**FOR FURTHER INFORMATION CONTACT:** For Recommendation 2013-1, Amber Williams; for Recommendations 2013-2 and 2013-3, Reeve Bull; for Recommendation 2013-4, Stephanie Tatham. For all four recommendations the address and phone number are: Administrative Conference of the United States, Suite 706 South, 1120 20th Street NW., Washington, DC 20036; Telephone 202-480-2080.

**SUPPLEMENTARY INFORMATION:** The Administrative Conference Act, 5 U.S.C. 591-596, established the Administrative Conference of the United States. The Conference studies the efficiency, adequacy, and fairness of the administrative procedures used by Federal agencies and makes recommendations for improvements to agencies, the President, Congress, and the Judicial Conference of the United States (5 U.S.C. 594(1)). For further information about the Conference and its activities, see <http://www.acus.gov>.

At its Fifty-eighth Plenary Session, held June 13-14, 2013, the Assembly of the Conference adopted four recommendations. Recommendation

2013-1, "Improving Consistency in Social Security Disability Adjudications," identifies ways to improve the adjudication of Social Security disability benefits claims before administrative law judges and the Appeals Council, suggests changes to the evaluation of opinion evidence from medical professionals, and encourages the agency to enhance data capture and reporting.

Recommendation 2013-2, "Benefit-Cost Analysis at Independent Regulatory Agencies," highlights a series of best practices directed at independent regulatory agencies in the preparation of benefit-cost analyses that accompany proposed and final rules.

Recommendation 2013-3, "Science in the Administrative Process," promotes transparency in agencies' scientific decision-making, including: articulation of questions to be informed by science information; attribution for agency personnel who contributed to scientific analyses; public access to underlying data and literature; and conflict of interest disclosures for privately funded research used by the agencies in licensing, rulemaking, or other administrative processes.

Recommendation 2013-4, "The Administrative Record in Informal Rulemaking," offers best practices for agencies in the compilation, preservation, and certification of records in informal rulemaking, and supports the judicial presumption of regularity for agency administrative records except in certain limited circumstances.

The Appendix (below) sets forth the full texts of these four recommendations. The Conference will transmit them to affected agencies and to appropriate committees of the United States Congress. The recommendations are not binding, so the relevant agencies, the Congress, and the courts will make decisions on their implementation.

The Conference based these recommendations on research reports that it has posted at: <http://www.acus.gov/meetings-and-events/plenary-meeting/58th-plenary-session/>. A video of the Plenary Session is available at the same web address, and a transcript of the Plenary Session will be posted once it is available.

Dated: July 3, 2013.

**Paul R. Verkuil,**  
Chairman.

## APPENDIX—RECOMMENDATIONS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### Administrative Conference Recommendation 2013-1

#### Improving Consistency in Social Security Disability Adjudications

*Adopted June 13, 2013*

The Administrative Conference of the United States (Conference) has undertaken many studies over the years relating to the Social Security disability benefits system.<sup>1</sup> It has issued a number of recommendations specifically directed at improving the Social Security Administration's (SSA's) initial application and appeals processes,<sup>2</sup> as well as other recommendations more generally designed to improve agency adjudicatory procedures.<sup>3</sup> The Conference last issued a recommendation on the Social Security disability benefits system over twenty years ago. The system has grown substantially since that time. Approximately 3.3 million disability claims are now filed annually,<sup>4</sup> which represents a 57% increase since 1990.<sup>5</sup> In a program of this size, adjudicating disability benefits claims in a fair, consistent,

<sup>1</sup> The Social Security Act created two programs—Social Security Disability Insurance and Supplemental Security Income—to provide monetary benefits to persons with disabilities who satisfy these programs' respective requirements. See 42 U.S.C. 401(b), 1381 (2011).

<sup>2</sup> These recommendations include: Recommendation 91-3, *The Social Security Representative Payee Program*, 56 FR 33847 (July 24, 1991); Recommendation 90-4, *Social Security Disability Program Appeals Process: Supplementary Recommendation*, 55 FR 34213 (Aug. 22, 1990); Recommendation 89-10, *Improved Use of Medical Personnel in Social Security Disability*, 55 FR 1665 (Jan. 18, 1990 (as amended)); Recommendation 87-7, *A New Role for the Social Security Appeals Council*, 52 FR 49143 (Dec. 30, 1987) [hereinafter ACUS Recommendation 87-7]; and Recommendation 78-2, *Procedures for Determining Social Security Disability Claims*, 43 FR 27508 (June 26, 1978).

<sup>3</sup> See, e.g., Recommendation 2011-4, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*, 76 FR 48789 (Aug. 9, 2011); Recommendation 89-8, *Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions*, 54 FR 53495 (Dec. 29, 1989); Recommendation 86-7, *Case Management as a Tool for Improving Agency Adjudication*, 51 FR 46989 (Dec. 30, 1986); Recommendation 73-3, *Quality Assurance Systems in the Adjudication of Claims of Entitlement to Benefits or Compensation*, 38 FR 16840 (June 27, 1973).

<sup>4</sup> Soc. Sec. Admin., Annual Performance Plan for FY 2013 and Revised Performance Plan for FY 2012, at 11 (2012).

<sup>5</sup> Soc. Sec. Advisory Bd., Aspects of Disability Decision Making: Data and Materials 6 tbls. 1a & 1b (Feb. 2012) [hereinafter SSAB 2012 Report].

and timely manner is a monumental challenge.

Those cases flow through a nationwide, multi-step process, by which SSA determines whether a claimant is disabled and eligible for benefits. State agencies make initial disability determinations using federal guidelines. Claimants may file (and pursue) their own claims or they may choose to enlist the assistance of a representative, who may or may not be a lawyer.<sup>6</sup> If benefits are denied, claimants may request reconsideration (in most states). If benefits are denied after reconsideration, claimants may request a hearing before an Administrative Law Judge (ALJ). ALJs adjudicate nearly 800,000 cases a year.<sup>7</sup> In FY 2011, about 56% of disability benefits claims were allowed at the ALJ hearing stage,<sup>8</sup> though more recent figures show a decline in this rate.<sup>9</sup> ALJ hearings, which may be in-person or by video teleconferencing, are conducted using a *de novo* standard of review, and generally follow the Administrative Procedure Act's adjudication procedures. Although ALJs preside at the hearings, decisionwriters typically write decisions for ALJs based on instructions from them. Usually, decisionwriters are not assigned to specific ALJs, but serve instead as part of a "pool" in each hearing office from which writing assignments for decisions are made.

Appeals Council review is the final step in the administrative process. The Appeals Council is comprised of about 125 appellate adjudicators who typically take action—without oral argument—individually or in two-member panels.<sup>10</sup> The Appeals Council has discretionary authority to grant, deny, or dismiss a claimant's request for review, as well as remand the case back to an ALJ or issue a decision.<sup>11</sup> In FY 2012, the Appeals

Council processed over 166,000 requests for review, a 30.7% increase from FY 2011.<sup>12</sup> In addition to processing requests for review, the Appeals Council has authority to review all types of unappealed decisions (i.e., allowances or benefit denials) on its "own motion" through use of random or selective sampling techniques.<sup>13</sup> Currently, the Appeals Council's "own motion" review docket draws from a national random sample of ALJ allowance decisions as a quality assurance mechanism; the Appeals Council has not yet reviewed unappealed ALJ denial decisions, and has declined to use its selective sampling authority to identify and review unappealed cases with a high likelihood of error in recent years.<sup>14</sup> In FY 2012, the Appeals Council completed random review of 7,074 ALJ allowance decisions.<sup>15</sup> The Appeals Council publishes its decisions only rarely, in the form of Appeals Council Interpretations (ACIs), and its decisions sometimes serve as the basis for Social Security Rulings. Claimants who disagree with the final administrative decision may seek initial judicial review in federal district court.

Adjudicators and other agency employees at both the ALJ hearing level and Appeals Council level use electronic case

management systems to help manage their workflow and to provide case-related management information. The current system in use at the hearing level is the Case Processing Management System (CPMS), while the Appeals Council level uses the Appeals Council Review Processing System (ARPS). Not only do adjudicators and other staff use CPMS and ARPS in their day-to-day work, but the agency also uses data from these systems to identify and address trends and anomalies existing at the various levels of agency adjudication. While SSA has endeavored to build effective data reporting systems, limitations still exist that relate to data capture and linking the various systems.

Not only does SSA process an extraordinary number of claims through a national, multi-tiered system, but, in doing so, the agency tries to ensure that decisionmaking is consistent and accurate at all levels of adjudication, and that legally sufficient decisions are issued that can withstand review by federal courts. Consistency and accuracy, however, have suffered under the strain of administering such a sprawling program. To be sure, an ALJ faces an enormous task in adjudicating hundreds of cases annually.<sup>16</sup> Nonetheless, divergent allowance rates among ALJs suggest that claims are being resolved in an inconsistent, if not inaccurate, manner.<sup>17</sup> The Appeals Council similarly struggles to fulfill its error-correction and quality-review roles. That these steps may have room for improvement is evidenced by the 45% rate at which cases are remanded back to the agency from federal courts in recent years.<sup>18</sup> Bringing greater consistency and accuracy to the disability claims adjudication process will enhance the fairness and integrity of the program.

One area of particular concern—due to its apparent contribution to a high remand rate—is SSA's treating source rule, which generally affords "controlling weight" to the opinions of a claimant's treating physician, psychologist, or other acceptable medical source.<sup>19</sup> In the early 1990s, SSA sought to bring greater clarity and uniformity to the assessment of medical evidence by establishing regulatory standards for such evaluations. In practice, however, this evidentiary rule has not delivered on its promise of improving consistency. In recent years, erroneous application of the treating source rule has been cited as the basis for

<sup>6</sup> The administrative process for adjudication of Social Security disability claims is nonadversarial in nature. *See, e.g.*, 20 CFR 404.900(b), 416.1400(b) (2012) (describing agency's administrative review process as "informal" and "nonadversary"); *Mathews v. Eldridge*, 424 U.S. 319, 339 (1976) ("The hearing is nonadversary and the SSA is not represented by counsel."); *Richardson v. Perales*, 402 U.S. 389, 403 (1971) ("We bear in mind that [SSA] operates essentially, and is intended so to do, as an adjudicator and not as an advocate or adversary.").

<sup>7</sup> SSAB 2012 Report, *supra* note 5, at 13.

<sup>8</sup> Harold Krent & Scott Morris, Statistical Appendix: Analysis of Administrative Law Judge Disposition and Favorable Rates in Fiscal Years 2009 to 2011 13, 14 tbl. A-8 (2013) [hereinafter Statistical Appendix].

<sup>9</sup> Harold Krent & Scott Morris, Achieving Greater Consistency in Social Security Disability: An Empirical Study and Suggested Reforms 8 (2013) (noting a 50% allowance rate in FY 2012).

<sup>10</sup> *See* 20 CFR 422.205 (2012) (prescribing Appeals Council review procedures); *see also* Charles H. Koch, Jr. & David A. Koplou, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Soc. Sec. Admin.'s Appeals Council*, 17 Fla. St. U. L. Rev. 199, 253-54 (1990).

<sup>11</sup> The Conference believes that its 1987 conclusion, that a "principal mandate" of the Appeals Council is "to recommend and, where appropriate, develop and implement adjudicatory principles and decisional standards for the disability determination process" remains valid today. *See* ACUS Recommendation 87-7, *supra* note 2.

<sup>12</sup> Soc. Sec. Admin., Office of Appellate Operations, Executive Director's Broadcast, at 1 (Oct. 19, 2012) [hereinafter Exec. Dir. Broadcast]. Of these 166,000 requests for review, the Appeals Council dismissed or denied 78.3% of the requests, remanded 18.6% of the cases back to ALJs, and issued decisions (i.e., fully favorable, partially favorable, or unfavorable) in 2.6% of the cases. *Id.* at 2.

<sup>13</sup> As the name connotes, random sampling involves selection of hearing level cases for Appeals Council review from a national pool without regard for case characteristics or correctness, other than broad categories designed to assure randomness (e.g., allowances within a given date range). By contrast, selective sampling is specifically designed to identify cases for review that "exhibit problematic issues or fact patterns that increase the likelihood of error." 20 CFR 404.969(b)(1), 416.1469(b)(1) (2012) (detailing the Appeals Council's "own motion" review authority and procedures); *see also* Soc. Sec. Admin., Identification and Referral of Cases Under Appeals Council's Own Motion Review Authority, 63 FR 36560 (July 7, 1998). These procedures are established pursuant to the Social Security Act's broad grant of authority to the Commissioner to establish hearing procedures and, on his or her own motion, hold hearings or conduct other proceedings as necessary for the proper administration of the program. *See, e.g.*, 42 U.S.C. 405(b)(1), 1383(c)(1)(A) (2011).

<sup>14</sup> This recommendation suggests that, to enhance decisional accuracy and consistency, SSA expand the Appeals Council's use of "own motion" review of unappealed ALJ decisions through selective sampling based on announced, neutral, and objective criteria that identify problematic issues, fact patterns, or case characteristics. Under this recommendation, focused review might be warranted, for example, based on: the subject matter of a claim, the manner in which a hearing was held, or statistical analyses showing a high likelihood of error or significantly anomalous outcomes.

<sup>15</sup> Exec. Dir. Broadcast, *supra* note 12, at 3. The Appeals Council agreed with the decisions of ALJs 82.5% of the time, and either remanded or issued corrective decisions approximately 16% of the time. At the end of the FY 2012, there were 741 "own motion" review cases still pending final action. *Id.*

<sup>16</sup> On average, for FY 2009-FY 2011, ALJs issued 538.9 dispositions per year. *See* Statistical Appendix, *supra* note 8, at 6, 8 tbl. A-2.

<sup>17</sup> In recent years, while the distribution of yearly allowance disposition rates has been approximately normal (i.e., a mean of 56%), the distribution covers a wide range of allowance rates, with 95% of the rates falling between 26% and 85%. *See id.* at 13, 14 fig. A-8 (analyzing allowance rates for FY 2009-FY 2011). The lowest allowance rate was 4% and the highest allowance rate was 98%. *See id.*

<sup>18</sup> *See id.* at 54 tbl. A-24. Policy compliance among ALJs has improved in recent years. *See* Michael J. Astrue, former Comm'r, Soc. Sec. Admin., Address at the Social Security Advisory Board Forum: Straight Talk about "Disability Reform." (Mar. 8, 2013), available at <http://www.ssb.gov/Portals/0/2013Forum/Presentations/Astrue%20Speech%203-8-13.pdf>.

<sup>19</sup> *See* 20 CFR 404.1527(c), 416.927(c) (2012).

remand by the Appeals Council at a 10% frequency rate, and the frequency rate with which it is cited by federal courts is even higher at 35%.<sup>20</sup> Dramatic changes in the American health care system over the past twenty years also call into question the ongoing efficacy of the special deference afforded to the opinions of treating sources. Individuals typically visit multiple medical professionals in a variety of settings for their health care needs and less frequently develop a sustained relationship with one physician.<sup>21</sup> Moreover, difficulty in determining who among a wide range of medical professionals should be considered a treating source has bedeviled ALJs and reviewing courts, contributing to high remand rates.<sup>22</sup>

This recommendation finds its genesis in SSA's request that the Conference study the role of the Appeals Council in reviewing cases to reduce any observed variances among adjudicative decisions at the hearing level, as well as the efficacy of SSA's treating source rule. These studies also revealed other areas that appear ripe for recommendation. While SSA has enacted various initiatives to increase consistency and has issued rulings to clarify its regulations, the size and complexity of the system leave more work to be done. The following recommendations reaffirm certain portions of past recommendations that remain valid and relevant and also identify new approaches to ensure consistency, accuracy, and fairness across this massive decision system.

## Recommendation

### ALJ Hearing Stage

**1. Improving Adjudication Effectiveness and Consistency.** In order to promote greater decisional consistency and streamline the adjudication process at the ALJ hearing stage, SSA should:

(a) Require claimant representatives (while also *permitting* claimants without representation) to submit pre-hearing briefs in a standardized format that, among other things, summarizes the medical evidence and justification for the claimant's eligibility for benefits;

(b) expand the use of video hearings in a manner consistent with sound technological practices, because such hearings promote efficiency and do not lead to a significant difference in allowance rates from in-person hearings. SSA should continue to advise claimants that opting for video hearings often results in faster scheduling of hearings (as compared to in-person hearings) and more convenient hearing locations; and

(c) assign decisionwriters and case technicians to specific ALJs in a hearing office (with Hearing Office Directors continuing to supervise such support staff), while maintaining flexibility to meet operational needs.

<sup>20</sup> See Office of the Chairman, Administrative Conference of the United States, *SSA Disability Benefits Programs: Assessing the Efficacy of the Treating Physician Rule*, Appendix B, at A-4, A-8 (2013).

<sup>21</sup> See *id.* at 25-33.

<sup>22</sup> See *id.* at 23-24, 33-35.

### Appeals Council

**2. Balancing Error-Correction and Systemic Review Functions.** SSA should continue to promote the consistent application of policy to the adjudication of disability benefits claims across a nationwide program. SSA should ensure that the Appeals Council strikes an appropriate balance between its error-correction function when exercising discretionary review of individual claimants' requests for review, and its mandate to improve organizational effectiveness, decisional consistency, and communication of agency policy through use of "own motion" review (as to both allowances and unappealed denials) and other types of systemic quality assurance measures.

**3. Enhancing Communication.** SSA should make clear that an essential function of the Appeals Council is both to focus on consistent application of Social Security regulations and policies on a systemic basis, and to disseminate advice and guidance to SSA policymakers, ALJs, and other lower-level decisionmakers. The Appeals Council should advise and assist policymakers and decisionmakers by:

(a) Issuing Appeals Council Interpretations (ACIs), with greater frequency, in order to: Address policy gaps; promote greater consistency and uniformity throughout the adjudicatory process; and establish precedents upon which claimants and their representatives may rely. Such ACIs should be circulated within the agency and made publicly available through posting on SSA's Web site or other similar means of public dissemination;

(b) publishing selected ALJ or Appeals Council decisions to serve as model decisions (e.g., they are well-reasoned and clear), or to provide needed policy clarifications. Consistent with statutory obligations to maintain the privacy of sensitive information, such publications should not include personally identifiable information;

(c) continuing, to the greatest extent feasible, to send cases that have been remanded from the Appeals Council or federal courts back to the same ALJs who initially adjudicated such claims for additional proceedings as required. If an ALJ who initially decided a claim will not be presiding over a case post-remand, SSA should nonetheless ensure that he or she still receives notification of the remand decision. Decisionwriters who were involved in drafting a remanded decision should also receive notification of remand decisions; and

(d) developing a program for ALJs to serve extended voluntary details on the Appeals Council in order to introduce a measure of peer review, enrich ALJ understanding of the appeals process, and benefit the Appeals Council by introducing the perspectives and insights of ALJs. In support of that effort, SSA should seek a waiver from the Office of Personnel Management (OPM) of its durational (120-day) limit on details, which, if granted, would enable detailed ALJs to gain a deeper knowledge of the Appeals Council than is possible under a shorter detail period. OPM should give favorable consideration to such a request.

**4. Expanding Focused "Own Motion" Review.** In order to focus attention on the

unappealed decisions that most warrant review, thereby enhancing both accuracy and consistency, SSA should expand the Appeals Council's use of its "own motion" review by using selective review in a manner consistent with ALJ decisional independence. The Appeals Council should use announced, neutral, and objective criteria, including statistical assessments, to identify problematic issues or fact patterns that increase the likelihood of error and, thereby, warrant focused review. In addition, SSA should review unappealed decisions that raise issues whose resolution likely would provide guidance to ALJs and adjudicators. In expanding its "own motion" review, SSA must ensure that (i) selection-of-review criteria are developed in a neutral fashion without targeting particular ALJs or other decisionmakers, and that (ii) inclusion of cases in such review does not serve as the basis for evaluation or discipline. Thus, if necessary, SSA should revise its regulations through notice-and-comment rulemaking to clarify and expand the Appeals Council's use of selective sampling to identify for review decisions that:

(a) Raise issues for which resolution by the Appeals Council would provide policy clarifications to agency adjudicators or the public;

(b) appear, based on statistical or predictive analysis of case characteristics, to have a likelihood of error or lack of policy compliance; or

(c) otherwise raise challenging issues of fact or law, or have case characteristics, that increase the likelihood of error.

### Use of Opinion Evidence From Medical Professionals (Treating Source Rule)

**5. Evaluating Medical Source Opinions.** SSA should revise its regulations through notice-and-comment rulemaking to eliminate the controlling weight aspect of the treating source rule in favor of a more flexible approach based on specific regulatory factors. SSA should give ALJs greater discretion and flexibility when determining the appropriate weight to afford opinions from treating sources (which may or may not be determinative), consistent with the factors enumerated in the current regulatory scheme for evaluation of opinions of acceptable medical sources who are not deemed "treating" sources. Such factors should include: (i) Length of the treatment relationship and frequency of examination; (ii) nature and extent of the treatment relationship; (iii) supportability of the medical source's opinion; (iv) consistency of the medical source's opinion; (v) specialization of the medical source; and (vi) any other factors that may support or contradict a medical source's opinion. In all cases, ALJs should articulate the bases for the weight given to opinions from medical sources.

**6. Recognizing the Value of Other Medical Sources.** SSA's existing regulatory scheme, which assigns second-tier evidentiary value to the opinions of nurse practitioners (NPs), physician assistants (PAs), and licensed clinical social workers (LCSWs) because they are not considered "acceptable medical sources," should be reconsidered to reflect

the realities of the current health care system. For many Social Security disability claimants, these medical professionals are the de facto “treating source” of medical care for physical and mental illnesses. SSA should:

(a) Revise its regulations through notice-and-comment rulemaking to add NPs, PAs, and LCSWs as “acceptable medical sources,” consistent with their respective state law-based licensure and scopes of practice; or

(b) issue a new Social Security ruling or other interpretive policy statement that makes clear, for agency adjudicators, federal courts, and the public, the value of, as well as the weight to be afforded, the opinions of these three types of medical professionals.

#### Statistical Quality Assurance Measures

7. *Enhancing Data Reporting Systems.* SSA should enhance its current data reporting systems in order to develop a more robust statistical quality assurance program. To enhance its current data reporting systems, such as the Case Processing Management System (CPMS) and the Appeals Council Review Processing System (ARPS), or any respective follow-on systems, SSA should determine how to associate types of cases and issues, regions, hearing offices, adjudicators, procedural elements and benchmarks, and decisional outcomes together. The goal of such systems should not only be objective evaluation of the agency’s case processing operation, but also the effective utilization of data to inform policy formation and operational consistency.

8. *Capturing Additional Data.* SSA should specifically address the limitations of CPMS, ARPS, and any respective follow-on systems by ensuring that these data reporting systems capture (as appropriate):

(a) Information related to any prior hearings;

(b) whether a decision involved a hearing or on-the-record decision;

(c) whether new evidence was submitted by a claimant after his or her hearing to the ALJ or to the Appeals Council; and

(d) data or other tracking mechanisms enabling ARPS and CPMS data to be related to a single claim through all case processing stages, including hearings, Appeals Council review, and remand by the Appeals Council or federal courts.

9. *Encouraging Employee Feedback.* SSA should encourage feedback from SSA employees to identify other types of case-related data that should be captured and to suggest ways to facilitate the linking of SSA’s multiple data reporting systems in order to improve overall data quality and quality assurance capabilities.

#### Administrative Conference Recommendation 2013–2

##### Benefit-Cost Analysis at Independent Regulatory Agencies

Adopted June 13, 2013

Benefit-cost analysis (also known as cost-benefit analysis) is one of the primary tools used in regulatory analysis to anticipate and evaluate the likely consequences of rules.<sup>1</sup>

Although some regulatory benefits and costs are difficult to quantify or monetize, those preparing such analyses generally attempt to estimate the overall benefits that a proposed or final rule would create as well as the aggregate costs that it would impose on society, and then determine whether the former justify the latter. Some observers have disputed its utility in rulemaking,<sup>2</sup> but benefit-cost analysis (and other forms of regulatory analysis) can help ensure that decisionmakers fully contemplate the risks and rewards of any proposed regulatory strategy.<sup>3</sup> Benefit-cost analysis can also improve transparency, helping to ensure that the public and Congress understand why regulatory decisions are made.

For more than 30 years, Cabinet departments and other executive agencies like the Environmental Protection Agency (but not independent regulatory agencies<sup>4</sup> such as the Federal Trade Commission (FTC)) have been required by executive orders to conduct benefit-cost or other types of regulatory analyses for their “major” or

[www.whitehouse.gov/omb/circulars\\_a004\\_a-4/](http://www.whitehouse.gov/omb/circulars_a004_a-4/) [hereinafter “OMB Circular A–4”]. Much of the literature on regulatory analysis, including prior recommendations of the Administrative Conference, uses the term “cost-benefit analysis” in lieu of, or in addition to, “benefit-cost analysis.” Circular A–4 uses the term “benefit-cost analysis,” and this recommendation will therefore utilize the same terminology.

<sup>2</sup> Critics of benefit-cost analysis contend that it ignores values that cannot be easily quantified, that benefits can often be difficult to monetize, that it tends to overestimate costs, and that it undervalues future benefits through the application of discounting methodologies. See, e.g., Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. Pa. L. Rev. 1553, 1557–60, 1580–81 (2001).

<sup>3</sup> See Administrative Conference of the United States, Recommendation 79–4, *Public Disclosure Concerning the Use of Cost-Benefit and Similar Analyses in Regulation*, 44 FR 38826 (July 3, 1979) (“Wise decisionmaking presupposes that the potential benefits and costs of the actions under consideration will be identified, will be quantified if feasible, and will be appraised in relation to each other.”); Cass R. Sunstein, *The Office of Information & Regulatory Affairs: Myths and Realities*, 126 Harv. L. Rev. 1838, 1846 (2013) (“Cost-benefit analysis can be exceedingly important, and in the Obama Administration, several steps were taken to strengthen it, contributing to a situation in which the net benefits of economically significant rules were extraordinarily high.”); cf. Richard L. Revesz & Michael A. Livermore, *Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and Our Health* 10 (2008) (“Although cost-benefit analysis, as currently practiced, is . . . biased against regulation, those biases are not inherent to the methodology. If those biases were identified and eliminated, cost-benefit analysis would become a powerful tool for neutral policy analysis.”).

<sup>4</sup> As a general matter, “independent regulatory agencies” are those whose heads possess “for cause” removal protection and that enjoy some degree of independence from the executive branch. David E. Lewis & Jennifer L. Selin, *ACUS Sourcebook of United States Executive Agencies* 49 (1st ed., 2d Printing Mar. 2013). Under Executive Order 12,866, 58 FR 51735 (Oct. 4, 1993), the term “agency” excludes independent regulatory agencies. *Id.* § 3(b). However, independent regulatory agencies are covered by the planning requirements in section 4 of the executive order.

“economically significant” rules.<sup>5</sup> In 1981, President Ronald Reagan issued Executive Order (EO) 12,291,<sup>6</sup> which instructed covered executive agencies to prepare regulatory impact analyses of their draft proposed and final major rules (including a description of benefits and costs), and to submit all of their draft rules to the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) before publication in the **Federal Register**. Subsequent administrations have reaffirmed the importance of benefit-cost analysis and OIRA review. Currently, EO 12,866, issued by President William Jefferson Clinton in 1993, requires Cabinet departments and other covered executive agencies to “assess both the costs and benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.”<sup>7</sup> It also requires them to assess the costs and benefits of “significant” draft proposed and final rules submitted to OIRA for review, and to conduct more thorough analysis of economically significant draft proposed and final rules.<sup>8</sup>

As noted previously, independent regulatory agencies traditionally have not been subject to the formal benefit-cost analysis requirements imposed by executive order, although several recent Presidents have encouraged those agencies to voluntarily apply the principles contained in the relevant executive orders.<sup>9</sup> Virtually all

<sup>5</sup> “Major” and “economically significant” rules include (but are not limited to) rules likely to result in annual funds, benefits, or transfer payments of \$100 million or more. See Congressional Review Act, 5 U.S.C. 804(2); Exec. Order No. 12,866, *supra* note 4, § 3(f)(1). Transfer payments are monetary payments from one group to another that do not affect total resources available to society. See OMB Circular A–4, *supra* note 1. The most common form is the transfer of federal funds to the recipients of those funds (e.g., grants, food stamps, Medicare or Medicaid funds, and crop payments). In 2010, more than one-third of all major rules were so categorized because of the amount of transfer payments. See U.S. Cong. Research Service, *REINS Act: Number and Types of “Major Rules” in Recent Years*, R41651, Feb. 21, 2011, by Curtis W. Copeland and Maeve Carey.

<sup>6</sup> Exec. Order No. 12,291, 46 FR 13193 (Feb. 17, 1981) (revoked by § 11 of EO 12,866).

<sup>7</sup> Exec. Order No. 12,866, *supra* note 4, § 1(b)(6).

<sup>8</sup> *Id.* § 6(a)(3); see also Exec. Order No. 13,563, 76 FR 3821 (Jan. 21, 2011) (President Obama) (stating that the benefits of proposed and final rules must “justify” the costs); Administrative Conference of the United States, Recommendation 88–9, *Presidential Review of Agency Rulemaking*, 54 FR 5207 (Feb. 2, 1989) (suggesting guidelines for the enhanced openness of executive regulatory review and recommending the reconsideration of existing rules looking toward the repeal of unnecessary regulations).

<sup>9</sup> See, e.g., Exec. Order No. 13,579, 76 FR 41,587 (July 14, 2011) (stating that independent regulatory agencies “should promote” the goal, articulated in EO 13,563, of producing a “regulatory system that protects public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation” and “should comply” with the provisions in EO 13,563

<sup>1</sup> See Office of Management and Budget, Circular A–4 (Sept. 17, 2003), available at [http://www.whitehouse.gov/omb/circulars\\_a004\\_a-4/](http://www.whitehouse.gov/omb/circulars_a004_a-4/)

independent regulatory agencies are subject to certain crosscutting statutes that may require some type of regulatory analysis, such as the Regulatory Flexibility Act<sup>10</sup> and the Paperwork Reduction Act.<sup>11</sup> In addition, some independent regulatory agencies' organic acts or other statutes require them to conduct benefit-cost analyses or to consider certain economic effects of their regulations, although the requirements vary significantly from agency to agency. For instance, some agencies (e.g., the Consumer Product Safety Commission) are required by statute to prepare a formal regulatory analysis statement that describes expected costs and benefits prior to issuing certain rules.<sup>12</sup> Other agencies (e.g., the Commodity Futures Trading Commission (CFTC) and the Securities and Exchange Commission (SEC)) are required by statute to "consider" costs and benefits or other factors associated with some of their rules.<sup>13</sup> Still other agencies (e.g., the Federal Communications Commission and the Nuclear Regulatory Commission) are not subject to any formal regulatory analysis requirements for most of their rules.

The Administrative Conference believes that it is in the interest of the independent regulatory agencies, the executive branch, Congress, the courts, and the public that independent regulatory agencies' current practices relating to benefit-cost analysis be documented. In this light, the report supporting the recommendation examined efforts by independent regulatory agencies to analyze regulatory benefits and costs in recent major rules.<sup>14</sup> It also examined whether the agencies factor benefits and costs into their decisionmaking. The report indicated that, in many instances, independent regulatory agencies quantify at least some of the costs (and, to a lesser extent, the benefits) created by the major rules they adopt and, in other instances, such agencies usually provide at least qualitative descriptions of the associated benefits and costs. The report also discusses several factors that the agencies said affected their ability to quantify and monetize regulatory costs and benefits. For example, several agencies mentioned the Paperwork Reduction Act approval process as inhibiting their ability to gather the data needed to prepare regulatory analyses in a timely fashion.<sup>15</sup>

regarding public participation, integration and innovation, flexible approaches, and science "[t]o the extent permitted by law").

<sup>10</sup> 5 U.S.C. 601–12.

<sup>11</sup> 44 U.S.C. 3501–21.

<sup>12</sup> 15 U.S.C. 2058(f).

<sup>13</sup> CFTC is required to "consider the costs and benefits" of the agency's action before issuing certain rules and orders. 7 U.S.C. 19(a). The SEC is required, when it is engaged in rulemaking under certain statutory provisions, to "consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation." 15 U.S.C. 77b(b). Interpretation of these provisions has been a matter of debate.

<sup>14</sup> See Curtis W. Copeland, *Economic Analysis and Independent Regulatory Agencies 60–107* (Mar. 29, 2013), available at <http://acus.gov/sites/default/files/documents/Copeland%20CBA%20Report%203-29-13.pdf>.

<sup>15</sup> Cf. Administrative Conference of the United States, Recommendation 2012–4, *Paperwork*

This recommendation encourages agencies to voluntarily adopt certain practices that some independent regulatory agencies (and other agencies) have developed when conducting regulatory analyses for major rules. The Conference recognizes that increasing the attention paid to the economic impact of proposed and final rules might well require substantial use of limited agency resources. This might require independent agencies to make significant tradeoffs among competing priorities and may delay the rulemaking process. Nevertheless, some independent regulatory agencies are already subject to benefit-cost and other types of regulatory analysis requirements, and others have voluntarily conducted such analyses, and the Conference therefore wishes to highlight innovative practices undertaken by these agencies.<sup>16</sup>

The recommendation, first, identifies various policies and practices used in several of the independent regulatory agencies and offers a series of proposals to encourage their use in other agencies. For example, it recommends that each independent regulatory agency develop written guidance on the preparation of benefit-cost and other types of regulatory analyses. Such guidance should be designed to help ensure that any regulatory analysis the agency undertakes is soundly developed, transparent, consistently conducted, and contributes to agency compliance with applicable statutes and other rulemaking requirements. Second, the recommendation highlights a series of analytical practices that OMB Circular A–4 recommends to Cabinet departments and other executive agencies for their major rules, and the recommendation encourages independent regulatory agencies to consider whether those practices may be useful in the development of their major rules. For example, it recommends that agencies' analyses be as transparent and reproducible as practicable, subject to the limitations of law and applicable policies (including preventing the disclosure of proprietary information or trade secrets, or other confidential information). The recommendation does not seek to establish a one-size-fits-all approach to regulatory analysis, and recognizes that each agency must tailor the analyses it conducts to accord with relevant statutory requirements, its own regulatory priorities, and the potential impact of the analysis on regulatory decisionmaking to ensure proper use of limited agency resources. Finally, the recommendation proposes that, to the extent Congress decides to impose or endorse new regulatory analysis requirements on independent regulatory agencies, Congress should consider giving those agencies the discretion to scale the analyses to the significance of the rules, and should consider the agency resources needed to satisfy such requirements.<sup>17</sup>

*Reduction Act*, ¶ 3, 77 FR 47800, 47808 (Aug. 10, 2012) (recommending that agencies "use all available processes for OMB approval for information gathering").

<sup>16</sup> See, e.g., Copeland, *supra* note 14, at 99 (describing the Federal Communications Commission's increased usage of benefit-cost analysis in light of EO 13,579).

<sup>17</sup> Between January 2007 and December 2012, federal agencies published 19,246 final rules, of

## Recommendation

### *Encouraging the Diffusion of Certain Policies and Practices*

1. Each independent regulatory agency should develop and keep up to date written guidance regarding the preparation of benefit-cost and other types of regulatory analyses. That guidance should be tailored to the agency's particular statutory and regulatory environment. To accomplish this goal, independent regulatory agencies may choose whether or not to adopt or adapt the regulatory analysis practices described in OMB Circular A–4 or any successor government-wide guidance.

2. If an independent regulatory agency prepares a regulatory analysis for a proposed or final rule, the analysis should be developed as early in the rulemaking process as reasonably practical. Once prepared, the analysis may need to be updated as the agency becomes aware of new information that may affect the rulemaking, or if changes are made to the substance of the rule.

3. If an independent regulatory agency determines that additional analytical expertise or experience may be helpful to prepare a regulatory analysis (e.g., determining how certain costs or benefits could be quantified or monetized), it should, to the extent appropriate, consult with other governmental entities with expertise in this area.

4. Consistent with applicable laws and the procedures and flexibilities permitted in the Paperwork Reduction Act, independent regulatory agencies and OIRA should facilitate the timely collection of information necessary to develop the agencies' regulatory analyses.

### *Recommended Practices for Major Rules*

5. Independent regulatory agencies should consider the appropriateness of the analytical guidance provided in OMB Circular A–4 when developing regulatory analyses for major rules. They should consider structuring their analyses of those rules in terms of three general principles: (a) Identify the need for the regulation; (b) examine plausible alternative regulatory approaches; and (c) estimate, to the extent possible, the benefits and costs of the proposed rule and the primary alternatives.

6. Consistent with applicable laws and agency resources, independent regulatory agencies should consider including in their regulatory analyses assessments of the impact of not only those actions that are within the agency's statutory discretion but also of those actions that are statutorily mandated. Agencies should consider showing the effects of both types of actions in order to improve regulatory transparency.

7. Subject to the limitations of law and applicable policies, independent regulatory agencies' regulatory analyses should be as

which 485 were considered "major" rules. See Copeland, *supra* note 14, at Table 1. Expanding the rules on which regulatory analysis is required from "economically significant" or "major" rules to rules considered "significant" under EO 12,866 would likely quintuple the number of analyses required. See <http://www.reginfo.gov/public/do/eoCountsSearch> for data on this issue.

transparent and reproducible as practicable. In particular, agencies should consider disclosing how the analyses were conducted, posting the analyses on their Web sites and other appropriate online fora, and summarizing the methods and results in the preambles of the notice of proposed rulemaking and the final rule.

8. Independent regulatory agencies should consider including in the preambles of the notice of proposed rulemaking and the final rule a summary statement or table concisely showing the agencies' overall estimates of the expected total benefits, costs, and transfer payments of regulatory actions and the primary alternatives, including any benefits or costs that could not be quantified or monetized.

#### Recommendations to Congress

9. If Congress decides to establish or endorse new requirements that independent regulatory agencies prepare benefit-cost analyses of their proposed or final rules, it should recognize that agencies need (a) the flexibility to scale the analyses to the significance of the rules and (b) the resources to satisfy such requirements.

#### Administrative Conference Recommendation 2013-3

##### Science in the Administrative Process

Adopted June 14, 2013

Over the last three decades, several authorities made recommendations for improving transparency in the use of science<sup>1</sup> in the administrative process.<sup>2</sup> Partially in response to these recommendations, the executive branch and Congress have made a number of reforms to the scientific process undergirding agency decisionmaking. In 2009, President Obama issued a memorandum directing that, "[t]o the extent permitted by law, there should be transparency in the preparation, identification, and use of scientific and technological information in policymaking."<sup>3</sup> "Each agency should [also]

<sup>1</sup> The scope of this recommendation is limited to the "natural sciences" (e.g., chemistry, physics, medical science, geology, etc.), mathematics, statistics, computer science, and other allied fields. It is based upon a report that deals with agency research and decisionmaking related to the natural sciences. Wendy Wagner, *Science in Regulation: A Study of Agency Decisionmaking Approaches* (Feb. 18, 2013), available at [http://www.acus.gov/sites/default/files/documents/Science%20in%20Regulation\\_Final%20Report\\_2\\_18\\_13\\_0.pdf](http://www.acus.gov/sites/default/files/documents/Science%20in%20Regulation_Final%20Report_2_18_13_0.pdf).

<sup>2</sup> See e.g. Nat'l Research Council, *Review of the Environmental Protection Agency's Draft IRIS Assessment of Formaldehyde* (2011); Comm. on Risk Assessment of Hazardous Air Pollutants, Nat'l Research Council, *Science and Judgment in Risk Assessment* (1994); Nat'l Research Council, *Risk Assessment in the Federal Government: Managing the Process* (1983); Bipartisan Policy Ctr., *Improving the Use of Science in Regulatory Policy* 16, 41-42 (2009) [hereinafter "BPC Report"]; see also Ctr. for Effective Gov't, *Advancing the Public Interest through Regulatory Reform: Recommendations for President-Elect Obama and the 111th Congress* 26, 34, 47 (2008).

<sup>3</sup> Memorandum from the Admin. of Barack H. Obama for the Heads of Executive Departments and Agencies on Scientific Integrity, Daily Comp. Pres. Docs., 2009 DCPD No. 00137 (Mar. 9, 2009)

have appropriate rules and procedures to ensure the integrity of the scientific process within the agency."<sup>4</sup> The Office of Science and Technology Policy (OSTP) elaborated upon this memorandum in 2010, instructing agencies to "communicate scientific and technological findings by including a clear explication of underlying assumptions; accurate contextualization of uncertainties; and a description of the probabilities associated with both optimistic and pessimistic projections."<sup>5</sup>

At base, these initiatives demand heightened transparency of agencies' use of science as a central means of ensuring the basic accountability of agency regulation. If an agency identifies the role that scientific information plays in its ultimate decision and explains how it ensured that its scientific analysis was rigorous, then the public has a basis against which it can evaluate both the scientific and policy judgments underlying the agency's decision. This transparency allows those outside the agency to assess whether the agency's policy decision comports with the authorizing law and the scientific record. A transparent decisionmaking process also advances other institutional and scientific goals, such as identifying promising areas for future research and serving as a bulwark against misuse of science for political ends.<sup>6</sup>

Despite these important initiatives, a study commissioned by the Administrative Conference<sup>7</sup> (and public meetings that considered questions it raised) revealed that agency decisionmaking processes would benefit from further improvements. Drawing on this learning, the recommendation offers several proposals for enhancing the transparency of agencies' use of science. At the same time, the Conference recognizes that agencies' abilities to implement this recommendation may be affected by resource limitations.

First, the recommendation highlights a number of innovative practices undertaken by different federal agencies to enhance the transparency of their scientific decisionmaking processes. As a general matter, agencies should articulate the specific questions to be informed by scientific information, specify study designs for new research, and establish criteria for weighing existing studies.<sup>8</sup> Agencies should identify

[hereinafter "Obama Scientific Integrity Memo"], available at <http://www.gpo.gov/fdsys/pkg/DCPD-200900137/pdf/DCPD-200900137.pdf>.

<sup>4</sup> *Id.*

<sup>5</sup> Memorandum from John P. Holdren, Director of the Office of Science and Technology Policy, to the Heads of Executive Departments and Agencies on Scientific Integrity (Dec. 17, 2010), available at <http://www.whitehouse.gov/sites/default/files/microsites/ostp/scientific-integrity-memo-12172010.pdf>. To effectuate this and a number of other responsibilities, agencies were asked to report back to OSTP on the actions taken to develop and implement their scientific integrity policies by April 2011.

<sup>6</sup> BPC Report, *supra* note 2, at 3.

<sup>7</sup> Wagner, *supra* note 1.

<sup>8</sup> In so doing, agencies should endeavor to explain the relationship between scientific research and the policy decisions the research is intended to inform. Nat'l Research Council, *Comm. on the Institutional Means for Assessment of Risks to Public Health,*

scientific reports or data upon which they relied and material literature that they considered, but upon which they did not rely, to the extent practicable and permitted by law.<sup>9</sup> Agencies should establish checkpoints (i.e., times for closing off consideration of additional research or debate prior to making a final regulatory decision) and policies for reopening that consideration. Agencies should also consider extending attribution to individual staff who participate in the preparation of scientific reports and taking other steps to promote robust debate among agency scientists.<sup>10</sup> In addition, agencies should share best practices with other agencies and should recommend the removal of any legal impediments to

Risk Assessment in the Federal Government: Managing the Process 7 (1983).

<sup>9</sup> See Administrative Conference of the United States, *Recommendation 2011-1, Legal Considerations in E-Rulemaking*, ¶ 4, 76 FR 48789, 48789 (Aug. 9, 2011); see also Exec. Order No. 13,642, *Making Open and Machine Readable the New Default for Government Information*, 78 FR 28111 (May 14, 2013); Memorandum from John P. Holdren, Director of the Office of Science and Technology Policy, to the Heads of Executive Departments and Agencies on Increasing Access to the Results of Federally Funded Research (Feb. 22, 2013) (calling for agency plans to permit public access to research papers funded in whole or in part with federal monies). As a general matter, the agency should make publicly available any scientific literature it considered, including literature it reviewed but upon which it ultimately did not rely. For purposes of the recommendation, literature that an agency "considered" includes not only any study an agency official relied upon but also any study an agency official reviewed but ultimately determined not to rely upon (because it was deemed to be outside the scope of the scientific study at hand, was not considered sufficiently reliable, or was otherwise rejected by the agency official). *Cf.* Administrative Conference of the United States, *Recommendation 2013-4, The Administrative Record in Informal Rulemaking*, — FR \_\_\_\_\_ (providing a similar definition of "consider" in the context of the administrative record in informal rulemaking). If an agency official merely had access to a study but did not specifically analyze it to determine its relevance, that study has not been "considered" within the meaning of the recommendation for purposes of making such literature publicly available.

<sup>10</sup> In response to President Obama's call for agencies to develop "appropriate rules and procedures to ensure the integrity of the scientific process," Obama Scientific Integrity Memo, *supra* note 3, a number of agencies have promulgated integrity policies to promote open debate among agency scientists. See, e.g., *Env'tl. Prot. Agency, Scientific Integrity Policy* (Feb. 2012), available at [http://epa.gov/osa/pdfs/epa\\_scientific\\_integrity\\_policy\\_20120115.pdf](http://epa.gov/osa/pdfs/epa_scientific_integrity_policy_20120115.pdf); *Food and Drug Admin., Scientific Integrity at FDA, FDA Staff Manual Guides, Volume IV—Agency Program Directives 2* (2012), available at <http://www.fda.gov/ScienceResearch/AboutScienceResearchatFDA/ucm306446.htm>; Nat'l Oceanic and Atmospheric Admin., *Scientific Integrity* (Dec. 7, 2011), available at [http://www.corporateservices.noaa.gov/ames/administrative\\_orders/chapter\\_202/202-735-D.pdf](http://www.corporateservices.noaa.gov/ames/administrative_orders/chapter_202/202-735-D.pdf); *Nuclear Regulatory Comm'n, Collaborative Work Environment Program*, <http://www.nrc.gov/about-nrc/values.html#open> (last updated May 4, 2012); see also Francesca T. Grifo, *Federal Agency Scientific Integrity Policies: A Comparative Analysis* (Mar. 2013), [http://www.ucsusa.org/assets/documents/scientific\\_integrity/SL-policies-comparative-analysis.pdf](http://www.ucsusa.org/assets/documents/scientific_integrity/SL-policies-comparative-analysis.pdf).

promoting transparency in decisions in which science is an important element.<sup>11</sup>

Second, the recommendation offers a series of proposals to bring greater congruity to the treatment of publicly and privately funded scientific research. Specifically, it encourages the disclosure of data underlying scientific research, including both privately funded and federally funded research, that an agency is considering (to the extent practicable and permitted by law).<sup>12</sup> Similarly, it recommends extending conflict of interest disclosure norms to private parties who submit studies used by an agency.

## Recommendation

### *Suggested Agency Practices Regarding the Use of Science in the Administrative Process*

**1. Explaining Agency Scientific Decisionmaking.** Agencies should explain in proposed and final decision documents how they ensured rigorous review of the scientific information underlying each science-intensive regulatory project. This includes a statement of how each agency evaluated the scientific information used in its analysis; how the agency made that information available to reviewers and the public; how the analysis was reviewed by experts and interested parties; and how the agency ensured that the final decision was supported by the scientific record.

**2. Assuring Transparent Assessments.** At an early stage in their decisionmaking processes, agencies should identify the specific policy questions that may be informed by science; describe the design of the assessments needed to characterize risks and inform policy decisions; and describe the criteria to be used in reviewing and weighing existing studies. When completed, assessments should: identify other appropriate analytical choices and explain why they were not chosen; provide a synthesis of the available evidence and relevant literature guided by the assessment design or criteria; identify significant assumptions and choices of analytical techniques; provide a statement of remaining uncertainties; and discuss how different plausible choices might change the results of the assessment. Where possible, agencies should also explain the relationship between their scientific findings and the final policy choice. Agencies should strive to communicate this information in a manner that is clear to the general public.

**3. Disclosing Underlying Studies and Data.** To the extent practicable and permitted by law and applicable policies, each agency should identify and make publicly available (on the agency Web site or some other widely available forum) references to the scientific literature, underlying data, models, and research results that it considered. In so

doing, the agency should list all information upon which it relied in reaching its conclusions, as well as any information material to the scientific analysis that it considered but upon which it ultimately did not rely. Consistent with the limitations in the Information Quality Act (IQA) guidelines issued by the Office of Management and Budget and its own IQA guidelines, each agency should ensure that members of the public have access to the information necessary to reproduce or assess the agency's technical or scientific conclusions.

**4. Checkpoints and Explanations.** Agencies should consider establishing explicit checkpoints for regulatory projects, defining both the conditions under which they intend to close their consideration of research or debate in order to reach a decision and when they might reopen that consideration, particularly in cases when they are not bound by judicially enforceable deadlines. In any case, agencies should explain their decisions to initiate, stop, or reopen consideration of research or debate. Such explanations should reference significant relevant ongoing research or other relevant factors.

**5. Identifying Future Projects.** For science-intensive projects, agencies should identify specific types of future research that may be needed to reduce significant uncertainties in order to advance understanding of the issues.

**6. Attribution for Agency Personnel.** Agency personnel play an important role in producing their respective agencies' scientific analyses. Agencies should consider providing their personnel with some form of consensual attribution for reports or analyses to which they contribute in a significant way. If appropriate, such attributions should be made for personnel who contributed in a significant way to a technical or scientific report, including not only scientists but also economists, lawyers, and other contributors. Reviewers and other contributors could be identified by name and general contribution.

**7. Encouraging Debate.** Agencies should encourage vigorous debate among agency scientists and should explore ways of incorporating the diversity of that debate in any resulting work product. Agency employees should be encouraged to publish their scientific work in the peer reviewed literature, provided that they follow applicable agency procedures and that confidential governmental deliberations are not compromised. Dissenting staff members should be protected from reprisals.

**8. Sharing of Agency Best Practices.** Agencies should identify and publicize the innovations they have developed for transparently incorporating science into their regulatory decisions. OSTP, an interagency group headed by OSTP, or another body should consider occasionally convening agency representatives to discuss and share best practices.

**9. Addressing Legal Obstacles to Transparent Decisionmaking.** Agencies should identify legal obstacles that may impede otherwise appropriate public access to the scientific information underlying agency analyses or that may prevent the agencies' development of scientifically robust decisionmaking processes. Agencies should

recommend appropriate actions to eliminate such impediments, including revisions in existing law, to the Executive Office of the President.

### *Agency Disclosures To Enhance the Transparency of Research*

**10. Data Disclosure.** To the extent practicable and in compliance with applicable legal restrictions, privileges, protections, and authorities, agencies should seek to provide disclosure of data underlying scientific research, including both privately and federally funded research being considered by the agencies. Where practicable, such information should be disclosed in machine-readable format. Where such data are not subject to legal or other protections, and the data's owners nonetheless will not provide such access, agencies should note that fact and explain why they used the results if they chose to do so. Agencies should review their confidential business information policies to ensure that they include appropriate mechanisms to prevent over-claiming.

**11. Conflict of Interest Disclosure.** Agencies should require conflict of interest disclosures on all scientific research submitted to inform an agency's licensing, regulatory, or other decisionmaking processes. This disclosure should be similar to the conflict of interest disclosure required by some scientific journals, such as that used by the International Committee of Medical Journal Editors. The regulatory conflict of interest disclosure should also, where permitted by law, identify whether the experimenter or author had the legal right without approval of the sponsor of the research to: design the research; collect the data; interpret the data; and author, publish or otherwise disseminate the resulting report or full dataset. To the extent that a party other than the principal investigator (e.g., the study sponsor or funder) had control over the design or publication of the study, agencies should disclose this fact and specify the nature of the control such an entity exercised.

## Administrative Conference Recommendation 2013-4

### The Administrative Record in Informal Rulemaking

*Adopted June 14, 2013*

The administrative record in informal rulemaking plays an essential role in informing the public of potential agency action and in improving the public's ability to understand and participate in agency decisionmaking. As well, the administrative record can be essential to judicial review of agency decisionmaking under the Administrative Procedure Act (APA), which directs courts to "review the whole record or those parts of it cited by a party" to determine whether challenged agency action is lawful.<sup>1</sup> This statutory language was originally understood as referring to formal proceedings. However, the Supreme Court has long interpreted this APA provision as also encompassing the "administrative record" in informal agency proceedings,

<sup>11</sup> See Wagner, *supra* note 1, at 135-38 (identifying a number of external legal impediments to promoting transparency, including short statutory deadlines, limits on dissemination of scientific studies, resource limitations, and caps on the number of discretionary advisory committees agencies can constitute).

<sup>12</sup> Legal restrictions that may limit agencies' ability to provide such disclosures include, among other things, protections for personal privacy, trade secrets, and confidential business information.

<sup>1</sup> 5 U.S.C. 706.

whether reviewable by statute or as final agency actions under 5 U.S.C. 704.<sup>2</sup> This application to informal proceedings has given rise to uncertainty and experimentation as agencies and courts have worked to implement the administrative record concept—at times inconsistently. As a result, confusion has arisen about the compilation and uses of agency rulemaking records maintained internally, public rulemaking dockets, and administrative records for judicial review. The differences among these three types of records can be seen from their descriptions below.

The Administrative Conference therefore commissioned a study of federal agencies' current practices in the development of rulemaking records, public rulemaking dockets, and administrative records for judicial review.<sup>3</sup> This recommendation and the supporting report address these concepts in the context of informal agency rulemaking adopted pursuant to the notice-and-comment procedures prescribed in 5 U.S.C. 553.<sup>4</sup> The recommendation does not address the record for agency decisions made in other contexts, such as in adjudication, formal rulemaking, or guidance documents.

This recommendation builds upon earlier Administrative Conference work in the areas of rulemaking, recordkeeping, and technological developments in managing records. Administrative Conference Recommendation 74–4, *Preenforcement Judicial Review of Rules of General Applicability*, identified the administrative materials that should be available to a court that was evaluating, on preenforcement review, the factual basis for agency rules of general applicability.<sup>5</sup> That recommendation was receptive to judicial development of the concept of a “record” on review of informal agency rulemakings. In Recommendation 93–4, *Improving the Environment for Agency Rulemaking*, the Administrative Conference advised agencies to establish and manage rulemaking files “so that maximum disclosure to the public is achieved during the comment period and so that a usable and reliable file is available for purposes of judicial review.”<sup>6</sup> A number of Administrative Conference recommendations also have examined the use of technology in acquiring, releasing, and managing agency

records.<sup>7</sup> Most recently, the Conference examined legal considerations associated with the use of digital technologies in the development and implementation of informal rulemakings.<sup>8</sup>

This recommendation synthesizes and updates the Conference's prior recommendations in these areas. It is grounded in empirical research, supported by a survey questionnaire on present agency recordkeeping practices, as well as by a review of existing agency guidance.<sup>9</sup> The Conference has identified and recommends best practices for all rulemaking agencies in the areas of record compilation, preservation, and certification. The recommendation also advises agencies to develop guidance to aid agency personnel as they compile rulemaking and administrative records and public rulemaking dockets and to increase public understanding of agency recordkeeping.

Agencies engage in informal rulemaking with differing frequencies, resources, and technological capabilities. Many agencies are in a period of transition, as they move from paper to electronic recordkeeping.<sup>10</sup> Attention to the design of information technology resources that is mindful of the principles and best practices set forth below can aid agencies in recordkeeping, as well as facilitate greater public understanding of agency decisionmaking and more effective judicial review. For the purposes of this recommendation, the rulemaking record, public rulemaking docket, and the administrative record for judicial review are defined as follows:

“*Rulemaking record*” means the full record of materials before the agency in an informal rulemaking. The Conference contemplates that, in addition to materials required by law to be included in the rulemaking record, as well as all comments and materials submitted to the agency during comment periods, any material that the agency considered should be included as part of that record.

“*Considered*” entails review by an individual with substantive responsibilities

in connection with the rulemaking.<sup>11</sup> To say that material was considered also entails some minimum degree of attention to the contents of a document. Thus, the rulemaking record need not encompass every document that rulemaking personnel encountered while rummaging through a file drawer, but it generally should include a document that an individual with substantive responsibilities reviewed in order to evaluate its possible significance for the rulemaking, unless the review disclosed that the document was not germane to the subject matter of the rulemaking. A document should not be excluded from the rulemaking record on the basis that the reviewer disagreed with the factual or other analysis in the document, or because the agency did not or will not rely on it. Although the concept resists precise definition, the term considered as used in this recommendation should be interpreted so as to fulfill its purpose of generating a body of materials by which the rule can be evaluated and to which the agency and others may refer in the future.

“*Public rulemaking docket*” means the public version of the rulemaking record managed by the agency, regardless of location, such as online at Regulations.gov or an agency Web site or available for physical review in a docket room. The public rulemaking docket includes all information that the agency has made available for public viewing. The Conference also urges agencies to manage their public rulemaking dockets to achieve maximum disclosure to the public. However, the Conference recognizes that prudential concerns may limit agencies from displaying some information, such as certain copyrighted or indecent materials, online. It is a best practice for agencies to describe and note online those materials that are not displayed but are available for physical inspection. Another agency best practice is to include in the public rulemaking docket materials generated and considered by the agency after the close of the comment period but prior to issuance of the final rule.<sup>12</sup>

“*Administrative record for judicial review*” means the materials tendered by the agency and certified to a court as the record on

<sup>2</sup> *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419 (1971).

<sup>3</sup> Leland E. Beck, Agency Practices and Judicial Review of Administrative Records in Informal Rulemaking (May 14, 2013) (report to the Administrative Conference of the United States) [hereinafter Beck Report].

<sup>4</sup> 5 U.S.C. 553(b)–(d). It may also have application to “hybrid” rulemaking statutes that require additional procedures beyond those in § 553 but less than those in formal rulemaking under 5 U.S.C. 556–57.

<sup>5</sup> Administrative Conference of the United States, Recommendation 74–4, *Preenforcement Judicial Review of Rules of General Applicability*, 39 FR 23,044 (June 26, 1974), based on consultant's report published as Paul R. Verkuil, *Judicial Review of Informal Rulemaking*, 60 Va. L. Rev. 185 (1974).

<sup>6</sup> Administrative Conference of the United States, Recommendation 93–4, *Improving the Environment for Agency Rulemaking*, 59 FR 4670 (Feb. 1, 1994), correction published, 59 FR 8507 (Feb. 22, 1994).

<sup>7</sup> Administrative Conference of the United States, Recommendation 2011–2, *Rulemaking Comments*, 76 FR 48,791 (Aug. 9, 2011); Administrative Conference of the United States, Recommendation 2011–1, *Legal Considerations in e-Rulemaking*, 76 FR 48,789 (Aug. 9, 2011); Administrative Conference of the United States, Recommendation 90–5, *Federal Agency Electronic Records Management and Archives*, 55 FR 53270 (Dec. 28, 1990); Administrative Conference of the United States, Recommendation 88–10, *Federal Agency Use of Computers in Acquiring and Releasing Information*, 54 FR 5209 (Feb. 2, 1989).

<sup>8</sup> Recommendation 2011–1, *supra* note 7.

<sup>9</sup> *Beck Report*, *supra* note 3, at Section III.

<sup>10</sup> The Office of Management and Budget and the National Archives have directed federal agencies to manage all permanent electronic records in an electronic format to the fullest extent possible by December 31, 2019, and to develop plans to do so by December 31, 2013. Memorandum from Jeffrey D. Zients, Acting Director, Office of Management and Budget, and David S. Ferriero, Archivist of the United States, National Archives and Records Administration, to the Heads of Executive Departments and Agencies and Independent Agencies concerning “Managing Government Records Directive” M–12–18 (Aug. 24, 2012).

<sup>11</sup> The Conference first recommended inclusion of materials “considered” by the agency in the administrative record for judicial review in Recommendation 74–4, *supra* note 5. Courts have also relied on the concept of consideration in defining the administrative record. *Pac. Shores Subdiv., Cal. Water Dist. v. U.S. Army Corps of Engineers*, 448 F. Supp. 2d 1, 4 (D.D.C. 2006) (citations omitted); see also *Nat'l Ass'n of Chain Drug Stores v. U.S. Dep't of Health & Human Servs.*, 631 F. Supp. 2d 23, 26 (D.D.C. 2009) (citing Recommendation 74–4 in defining the administrative record); cf. *Sierra Club v. Costle*, 657 F.2d 298, 394 n. 469 (D.C. Cir. 1981) (discussing Recommendation 74–4 as an approach to defining the administrative record).

<sup>12</sup> The present recommendation is not limited to disclosures that the APA, as construed in widely followed case law, may require. See *Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors*, 745 F.2d 677, 684 (D.C. Cir. 1984) (“[A]t least the most critical factual material that is used to support the agency's position on review must have been made public in the proceeding. . . .”). However, this case law gives agencies an additional reason to provide public disclosure of factual material in some circumstances.

review of the agency's regulatory action. The administrative record provided to the court will include an affidavit, made by a certifying official, attesting to the contents and accuracy of the record being certified.<sup>13</sup> It should also include an index itemizing the contents.<sup>14</sup> Parties often rely on this index in designating portions of the administrative record for judicial review, such as for inclusion in a joint appendix that will be presented to the court. The designated portions of the administrative record then typically serve as the basis for the court's review, as provided in the Administrative Procedure Act and as appropriate under the rules of the reviewing court.<sup>15</sup>

Some materials in an agency's rulemaking record may be protected from public disclosure by law or withheld from the public on the basis of agency privilege. For example, protected materials might include classified information, confidential supervisory or business information, or trade secrets. Other materials might be withheld on the basis of privilege, including attorney-client privilege, the attorney work product privilege, and the pre-decisional deliberative process privilege. Agency practices regarding the identification or inclusion of protected or privileged materials in administrative records and their accompanying indices vary.<sup>16</sup> Some agencies do not include or identify deliberative or privileged materials in administrative records for judicial review.<sup>17</sup> Other agencies identify non-disclosed materials specifically in a privilege log provided with the index of the administrative record for judicial review. Agencies have also noted redactions of protected materials in the administrative record for judicial review and moved the court to permit filing of protected materials, or a summary thereof, under seal. Many agencies do not have a policy on inclusion of protected or privileged materials in an administrative record for judicial review and manage such materials on a case-by-case basis. Case-by-case consideration may occasionally be necessary, such as when privileged materials are referenced as the basis of the agency's decision. Nonetheless, the Conference recommends that agencies develop a written policy for treatment of protected or privileged materials, including indexing, in public rulemaking dockets and in certification of the administrative record for judicial review, and that agencies make this policy publicly available.

Compilation and preparation of the administrative record for judicial review is

<sup>13</sup> *Beck Report*, *supra* note 3, at Section IV.A.

<sup>14</sup> *Id.*

<sup>15</sup> 5 U.S.C. 706 (“ . . . the court shall review the whole record or those parts of it cited by a party. . . .”).

<sup>16</sup> The variety of agency practices is described at length in the *Beck Report*, *supra* note 3, at Section IV.A.

<sup>17</sup> Absent a showing of bad faith or improper behavior, the agency practice of excluding pre-decisional materials from the administrative record on judicial review enjoys substantial judicial support. See *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 156 F.3d 1279 (D.C. Cir. 1998); *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 789 F.2d 26, 44–45 (D.C. Cir. 1986) (en banc).

properly within the province of the agency and this process should be accorded a presumption of regularity by the reviewing court.<sup>18</sup> Completion or supplementation of the administrative record for judicial review may be appropriate where a strong showing has been made to overcome the presumption of regularity in compilation. For example, courts have permitted limited discovery on the basis of a “strong showing of bad faith or improper behavior” on the part of the agency decisionmaker.<sup>19</sup> Courts may also inquire into allegations that the agency omitted information from the administrative record for judicial review that should have been included.<sup>20</sup>

Completion or supplementation of the administrative record for judicial review may also be appropriate in other circumstances not addressed in this recommendation. In a previous recommendation, the Conference has recognized that the reviewing court should not invariably be confined to the record on review in evaluating the factual basis of a generally applicable rule on pre-enforcement review.<sup>21</sup> The Conference has also acknowledged that, on direct review by courts of appeals, the record on review “can usually be supplemented, if necessary, by means other than an evidentiary trial in a district court.”<sup>22</sup>

## Recommendation

### Record Contents

1. *The Rulemaking Record.* In the absence of a specific statutory requirement to the contrary, the agency rulemaking record in an informal rulemaking proceeding should include:

- (a) Notices pertaining to the rulemaking;
- (b) comments and other materials submitted to the agency related to the rulemaking;
- (c) transcripts or recordings, if any, of oral presentations made in the course of a rulemaking;
- (d) reports or recommendations of any relevant advisory committees;
- (e) other materials required by statute, executive order, or agency rule to be considered or to be made public in connection with the rulemaking; and

<sup>18</sup> See *Citizens for Alternatives to Radioactive Dumping v. U.S. Dep't of Energy*, 485 F.3d 1091, 1097 (10th Cir. 1985) (“ . . . designation of the Administrative Record, like any established administrative procedure, is entitled to a presumption of administrative regularity.”) (citation omitted); *Amfac Resorts, LLC v. U.S. Dep't of Interior*, 143 F.Supp. 2d 7, 12 (D.D.C. 2001); see also *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926) (“The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.”).

<sup>19</sup> *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971).

<sup>20</sup> See, e.g., *Cape Cod Hospital v. Sebelius*, 630 F.3d 203, 211–12 (D.C. Cir. 2011); *Ad Hoc Metals Coalition v. Whitman*, 227 F. Supp. 2d 134, 139–40 (D.D.C. 2002).

<sup>21</sup> Recommendation 74–4, *supra* note 5.

<sup>22</sup> Administrative Conference of the United States, Recommendation 75–3, *The Choice of Forum for Judicial Review of Administrative Action* ¶ 5(a), 40 FR 27926 (July 2, 1975).

(f) any other materials considered by the agency during the course of the rulemaking.

### 2. *The Public Rulemaking Docket.*

Agencies should manage their public rulemaking dockets to achieve maximum public disclosure. Insofar as feasible, the public rulemaking docket should include all materials in the rulemaking record, subject to legal limitations on disclosure, any claims of privilege, or any exclusions allowed by law that the agency chooses to invoke. In addition, it may be prudent not to include some sensitive information online and to note instead that this material is available for physical review in a reading room.

3. *The Administrative Record for Judicial Review.* The administrative record provided to the court on judicial review of informal rulemaking should contain all of the materials in the rulemaking record as set forth in paragraph 1, except that agencies need not include materials protected from disclosure by law nor materials that the agency has determined are subject to withholding based on appropriate legal standards, including privilege.

### Rulemaking Recordkeeping

4. Agencies should begin compiling rulemaking records no later than the date on which an agency publishes the notice of proposed rulemaking. Agencies should include materials considered in preparation of the notice of proposed rulemaking. For example, agencies should include materials received in response to an advance notice of proposed rulemaking or a notice of inquiry, if there is one, and considered in development of the proposed rule. The agency should continue compiling the rulemaking record as long as the rule is pending before the agency.

5. Agencies should designate one or more custodians for rulemaking recordkeeping, either on a rulemaking-by-rulemaking basis or generally. Agencies should inform agency personnel of the custodian(s) and direct them to deposit rulemaking record materials with the custodian(s), excepting if necessary confidential information to which access is restricted. The custodian(s) should document the record compilation process.

### Public Rulemaking Dockets

6. To the extent practicable, agencies should index public rulemaking dockets for informal rulemaking, at an appropriate level of detail.

### Record Preservation

7. The National Archives and Records Administration (NARA) should amend its agency guidance to address the official status and legal value of records relating to informal rulemaking, particularly administrative records for judicial review.

8. Agencies using electronic records management systems to manage rulemaking records, such as the Federal Document Management System or agency specific systems, should work with NARA to ensure the adequacy of such systems for recordkeeping purposes and the transfer to the National Archives of permanent records. Agencies should review their records schedules in light of developments in electronic records management.

### Certification of Administrative Records for Judicial Review

9. Agencies should develop procedures for designating appropriate individuals, who may or may not be record custodians, to certify administrative records to the court in case of judicial review of agency action. Agency certifications should include an index of contents of the administrative record for judicial review.

### Agency Record Policies and Guidance

10. Agencies should develop a general policy regarding treatment of protected or privileged materials, including indexing, in public rulemaking dockets and in certification of the administrative record for judicial review. Agencies should make this policy available to the public and should provide it to the Department of Justice, if the Department represents the agency in litigation.

11. Agencies that engage in informal rulemaking should issue guidance to aid personnel in implementing the above best practices. Agencies should make their guidance on informal rulemaking and administrative recordkeeping available to the public and should provide it to the Department of Justice, if the Department represents the agency in litigation. The level of detail and contents of such guidance will vary based on factors such as: The size of typical agency rulemaking records; institutional experience, or the lack thereof, with record compilation and informal rulemaking litigation; the need for consistency across agency components in the development and maintenance of rulemaking records; and agency resources. However, agencies should ensure that guidance addresses at least the following:

- (a) Essential components of the rulemaking record, public rulemaking docket, and the administrative record for judicial review;
- (b) appropriate exclusions from the rulemaking record, including guidance on whether and when to exclude materials such as personal notes or draft documents;
- (c) timing of compilation and indexing practices;
- (d) management and segregation of privileged materials, e.g., attorney work product or pre-decisional deliberative materials;
- (e) management and segregation of sensitive or protected materials, e.g., copyrighted, classified, protected personal, or confidential supervisory or business information;
- (f) policies and procedures, if any, for the protection of sensitive information submitted by the public during the process of rulemaking or otherwise contained in the rulemaking record;
- (g) preservation of rulemaking and administrative records and public rulemaking dockets;
- (h) certification of the administrative record for judicial review, including the process for identifying the appropriate certifying official; and
- (i) relevant capabilities and limitations of recordkeeping tools and technologies.

### Judicial Review

12. A reviewing court should afford the administrative record for judicial review a presumption of regularity.

13. In appropriate circumstances, a reviewing court should permit or require supplementation or completion of the record on review. Supplementation or completion may be appropriate when the presumption of regularity has been rebutted, such as in cases where there is a strong showing that an agency has acted improperly or in bad faith or there are credible allegations that the administrative record for judicial review is incomplete.

[FR Doc. 2013-16541 Filed 7-9-13; 8:45 am]

BILLING CODE 6110-01-P

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

[Docket No. APHIS-2013-0054]

#### Notice of Request for Extension of Approval of an Information Collection; Interstate Movement of Fruit From Hawaii

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

**ACTION:** Extension of approval of an information collection; comment request.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection associated with the regulations for the interstate movement of fruit from Hawaii.

**DATES:** We will consider all comments that we receive on or before September 9, 2013.

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

- **Federal eRulemaking Portal:** Go to <http://www.regulations.gov/#!documentDetail;D=APHIS-2013-0054-0001>.
- **Postal Mail/Commercial Delivery:** Send your comment to Docket No. APHIS-2013-0054, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road, Unit 118, Riverdale, MD 20737-1238.

Supporting documents and any comments we receive on this docket may be viewed at <http://www.regulations.gov/#!docketDetail;D=APHIS-2013-0054> or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m.,

Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799-7039 before coming.

**FOR FURTHER INFORMATION CONTACT:** For information on the regulations for the interstate movement of fruit from Hawaii, contact Mr. David Lamb, Regulatory Coordination Specialist, RPM, PPQ, APHIS, 4700 River Road, Unit 133, Riverdale, MD 20737; (301) 851-2103. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851-2908.

#### SUPPLEMENTARY INFORMATION:

**Title:** Interstate Movement of Fruit From Hawaii.

**OMB Number:** 0579-0331.

**Type of Request:** Extension of approval of an information collection.

**Abstract:** The Plant Protection Act (7 U.S.C. 7701 *et seq.*) authorizes the Secretary of Agriculture to restrict the importation, entry, or interstate movement of plants, plant products, and other articles to prevent the introduction of plant pests into the United States or their dissemination within the United States. The regulations in 7 CFR part 318, State of Hawaii and Territories Quarantine Notices, prohibit or restrict the interstate movement of fruits, vegetables, and other products from Hawaii, Puerto Rico, the U.S. Virgin Islands, and Guam to the continental United States to prevent the spread of plant pests or noxious weeds.

In accordance with the regulations in § 318.13-26, breadfruit, jackfruit, fresh pods of cowpea and its relatives, dragon fruit, mangosteen, moringa pods, and melon must meet certain conditions for interstate movement from Hawaii into the continental United States. These conditions involve information collection activities, including certificates and limited permits.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

- (1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;
- (2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; e.g., permitting electronic submission of responses.

*Estimate of burden:* The public reporting burden for this collection of information is estimated to average 0.20 hours per response.

*Respondents:* Growers of breadfruit, jackfruit, fresh pods of cowpea and its relatives, dragon fruit, mangosteen, moringa pods, and melon in Hawaii.

*Estimated annual number of respondents:* 110.

*Estimated annual number of responses per respondent:* 24.76.

*Estimated annual number of responses:* 2,724.

*Estimated total annual burden on respondents:* 545 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 26th day of June 2013.

**Kevin Shea,**

*Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2013-16546 Filed 7-9-13; 8:45 am]

**BILLING CODE 3410-34-P**

## DEPARTMENT OF AGRICULTURE

### Forest Service

#### Gogebic Resource Advisory Committee

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** The Gogebic Resource Advisory Committee (RAC) will meet in Watersmeet, Michigan on the date listed below. The Committee is meeting as authorized under the Secure Rural Schools and Community Self-Determination Act of 2000 (the Act) (Pub. L. 112-141) and operates in compliance with the Federal Advisory Committee Act (FACA) (Pub. L. 92-463). The RAC's purposes are to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with the Title II of the Act. The meeting is open to the

public. The purpose of the meeting is to review progress made on previously approved projects and prioritize future work.

**DATES:** The meeting will be held on Wednesday, July 31, 2013, at 9:30 a.m. (CST).

**ADDRESSES:** The meeting will be held at the Watersmeet and Iron River Ranger District Office, E23979 US 2 East (Corner of US 2 and HWY 45), Watersmeet, MI.

Written comments may be submitted as described under Supplementary Information listed below. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at the Ottawa National Forest Supervisor's Office, E6248 US HWY 2, Ironwood, MI. Please call ahead to 906-932-1330 to facilitate entry into the building to view comments.

**FOR FURTHER INFORMATION CONTACT:** Lisa Klaus, RAC Coordinator, USDA, Ottawa National Forest Headquarters, E6248 US HWY 2, Ironwood, MI, 906-932-1330, ext. 328, or via email at [lklaus@fs.fed.us](mailto:lklaus@fs.fed.us).

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

**SUPPLEMENTARY INFORMATION:** The agenda will include the following:

1. Review and approval of previous meeting minutes;
2. Review progress of previously approved projects and establish priorities for remaining projects; and
3. Public comments.

Anyone who would like to bring related matters to the attention of the Committee may file written statements with the Committee staff before or after the meeting. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should request in writing by July 24, 2013, to be scheduled on the agenda. Written comments and requests for time for oral comments must be sent to Lisa Klaus, Ottawa National Forest, E6248 US HWY 2, Ironwood, MI 49938; Email: [lklaus@fs.fed.us](mailto:lklaus@fs.fed.us); or Facsimile: 906-932-0122.

A summary of the meeting will be posted at [https://fsplaces.fs.fed.us/fsfiles/unit/wo/secure\\_rural\\_schools/nsf/RAC/633A713D46389D1A882575E00062107E?OpenDocument](https://fsplaces.fs.fed.us/fsfiles/unit/wo/secure_rural_schools/nsf/RAC/633A713D46389D1A882575E00062107E?OpenDocument) within 21 days of the meeting.

If you are a person requiring reasonable accommodation, please make requests in advance for sign language interpreting, assistive listening devices, or other reasonable accommodations for access to the facility for proceedings by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All reasonable accommodation requests are managed on a case by case basis.

Dated: July 2, 2013.

**Anthony Scardina,**  
*Forest Supervisor.*

[FR Doc. 2013-16551 Filed 7-9-13; 8:45 am]

**BILLING CODE 3410-11-P**

## DEPARTMENT OF AGRICULTURE

### Forest Service

#### Ontonagon Resource Advisory Committee

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** The Ontonagon Resource Advisory Committee will meet in Kenton, Michigan on the dates listed below. The Committee is authorized under the Secure Rural Schools and Community Self-Determination Act of 2000, (the Act) (Pub. L. 112-141) and operates in compliance with the Federal Advisory Committee Act (FACA) (Pub. L. 92-463). The RAC's purposes are to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with the Title II of the Act. The meeting is open to the public. The purpose of the meeting is to review progress made on previously approved projects and prioritize future work.

**DATES:** The meeting will be held on Tuesday, July 30, 2013, at 9:30 a.m. (EST).

**ADDRESSES:** The meeting will be held at the Kenton Ranger District Office, 4810 E. M28, Kenton, Michigan.

Written comments may be submitted as described under Supplementary Information listed below. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments at the Ottawa National Forest Headquarters, E6248 US HWY 2, Ironwood, MI. Please call ahead at 906-932-1330 to facilitate entry into the building to view comments.

**FOR FURTHER INFORMATION CONTACT:** Lisa Klaus, RAC Coordinator, USDA, Ottawa National Forest Headquarters, E6248 US

HWY 2, Ironwood, MI, 906-932-1330, ext. 328, or via email [lklaus@fs.fed.us](mailto:lklaus@fs.fed.us).

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

**SUPPLEMENTARY INFORMATION:** The agenda will include the following:

1. Review and approval of previous meeting minutes;
2. Review progress of previously approved projects and establish priorities for remaining projects; and
3. Public comments.

Anyone who would like to bring related matters to the attention of the Committee may file written statements with the Committee staff before or after the meeting. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should request in writing by July 23, 2013, to be scheduled on the agenda. Written comments and requests for time for oral comments must be sent to Lisa Klaus, Ottawa National Forest, E6248 US HWY 2, Ironwood, MI 49938; Email: [lklaus@fs.fed.us](mailto:lklaus@fs.fed.us); or Facsimile: 906-932-0122.

A summary of the meeting will be posted at: [https://fsplaces.fs.fed.us/fsfiles/unit/wo/secure\\_rural\\_schools.nsf/RAC/Ontonagon+County?OpenDocument](https://fsplaces.fs.fed.us/fsfiles/unit/wo/secure_rural_schools.nsf/RAC/Ontonagon+County?OpenDocument) within 21 days of the meeting.

If you are a person requiring reasonable accommodation, please make requests in advance for sign language interpreting, assistive listening devices, or other reasonable accommodations for access to the facility for proceedings by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All reasonable accommodation requests are managed on a case by case basis.

Dated: July 2, 2013.

**Anthony Scardina**,  
Forest Supervisor.

[FR Doc. 2013-16553 Filed 7-9-13; 8:45 am]

**BILLING CODE 3410-11-P**

## DEPARTMENT OF AGRICULTURE

### Rural Utilities Service

#### Information Collection Activity; Comment Request

**AGENCY:** Rural Utilities Service, USDA.

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 (44

U.S.C. Chapter 35, as amended), the Rural Utilities Service (RUS) invites comments on this information collection for which approval from the Office of Management and Budget (OMB) will be requested.

**DATES:** Comments on this notice must be received by September 9, 2013.

**FOR FURTHER INFORMATION CONTACT:**

Michele L. Brooks, Director, Program Development and Regulatory Analysis, Rural Utilities Service, 1400 Independence Ave. SW., STOP 1522, Room 5162—South Building, Washington, DC 20250-1522. Telephone: (202) 690-1078. FAX: (202) 720-8435. Email: [michele.brooks@wdc.usda.gov](mailto:michele.brooks@wdc.usda.gov).

**SUPPLEMENTARY INFORMATION:** The Office of Management and Budget's (OMB) regulation (5 CFR 1320) implementing provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104-13) requires that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities (see 5 CFR 1320.8(d)). This notice identifies an information collection that the Agency is submitting to OMB for extension.

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 will have practical utility; (b) 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; (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 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. Comments may be sent to: Michele L. Brooks, Director, Program Development and Regulatory Analysis, Rural Utilities Service, STOP 1522, 1400 Independence Ave. SW., Washington, DC 20250-1522. FAX: (202) 720-8435. Email: [michele.brooks@wdc.usda.gov](mailto:michele.brooks@wdc.usda.gov).  
Title: Broadband Grant Program.  
OMB Control Number: 0572-0127.

*Type of Request:* Extension of a currently approved information collection.

*Abstract:* The provision of broadband service is vital to the economic development, education, health, and safety of rural Americans. To further this objective, RUS provides financial assistance in the form of grants to

eligible entities that propose, on a "community-oriented connectivity" basis, to provide broadband service that fosters economic growth and delivers enhanced educational, health care, and public safety services to extremely rural, lower income communities. The Agency gives priority to rural areas that it believes have the greatest need for broadband services. Grant authority is utilized to deploy broadband infrastructure to extremely rural, lower income communities on a "community-oriented connectivity" basis. The "community-oriented connectivity" concept integrates the deployment of broadband infrastructure with the practical, everyday uses and applications of the facilities. This broadband access is intended to promote economic development and provide enhanced educational and health care opportunities. The Agency provides financial assistance to eligible entities that are proposing to deploy broadband service in rural communities where such service does not currently exist and who will connect the critical community facilities including the local schools, libraries, hospitals, police, fire and rescue services and who will operate a community center that provides free and open access to residents.

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average 130.11 hours per response.

*Respondents:* Public bodies, commercial companies, cooperatives, nonprofits, Indian tribes, and limited dividend or mutual associations and must be incorporated or a limited liability company.

*Estimated Number of Respondents:* 90.

*Estimated Number of Responses per Respondent:* 1.23.

*Estimated Total Annual Burden on Respondents:* 14,442.

Copies of this information collection can be obtained from: Michele L. Brooks, Director, Program Development and Regulatory Analysis, 202-690-1078, FAX: (202) 720-8435. Email: [michele.brooks@wdc.usda.gov](mailto:michele.brooks@wdc.usda.gov).

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Dated: July 1, 2013.

**John Charles Padalino**,  
Administrator, Rural Utilities Service.

[FR Doc. 2013-16569 Filed 7-9-13; 8:45 am]

**BILLING CODE 3410-15-P**

**DEPARTMENT OF COMMERCE****Submission for OMB Review;  
Comment Request**

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

*Agency:* National Oceanic and Atmospheric Administration (NOAA).

*Title:* Marine Recreational Information Program Longitudinal Survey of Recreational Fishing Participation.

*OMB Control Number:* None.

*Form Number(s):* NA.

*Type of Request:* Regular submission (request for a new information collection).

*Number of Respondents:* 5,131.

*Average Hours per Response:* 10 minutes.

*Burden Hours:* 1,593.

*Needs and Uses:* This request is for a new information collection.

Marine recreational anglers are surveyed to collect catch and effort data, fish biology data, and angler socioeconomic characteristics. These data are required to carry out provisions of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*), as amended, regarding conservation and management of fishery resources.

This data collection will test the effectiveness of a longitudinal panel study for contacting anglers and determining how many individuals participate in recreational saltwater fishing. The goal of the study is to assess the feasibility of the data collection design for collecting recreational fishing data, as well as testing assumptions and measuring potential sources of error in ongoing recreational fishing surveys.

*Affected Public:* Individuals or households.

*Frequency:* Every four months; annually.

*Respondent's Obligation:* Voluntary.  
*OMB Desk Officer:*

*OIRA\_Submission@omb.eop.gov.*

Copies of the above information collection proposal can be obtained by calling or writing Jennifer Jessup, Departmental Paperwork Clearance Officer, (202) 482-0336, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at [JJessup@doc.gov](mailto:JJessup@doc.gov)).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this

notice to

[OIRA\\_Submission@omb.eop.gov](mailto:OIRA_Submission@omb.eop.gov).

Dated: July 3, 2013.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 2013-16543 Filed 7-9-13; 8:45 am]

**BILLING CODE 3510-22-P**

**DEPARTMENT OF COMMERCE****International Trade Administration**

**[A-570-898]**

**Chlorinated Isocyanurates From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2011-2012**

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on chlorinated isocyanurates (chlorinated isos) from the People's Republic of China (PRC). The period of review (POR) is June 1, 2011, through May 31, 2012. This administrative review covers six producers/exporters of the subject merchandise: (1) Arch Chemicals (China) Co. Ltd. (Arch China); (2) Hebei Jiheng Chemical Co., Ltd. and Hebei Jiheng Baikang Chemical Industry Co., Ltd. (collectively, Jiheng); (3) Heze Huayi Chemical Co. Ltd. (Heze); (4) Juancheng Kangtai Chemical Co., Ltd. and Juancheng Ouya Chemical Co., Ltd. (collectively, Kangtai); (5) Sinoacarbon International Trading Co., Ltd. (Sinoacarbon); and (6) Zhucheng Taisheng Chemical Co., Ltd. (Zhucheng). Jiheng and Kangtai are the two producers/exporters being individually examined as mandatory respondents. We preliminarily determine that Jiheng and Kangtai made sales in the United States at prices below normal value (NV). We preliminarily determine that Arch China, Sinoacarbon and Zhucheng have demonstrated that they are eligible for a separate rate. The Department is also preliminarily determining that Heze made no shipments during the POR.

**DATES:** *Effective Date:* July 10, 2013.

**FOR FURTHER INFORMATION CONTACT:** Emily Halle, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482-0176.

**SUPPLEMENTARY INFORMATION:**

**Scope of the Order**

The products covered by the order are chlorinated isos, which are derivatives of cyanuric acid, described as chlorinated s-triazine triones.<sup>1</sup> Chlorinated isos are currently classifiable under subheadings 2933.69.6015, 2933.69.6021, 2933.69.6050, 3808.40.50, 3808.50.40 and 3808.94.5000 of the Harmonized Tariff Schedule of the United States (HTSUS). The HTSUS subheadings are provided for convenience and customs purposes only; the written product description of the scope of the order is dispositive.

**Preliminary Determination of No Shipments**

Heze timely filed a "no shipment" certification stating that it had no entries of subject merchandise during the POR.<sup>2</sup> The Department subsequently confirmed with U.S. Customs and Border Protection (CBP) the "no shipment" claim made by Heze. Based on the certifications by Heze and our analysis of CBP information, we preliminarily determine that Heze did not have any reviewable transactions during the POR. In addition, the Department finds that consistent with its recently announced refinement to its assessment practice in non-market economy (NME) cases, further discussed below, it is appropriate not to rescind the review in part in these circumstances but, rather, to complete the review with respect to Heze and issue appropriate instructions to CBP based on the final results of the review.<sup>3</sup>

**Methodology**

The Department has conducted this review in accordance with section 751(a)(1)(A) of the Tariff Act of 1930, as amended (the Act). Export prices have been calculated in accordance with section 772 of the Act. Because the PRC is an NME country within the meaning of section 771(18) of the Act, NV has been calculated in accordance with section 773(c) of the Act. Specifically,

<sup>1</sup> For a complete description of the Scope of the Order, see Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Import Administration, "Decision Memorandum for the Preliminary Results of the 2011-2012 Antidumping Duty Administrative Review: Chlorinated Isocyanurates from the People's Republic of China," dated concurrently with this notice (Preliminary Decision Memorandum).

<sup>2</sup> See Letter from Heze, "Chlorinated Isocyanurates from the People's Republic of China: No Sales Certification," September 18, 2012.

<sup>3</sup> See *Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties*, 76 FR 65694 (October 24, 2011) (NME Proceedings); see also "Assessment Rates" section below.

the respondents' factors of production have been valued in the Philippines, which is economically comparable to the PRC and is a significant producer of comparable merchandise.

For a full description of the methodology underlying our conclusions, see the Preliminary Decision Memorandum, which is hereby adopted by this notice. The Preliminary Decision Memorandum is a public

document and is on file electronically via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (IA ACCESS). IA ACCESS is available to registered users at <http://iaaccess.trade.gov> and in the Central Records Unit, room 7046 of the main Department of Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can

be accessed directly on the internet at <http://www.trade.gov/ia/>. The signed Preliminary Decision Memorandum and the electronic versions of the Preliminary Decision Memorandum are identical in content.

#### Preliminary Results of Review

The Department preliminarily determines that the following weighted-average dumping margins exist:

Exporter	Weight-average dumping margin percentage
Arch Chemicals (China) Co. Ltd.* .....	51.12
Hebei Jiheng Chemical Co., Ltd. ....	68.49
Juancheng Kangtai Chemical Co., Ltd. ....	33.75
Sinoacarbon International Trading Co., Ltd.* .....	51.12
Zhucheng Taisheng Chemical Co., Ltd.* .....	51.12

\* These companies demonstrated eligibility for a separate rate in this administrative review. The rate for these companies is the simple average of the calculated antidumping duty rates for Jiheng and Kangtai.

#### Disclosure and Public Comment

The Department intends to disclose calculations performed for these preliminary results to parties within five days of the date of publication of this notice.<sup>4</sup> The schedule for filing case briefs will be provided to parties at a later date. Rebuttal briefs, limited to issues raised in case briefs, may be filed no later than five days after the time limit for filing the case briefs, as specified by 19 CFR 351.309(d).

Interested parties that wish to request a hearing, or participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, filed electronically using IA ACCESS. An electronically filed document must be received successfully in its entirety by the Department's IA ACCESS by 5:00 p.m. Eastern Standard Time within 30 days after the date of publication of this notice.<sup>5</sup> Hearing requests should contain the following information: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. Oral presentations will be limited to issues raised in the briefs. If a request for a hearing is made, parties will be notified of the time and date for the hearing to be held at the U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230

The Department intends to issue the final results of this administrative review, which will include the results of its analysis of issues raised in any such comments, within 120 days of publication of these preliminary results,

pursuant to section 751(a)(3)(A) of the Act unless this deadline is extended.

#### Deadline for Submission of Publicly Available Surrogate Value Information

In accordance with 19 CFR 351.301(c)(3)(ii), the deadline for submission of publicly available information to value factors of production under 19 CFR 351.408(c) is 20 days after the date of publication of the preliminary results. In accordance with 19 CFR 351.301(c)(1), if an interested party submits factual information less than ten days before, on, or after (if the Department has extended the deadline), the applicable deadline for submission of such factual information, an interested party may submit factual information to rebut, clarify, or correct the factual information no later than ten days after such factual information is served on the interested party. However, the Department generally will not accept in the rebuttal submission additional or alternative surrogate value information not previously on the record, if the deadline for submission of surrogate value information has passed.<sup>6</sup> Furthermore, the Department generally will not accept business proprietary information in either the surrogate value submissions or the rebuttals thereto, as the regulation regarding the submission of surrogate values allows only for the submission of publicly available information.<sup>7</sup>

<sup>6</sup> See, e.g., *Glycine from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Rescission*, in Part, 72 FR 58809 (October 17, 2007) and accompanying Issues and Decision Memorandum at Comment 2.

<sup>7</sup> See 19 CFR 351.301(c)(3).

#### Assessment Rates

Upon issuance of the final results, the Department will determine, and CBP shall assess, antidumping duties on all appropriate entries covered by this review. For assessment purposes, we calculated importer- (or customer-) specific assessment rates for merchandise subject to this review.<sup>8</sup> Where appropriate, we calculated an *ad valorem* rate for each importer (or customer) by dividing the total dumping margins for reviewed sales to that party by the total entered values associated with those transactions. For duty-assessment rates calculated on this basis, we will direct CBP to assess the resulting *ad valorem* rate against the entered customs values for the subject merchandise.

Where appropriate, we calculated a per-unit rate for each importer (or customer) by dividing the total dumping margins for reviewed sales to that party by the total sales quantity associated with those transactions. For duty-assessment rates calculated on this basis, we will direct CBP to assess the resulting per-unit rate against the entered quantity of the subject merchandise. Where an importer- (or customer-) specific assessment rate is *de minimis* (i.e., less than 0.50 percent), the Department will instruct CBP to assess that importer (or customer's) entries of subject merchandise without regard to antidumping duties. The Department intends to issue appropriate assessment instructions directly to CBP 15 days after publication of the final results of this review.

Also, the Department recently announced a refinement to its assessment practice in NME cases.

<sup>8</sup> See 19 CFR 351.212(b)(1).

<sup>4</sup> See 19 CFR 351.224(b).

<sup>5</sup> See 19 CFR 351.310(c).

Pursuant to this refinement in practice, for merchandise that was not reported in the U.S. sales databases submitted by an exporter individually examined during this review, but that entered under the case number of that exporter (*i.e.*, at the individually-examined exporter's cash deposit rate), the Department will instruct CBP to liquidate such entries at the NME-wide rate. In addition, if the Department determines that an exporter under review had no shipments of the subject merchandise, any suspended entries that entered under that exporter's case number (*i.e.*, at that exporter's rate) will be liquidated at the PRC-wide rate.<sup>9</sup>

### Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of the subject merchandise from the PRC entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(C) of the Act: (1) For the exporter's listed above, the cash deposit rate will be the rate established in the final results of this review (except, if the rate is zero or *de minimis*, a zero cash deposit rate will be required for that company); (2) for previously investigated or reviewed PRC and non-PRC exporters not listed above that have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recent period; (3) for all PRC exporters of subject merchandise that have not been found to be eligible for a separate rate, the cash deposit rate will be the PRC-wide rate of 285.63 percent;<sup>10</sup> and (4) for all non-PRC exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporter(s) that supplied that non-PRC exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

### Notification to Importers

This notice also serves as a 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 Department's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.213.

Dated: July 2, 2013.

**Paul Piquado,**

*Assistant Secretary for Import Administration.*

### Appendix

#### List of Topics Discussed in the Preliminary Decision Memorandum

1. Scope of the Order
2. Non-Market Economy Country Status
3. Preliminary Determination of No Shipments
4. Separate Rates
5. Separate Rates for Non-Selected Companies
6. Surrogate Country
7. Date of Sale
8. Fair Value Comparisons
9. Export Price
10. Normal Value

[FR Doc. 2013-16578 Filed 7-9-13; 8:45 am]

**BILLING CODE 3510-DS-P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

[A-588-850]

#### Certain Large Diameter Carbon and Alloy Seamless Standard, Line, and Pressure Pipe (Over 4 1/2 Inches) From Japan: Preliminary Results of Antidumping Duty Administrative Review; 2011-2012

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on certain large diameter carbon and alloy seamless standard, line, and pressure pipe (over 4 1/2 inches) (large diameter seamless pipe) from Japan. The period of review (POR) is June 1, 2011, through May 31, 2012. This review covers five producers/exporters of subject merchandise, Canadian Natural Resources Limited (CNRL), JFE Steel Corporation (JFE), Nippon Steel Corporation (Nippon), NKK Tubes (NKK), and Sumitomo Metal Industries, Ltd. (SMI). We preliminarily find that no shipments were made by JFE, Nippon, NKK, or SMI. We also preliminarily find that CNRL's entries of subject merchandise should be

liquidated without regard to antidumping duties.

**DATES:** *Effective Date:* July 10, 2013.

**FOR FURTHER INFORMATION CONTACT:** Nancy Decker or Joshua Morris, AD/CVD Operations, Office 1, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482-0196, and (202) 482-1779, respectively.

### SUPPLEMENTARY INFORMATION:

#### Scope of the Order

The merchandise subject to the order is large diameter seamless pipe. The large diameter seamless pipe subject to the order is currently classifiable under the following subheadings of the Harmonized Tariff Schedule of the United States (HTSUS): 7304.10.10.30, 7304.10.10.45, 7304.10.10.60, 7304.10.50.50, 7304.19.10.30, 7304.19.10.45, 7304.19.10.60, 7304.19.50.50, 7304.31.60.10, 7304.31.60.50, 7304.39.00.04, 7304.39.00.06, 7304.39.00.08, 7304.39.00.36, 7304.39.00.40, 7304.39.00.44, 7304.39.00.48, 7304.39.00.52, 7304.39.00.56, 7304.39.00.62, 7304.39.00.68, 7304.39.00.72, 7304.51.50.15, 7304.51.50.45, 7304.51.50.60, 7304.59.20.30, 7304.59.20.55, 7304.59.20.60, 7304.59.20.70, 7304.59.60.00, 7304.59.80.30, 7304.59.80.35, 7304.59.80.40, 7304.59.80.45, 7304.59.80.50, 7304.59.80.55, 7304.59.80.60, 7304.59.80.65, and 7304.59.80.70. The subheadings are provided for convenience and customs purposes. A full description of the scope of the order is contained in the memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations to Paul Piquado, Assistant Secretary for Import Administration, "Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review: Certain Large Diameter Carbon and Alloy Seamless Standard, Line, and Pressure Pipe (Over 4 1/2 Inches) from Japan," dated concurrently with this notice (Preliminary Decision Memorandum), which is hereby adopted by this notice. The written description is dispositive.

The Preliminary Decision Memorandum is a public document and is on file electronically *via* Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (IA ACCESS). IA ACCESS is available to registered users at <http://iaaccess.trade.gov> and in

<sup>9</sup> For a full discussion of this practice, see *NME Proceedings*.

<sup>10</sup> For an explanation on the derivation of the PRC-wide rate, see *Notice of Final Determination of Sales at Less Than Fair Value: Chlorinated Isocyanurates From the People's Republic of China*, 70 FR 24502, 24505 (May 10, 2005).

the Central Records Unit, room 7046 of the main Department of Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly on the internet at <http://www.trade.gov/ia/>. The signed Preliminary Decision Memorandum and the electronic versions of the Preliminary Decision Memorandum are identical in content.

#### Preliminary Determination of No Shipments

See the Preliminary Decision Memorandum for a full discussion of our preliminary determination of no shipments with respect to JFE, Nippon, NKK, and SMI.

#### Entries by CNRL

As discussed in the Preliminary Decision Memorandum, we preliminarily find that CNRL had no sales of subject merchandise to unaffiliated customers in the United States, or to unaffiliated customers for exportation to the United States. As a result, antidumping duties would not be applied under current law and practice. Accordingly, at the completion of the final results of review, we intend to instruct U.S. Customs and Border Protection (CBP) to liquidate the entries at issue without regard to antidumping duties.

#### Disclosure and Public Comment

Pursuant to 19 CFR 351.309(c), interested parties may submit cases briefs not later than 30 days after the date of publication of this notice. Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs. See 19 CFR 351.309(d). Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities. See 19 CFR 351.309(c)(2) and (d)(2). Case and rebuttal briefs should be filed using IA ACCESS. See 19 CFR 351.303.

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, filed electronically via IA ACCESS. An electronically filed document must be received successfully in its entirety by the Department's electronic records system, IA ACCESS, by 5 p.m. Eastern Time within 30 days after the date of publication of this notice. Requests should contain: (1) The party's name, address and telephone number; (2) the

number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case briefs. The Department intends to issue the final results of this administrative review, including the results of its analysis of the issues raised in any written briefs, not later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act).

#### Assessment Rates

Upon completion of the administrative review, the Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries, in accordance with 19 CFR 351.212. The Department intends to issue appraisal instructions directly to CBP 15 days after the date of publication of the final results of this review.

The Department clarified its "automatic assessment" regulation on May 6, 2003. See *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003). Unless we otherwise determine that such entries should not be subject to antidumping duties, this clarification will apply to POR entries by JFE, Nippon, NKK, and SMI if we continue to make a final determination of no shipments because these companies certified that they made no POR shipments of subject merchandise for which they had knowledge of U.S. destination. We will instruct CBP to liquidate these entries at the all-others rate established in the less-than-fair-value investigation (68.88 percent) if there is no rate for the intermediary involved in the transaction. See Preliminary Decision Memorandum at "Preliminary Determination of No Shipments" for a full discussion of this clarification.

These preliminary results of administrative review and notice are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.221.

Dated: July 2, 2013.

**Paul Piquado,**

*Assistant Secretary for Import Administration.*

#### Appendix

##### List of Topics Discussed in the Preliminary Decision Memorandum

1. Scope of the Order
2. Preliminary Determination of No Shipments
3. Entries by CNRL

[FR Doc. 2013-16577 Filed 7-9-13; 8:45 am]

**BILLING CODE 3510-DS-P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

[A-469-814]

#### Chlorinated Isocyanurates From Spain: Preliminary Results of Antidumping Duty Administrative Review; 2011-2012

**AGENCY:** Import Administration, International Trade Administration, U.S. Department of Commerce.

**SUMMARY:** In response to a request by a Ercros S.A. (Ercros),<sup>1</sup> the Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on chlorinated isocyanurates (chlorinated isos) from Spain.<sup>2</sup> The period of review is June 1, 2011, to May 31, 2012. We preliminarily determine that Ercros did not make sales below normal value (NV). The preliminary results are listed below in the section titled "Preliminary Results of Review."

**DATES:** *Effective Date:* July 10, 2013.

**FOR FURTHER INFORMATION CONTACT:** Sean Carey or Dana Mermelstein at (202) 482-3964, or (202) 482-1391, respectively; AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230.

#### SUPPLEMENTARY INFORMATION:

##### Scope of the Order

The merchandise subject to the order is chlorinated isocyanurates. Chlorinated isocyanurates are derivatives of cyanuric acid, described as chlorinated s-triazine triones. There are three primary chemical compositions of chlorinated isocyanurates: (1) trichloroisocyanuric acid (Cl<sub>3</sub>(NCO)<sub>3</sub>), (2) sodium dichloroisocyanurate (dihydrate) (NaCl<sub>2</sub>(NCO)<sub>3</sub> 2H<sub>2</sub>O), and (3) sodium dichloroisocyanurate (anhydrous) (NaCl<sub>2</sub>(NCO)<sub>3</sub>). Chlorinated isocyanurates are available in powder, granular, and tableted forms. The order covers all chlorinated isocyanurates. Chlorinated isocyanurates are currently classifiable under subheadings 2933.69.6015, 2933.69.6021, and 2933.69.6050 of the Harmonized Tariff Schedule of the United States (HTSUS). A full description of the scope of the

<sup>1</sup> Ercros formerly exported the subject merchandise through its 100%-owned subsidiary Aragonesas Industrias y Energia S.A. (Aragonesas). In 2010, Aragonesas was merged with Ercros.

<sup>2</sup> See *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 77 FR 45338 (July 31, 2012).

order is contained in the memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Import Administration, "Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review: Chlorinated Isocyanurates from Spain; 2011–2012" (Preliminary Decision Memorandum), which is issued concurrent with and hereby adopted by this notice.<sup>3</sup>

**Methodology**

The Department has conducted this review in accordance with section 751(a)(2) of the Tariff Act of 1930, as amended (the Act). Export price is calculated in accordance with section 772 of the Act. NV is calculated in accordance with section 773 of the Act. To determine the appropriate comparison method, the Department applied a "differential pricing" analysis and has preliminarily determined to use the average-to-average method in making comparisons of export price and NV for Ercros. For a full description of the methodology underlying our conclusions, see the Preliminary Decision Memorandum.

**Preliminary Determination of Successor-In-Interest**

On August 27, 2012, and March 22, 2013, the Department issued its antidumping duty questionnaire and supplemental questionnaire to Ercros, requesting copies of agreements and other documents associated with the merger and any related changes in the corporate structure of Aragonesas when it was merged into Ercros by absorption on May 25, 2010. We found the information contained in Ercros' responses sufficient to warrant a successor-in-interest analysis within the context of the instant administrative review. We have preliminarily found Ercros to be the successor-in-interest to Aragonesas. For the full successor-in-interest analysis and our conclusions, see the Preliminary Decision Memorandum.

<sup>3</sup> The Preliminary Decision Memorandum is a public document and is on file electronically via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (IA ACCESS). Access to IA ACCESS is available to registered users at <http://iaaccess.trade.gov> and is available to all parties in the Central Records Unit, room 7046 of the main Department of Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly on the Internet at <http://www.trade.gov/ia/>. The signed Preliminary Decision Memorandum and the electronic versions of the Preliminary Decision Memorandum are identical in content.

**Preliminary Results of Review**

On June 14, 2013, the petitioners Clearon Corp. and Occidental Chemical Corporation filed comments arguing that Ercros' U.S. sales are not *bona fide* sales. Ercros submitted information regarding this issue on June 20, 2013. The Department had insufficient time to analyze these comments and the underlying data by the July 2, 2013 deadline for issuing the preliminary results. Therefore, in accordance with 19 CFR 351.309(c)(2), parties must present all arguments as it relates to this issue in their case briefs, if they deem them to be relevant to the Secretary's final determination.

As a result of this review, we preliminarily determine that the weighted-average dumping margins for the period June 1, 2011, through May 31, 2012, are as follows:

Manufacturer/exporter	Weighted-average dumping margin (percent)
Ercros .....	0.00

**Disclosure and Public Comment**

The Department will disclose to interested parties the calculations performed in connection with these preliminary results within five days of the date of publication of this notice.<sup>4</sup> Pursuant to 19 CFR 351.309(c), interested parties may submit cases briefs no later than 30 days after the date of publication of this notice.<sup>5</sup> Rebuttal briefs, limited to issues raised in the case briefs, may be filed no later than five days after the date for filing case briefs.<sup>6</sup> Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.<sup>7</sup> Case and rebuttal briefs should be filed using IA ACCESS.<sup>8</sup>

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, filed electronically via IA ACCESS. The Department's electronic records system, IA ACCESS, must successfully receive an electronically-filed document in its entirety by 5 p.m. Eastern Daylight Time within 30 days after the date of

<sup>4</sup> See 19 CFR 351.224(b).

<sup>5</sup> See 19 CFR 351.309(c)(ii).

<sup>6</sup> See 19 CFR 351.309(d).

<sup>7</sup> See 19 CFR 351.309(c)(2) and (d)(2).

<sup>8</sup> See 19 CFR 351.303.

publication of this notice.<sup>9</sup> Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case briefs. The Department will issue the final results of this administrative review, including the results of its analysis of the issues raised in any written briefs, not later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act.

**Assessment Rates**

Upon completion of the administrative review, the Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries in accordance with 19 CFR 351.212(b)(1). We intend to issue instructions to CBP 15 days after the date of publication of the final results of this review.

If Ercros' weighted-average dumping margin is not zero or *de minimis* (*i.e.*, less than 0.5 percent) in the final results of this review, we will calculate importer-specific assessment rates on the basis of the ratio of the total amount of dumping calculated for the importer's examined sales and the total entered value of the sales in accordance with 19 CFR 351.212(b)(1). Where either a respondent's weighted-average dumping margin is zero or *de minimis*, or an importer-specific assessment rate is zero or *de minimis*, we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

The Department clarified its "automatic assessment" regulation on May 6, 2003.<sup>10</sup> This clarification will apply to entries of subject merchandise during the period of review produced by Ercros for which these companies did not know that the merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.

**Cash Deposit Requirements**

The following cash deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1)

<sup>9</sup> See 19 CFR 351.310(c).

<sup>10</sup> For a full discussion of this clarification, see *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003).

The cash deposit rate for Ercros will be equal to the weighted-average dumping margin established in the final results of this review, except if the rate is *de minimis* within the meaning of 19 CFR 351.106(c)(1), in which case the cash deposit rate will be zero; (2) for other manufacturers and exporters covered in a prior segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published for the most recently completed segment of this proceeding in which that manufacturer or exporter participated; (3) if the exporter is not a firm covered in this review, a prior review, or the original less-than-fair-value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recently completed segment of this proceeding for the manufacturer of subject merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be 24.83 percent, the all-others rate established in the LTFV investigation.<sup>11</sup> These deposit requirements, when imposed, shall remain in effect until further notice.

#### Notification

This notice also serves as a preliminary 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.

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: July 2, 2013.

**Paul Piquado,**

*Assistant Secretary for Import Administration.*

#### Appendix

##### List of Topics Discussed in the Preliminary Decision Memorandum

1. Scope of the Order
4. Successor-In-Interest
5. Comparisons to Normal Value
  - A. Determination of Comparison Method
  - B. Results of the Differential Pricing Analysis
6. Product Comparisons
7. Date of Sale
8. Export Price
9. Normal Value

- A. Home Market Viability as Comparison Market
- B. Level of Trade
- C. Cost of Production Analysis
  1. Calculation of Cost of Production
  2. Test of Comparison Market Sales Prices
  3. Results of the Cost of Production Test
- D. Calculation of Normal Value Based on Home Market Prices
10. Currency Conversion

[FR Doc. 2013-16579 Filed 7-9-13; 8:45 am]

BILLING CODE 3510-DS-P

## DEPARTMENT OF COMMERCE

### International Trade Administration

[A-485-805]

#### **Certain Small Diameter Carbon and Alloy Seamless Standard, Line and Pressure Pipe From Romania: Preliminary Results of Antidumping Duty Administrative Review; 2011-2012**

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on certain small diameter carbon and alloy seamless standard, line and pressure pipe (small diameter seamless pipe) from Romania. The period of review (POR) is August 1, 2011, through July 31, 2012. The review covers two producers/exporters of the subject merchandise, ArcelorMittal Tubular Products Roman S.A. (AMTP) and Canadian Natural Resources Limited (CNRL). We preliminarily find that AMTP has not sold subject merchandise at less than normal value. We also preliminarily find that CNRL's entries of subject merchandise should be liquidated without regard to antidumping duties.

**DATES:** *Effective Date:* July 10, 2013.

**FOR FURTHER INFORMATION CONTACT:** Dmitry Vladimirov or Minoo Hatten, AD/CVD Operations, Office 1, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482-0665, and (202) 482-1690, respectively.

#### **SUPPLEMENTARY INFORMATION:**

##### **Scope of the Order**

The merchandise subject to the order is small diameter seamless pipe. The small diameter seamless pipe subject to the order is currently classifiable under the following subheadings of the Harmonized Tariff Schedule of the

United States (HTSUS): 7304.10.10.20, 7304.10.50.20, 7304.19.10.20, 7304.19.50.20, 7304.31.30.00, 7304.31.60.50, 7304.39.00.16, 7304.39.00.20, 7304.39.00.24, 7304.39.00.28, 7304.39.00.32, 7304.51.50.05, 7304.51.50.60, 7304.59.60.00, 7304.59.80.10, 7304.59.80.15, 7304.59.80.20, and 7304.59.80.25. The HTSUS subheadings are provided for convenience and customs purposes. A full description of the scope of the order is contained in the memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Import Administration, "Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review: Certain Small Diameter Carbon and Alloy Seamless Standard, Line and Pressure Pipe from Romania," dated concurrently with this notice (Preliminary Decision Memorandum), which is hereby adopted by this notice. The written description is dispositive.

The Preliminary Decision Memorandum is a public document and is on file electronically *via* Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System ("IA ACCESS"). IA ACCESS is available to registered users at <http://iaaccess.trade.gov> and is available to all parties in the Central Records Unit, room 7046 of the main Department of Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly on the Internet at <http://www.trade.gov/ia/>. The signed Preliminary Decision Memorandum and the electronic versions of the Preliminary Decision Memorandum are identical in content.

#### **Entries by Canadian Natural Resources Limited**

As discussed in the Preliminary Decision Memorandum, we preliminarily find that CNRL had no sales to unaffiliated customers in the United States, or to unaffiliated customers for exportation to the United States. As a result, antidumping duties would not be applied under current law and practice. Accordingly, at the completion of the final results of review, we intend to instruct U.S. Customs and Border Protection (CBP) to liquidate the entries at issue without regard to antidumping duties.

#### **Methodology**

The Department has conducted this review in accordance with section

<sup>11</sup> See *Chlorinated Isocyanurates From Spain: Notice of Final Determination of Sales at Less Than Fair Value*, 70 FR 24506 (May 10, 2005).

751(a)(2) of the Tariff Act of 1930, as amended (the Act). Constructed export price is calculated in accordance with section 772 of the Act. Normal value is calculated in accordance with section 773 of the Act. In accordance with section 773(b) of the Act, we disregarded certain sales made by AMTP in the home market which were made at below-cost prices. To determine the appropriate comparison method, the Department applied a “differential pricing” analysis and has preliminarily determined to use the average-to-average method in making comparisons of constructed export price and normal value for AMTP. For a full description of the methodology underlying our conclusions, see Preliminary Decision Memorandum.

#### Preliminary Results of Review

As a result of this review, we preliminarily determine that a weighted-average dumping margin of 0.00 percent exists for AMTP for the period August 1, 2011, through July 31, 2012.

#### Disclosure and Public Comment

The Department will disclose to parties the calculations performed in connection with these preliminary results within five days of the date of publication of this notice. See 19 CFR 351.224(b).

Pursuant to 19 CFR 351.309(c), interested parties may submit cases briefs not later than 30 days after the date of publication of this notice. Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs. See 19 CFR 351.309(d). Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities. See 19 CFR 351.309(c)(2) and (d)(2). Case and rebuttal briefs should be filed using IA ACCESS. See 19 CFR 351.303.

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, filed electronically via IA ACCESS. An electronically filed document must be received successfully in its entirety by the Department’s electronic records system, IA ACCESS, by 5 p.m. Eastern Time within 30 days after the date of publication of this notice. Requests should contain: (1) The party’s name, address and telephone number; (2) the number of participants; and (3) a list of

issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case briefs. The Department intends to issue the final results of this administrative review, including the results of its analysis of the issues raised in any written briefs, not later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act.

#### Assessment Rates

Upon completion of the administrative review, the Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries, in accordance with 19 CFR 351.212(b)(1). If AMTP’s weighted-average dumping margin is above *de minimis* in the final results of this review, we will calculate an importer-specific assessment rate on the basis of the ratio of the total amount of antidumping duties calculated for the importer’s examined sales and the total entered value of the sales in accordance with 19 CFR 351.212(b)(1). If AMTP’s weighted-average dumping margin continues to be zero or *de minimis* in the final results of review, we will instruct CBP not to assess duties on any of its entries in accordance with the *Final Modification for Reviews, i.e., “{w}here the weighted-average margin of dumping for the exporter is determined to be zero or de minimis, no antidumping duties will be assessed.”*<sup>1</sup>

The Department clarified its “automatic assessment” regulation on May 6, 2003. This clarification will apply to entries of subject merchandise during the POR produced by AMTP for which it did not know its merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction. For a full discussion of this clarification, see *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003).

Upon completion of the review the Department will instruct CBP to liquidate any entries by CNRL without regard to antidumping duties.

We intend to issue instructions to CBP 15 days after publication of the final results of this review.

<sup>1</sup> In these preliminary results, the Department applied the assessment rate calculation method adopted in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings: Final Modification*, 77 FR 8101, 80102 (February 14, 2012).

#### Cash Deposit Requirements

The following deposit requirements will be effective upon publication of the notice of final results of administrative review for all shipments of small diameter seamless pipe from Romania entered, or withdrawn from warehouse, for consumption on or after the date of publication as provided by section 751(a)(2) of the Act: (1) The cash deposit rate for AMTP will be the rate established in the final results of this administrative review and we will not establish a cash deposit rate for CNRL; (2) for merchandise exported by manufacturers or exporters not covered in this review but covered in a prior segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original investigation but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; (4) the cash deposit rate for all other manufacturers or exporters will continue to be 13.06 percent, the all-others rate established in the *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Small Diameter Carbon and Alloy Seamless Standard, Line and Pressure Pipe From Romania*, 65 FR 48963 (August 10, 2000). These cash deposit requirements, when imposed, shall remain in effect until further notice.

#### Notification to Importers

This notice also serves as a preliminary 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.

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: July 2, 2013.

**Paul Piquado,**  
Assistant Secretary for Import  
Administration.

#### Appendix I

##### List of Topics Discussed in the Preliminary Decision Memorandum

1. Scope of the Order

2. Entries by Canadian Natural Resources Limited
3. Comparisons to Normal Value
4. Product Comparisons
5. Date of Sale
6. Constructed Export Price
7. Normal Value
8. Allegation of Sales-Below Cost of Production
9. Currency Conversion

[FR Doc. 2013-16576 Filed 7-9-13; 8:45 am]

BILLING CODE 3510-DS-P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### Proposed Information Collection; Comment Request; Role of Tournament Fishing in the Development of Fishery Regulations

**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 September 9, 2013.

**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](mailto:Jjessup@doc.gov)).

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection instrument and instructions should be directed to Dr. Brent Stoffle, (305) 951-1212 or [brent.stoffle@noaa.gov](mailto:brent.stoffle@noaa.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Abstract

This request is for a new information collection.

The National Marine Fisheries Service (NMFS) proposes to conduct a survey to collect demographic, cultural, economic and social information about those that organize and participate in fishing tournaments in the South Atlantic. The survey also intends to inquire about the industry's perceptions, attitudes and beliefs regarding the relationships between tournament organizations and their participants with the development

of federal fishery regulations. The data gathered will be used to describe the socio-political impact of tournament fishing in the South Atlantic. The information will be used to identify the ways in which people within the tournament culture are affecting fishery policy and identify the means by which information is disseminated and shared among fishermen and administrators associated with fishing tournaments.

##### II. Method of Collection

The information sought will be collected via in personal interviews and telephone surveys.

##### III. Data

*OMB Control Number:* None.

*Form Number:* None.

*Type of Review:* Regular submission (request for a new information collection).

*Affected Public:* Business or other for-profits organizations; individuals or households.

*Estimated Number of Respondents:* 100.

*Estimated Time per Response:* 1 hour.

*Estimated Total Annual Burden Hours:* 100.

*Estimated Total Annual Cost to Public:* \$0.

##### IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: July 3, 2013.

##### Gwellnar Banks,

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 2013-16542 Filed 7-9-13; 8:45 am]

BILLING CODE 3510-22-P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

[Docket No. 1206013117-3579-02]

RIN 0648-XA768

#### Endangered and Threatened Wildlife; Determination on Whether To List the Ribbon Seal as a Threatened or Endangered Species

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice of a listing determination and availability of a status review document.

**SUMMARY:** We, NMFS, have completed a comprehensive status review of the ribbon seal (*Histiophoca fasciata*) under the Endangered Species Act (ESA). Based on the best scientific and commercial data available, including the Biological Review Team's (BRT's) status review report, we conclude that listing the ribbon seal as threatened or endangered under the ESA is not warranted at this time. We also announce the availability of the ribbon seal status review report.

**DATES:** This listing determination was made on July 10, 2013.

**ADDRESSES:** The ribbon seal status review report, as well as this listing determination, can be obtained via the internet at <http://alaskafisheries.noaa.gov/>.

Supporting documentation used in preparing this listing determination is available for public inspection, by appointment, during normal business hours at the office of NMFS Alaska Region, Protected Resources Division, 709 West Ninth Street, Room 461, Juneau, AK 99801. This documentation includes the status review report, information provided by the public, and scientific and commercial data gathered for the status review.

**FOR FURTHER INFORMATION CONTACT:** Tamara Olson, NMFS Alaska Region, (907) 271-5006; Jon Kurland, NMFS Alaska Region, (907) 586-7638; or Marta Nammack, NMFS Office of Protected Resources, (301) 427-8469.

#### SUPPLEMENTARY INFORMATION:

##### Background

On December 20, 2007, we received a petition from the Center for Biological Diversity (CBD) to list the ribbon seal as a threatened or endangered species under the ESA, primarily due to concern about threats to this species' habitat from climate change and

resultant loss of sea ice. The Petitioner also requested that critical habitat be designated for ribbon seals concurrently with listing under the ESA. On March 28, 2008, we published a 90-day finding (73 FR 16617) in which we determined that the petition presented substantial information indicating that the petitioned action may be warranted and initiated a status review of the ribbon seal. On December 30, 2008, we published our 12-month finding and determined that listing of the ribbon seal was not warranted (73 FR 79822).

On September 3, 2009, CBD and Greenpeace, Inc. (collectively, "Petitioners") filed a complaint in the U.S. District Court for the Northern District of California challenging our 12-month finding. On December 21, 2010, after considering cross-motions for summary judgment, the Court denied the Petitioners' motion for summary judgment and granted NMFS's cross-motion. The Petitioners filed a notice of appeal of this judgment to the Ninth Circuit Court of Appeals on January 18, 2011.

Information became available since publication of the December 30, 2008, 12-month finding that had potential implications for the status of the ribbon seal relative to the listing provisions of the ESA, including new data on ribbon seal movements and diving, as well as a modified threat-specific approach to analyzing the "foreseeable future" which we used in status reviews for spotted (*Phoca largha*), ringed (*Phoca hispida*), and bearded seals (*Erignathus barbatus*) that we completed subsequent to the ribbon seal status review (75 FR 65239, October 22, 2010; 77 FR 76706 and 77 FR 76740, December 28, 2012). In consideration of this information, on August 30, 2011, we agreed to initiate a new status review and issue a determination on whether listing the ribbon seal as threatened or endangered is warranted and submit a determination to the Office of the **Federal Register** by December 10, 2012. In addition, under the terms of this agreement, following publication of the new listing determination in the **Federal Register**, the Petitioners will file a motion for voluntary dismissal of its appeal of the December 21, 2010, judgment. We announced the initiation of this status review on December 13, 2011 (76 FR 77467). Subsequently, NMFS and the other parties to this agreement agreed to change the 12-month deadline to July 10, 2013.

The 2013 status review report for the ribbon seal (Boveng *et al.*, 2013) is a compilation of the best scientific and commercial data available concerning the status of the species, including

identification and assessment of the past, present, and foreseeable future threats to the species. The BRT that prepared this report was composed of eight marine mammal biologists, two fishery biologists, and a climate scientist from NMFS's Alaska and Southwest Fisheries Science Centers and NOAA's Pacific Marine Environmental Laboratory. The status review report underwent independent peer review by three scientists with expertise in marine mammal biology and ecology, including specifically ribbon seals.

#### ESA Statutory, Regulatory, and Policy Provisions

Section 3 of the ESA defines a "species" as "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." Section 3 of the ESA further defines an endangered species as "any species which is in danger of extinction throughout all or a significant portion of its range" and a threatened species as one "which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." Thus, we interpret an "endangered species" to be one that is presently in danger of extinction. A "threatened species," on the other hand, is not presently in danger of extinction, but is likely to become so in the foreseeable future (that is, at a later time). In other words, the primary statutory difference between a threatened and endangered species is the timing of when a species may be in danger of extinction, either presently (endangered) or in the foreseeable future (threatened). Under section 4(a)(1) of the ESA, we must determine whether a species is threatened or endangered because of any one or a combination of the following 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) inadequacy of existing regulatory mechanisms; or (E) other natural or human-made factors affecting its continued existence. We are to make this determination based solely on the best scientific and commercial data available after conducting a review of the status of the species and taking into account those efforts being made by states or foreign governments to protect the species. In judging the efficacy of protective efforts not yet implemented or not yet shown to be effective, we rely on the joint NMFS and FWS Policy for Evaluating Conservation Efforts When

Making Listing Decisions (68 FR 15100; March 28, 2003).

Two key tasks are associated with conducting an ESA status review. The first is to identify the taxonomic group under consideration; and the second is to conduct an extinction risk assessment which will be used to determine whether the petitioned species is threatened or endangered.

To be considered for listing under the ESA, a group of organisms must constitute a "species," which section 3(16) of the ESA defines to include "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." The term "distinct population segment" (DPS) is not commonly used in scientific discourse, so the U.S. Fish and Wildlife Service (FWS) and NMFS developed the "Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act" to provide a consistent interpretation of this term for the purposes of listing, delisting, and reclassifying vertebrates under the ESA (61 FR 4722; February 7, 1996). We describe and use this policy below to guide our determination of whether any population segments of this species meet the DPS criteria established in the policy.

The foreseeability of a species' future status is case specific and depends upon both the foreseeability of threats to the species and foreseeability of the species' response to those threats. When a species is exposed to a variety of threats, each threat may be foreseeable over a different time frame. For example, threats stemming from well-established, observed trends in a global physical process may be foreseeable on a much longer time horizon than a threat stemming from a potential, though unpredictable, episodic process such as an outbreak of disease that may never have been observed to occur in the species.

Since completing the 2008 status review of the ribbon seal (Boveng *et al.*, 2008), with its climate impact analysis, NMFS scientists have revised their analytical approach to the foreseeability of threats due to climate change and responses to those threats, adopting a more threat-specific approach based on the best scientific and commercial data available for each respective threat. For example, because the climate projections in the Intergovernmental Panel on Climate Change's (IPCC's) *Fourth Assessment Report* (AR4; IPCC, 2007) extend through the end of the century (and we note the IPCC's *Fifth Assessment Report* (AR5), due in 2014,

will extend even farther into the future), our updated analysis of ribbon seals used the same models to assess impacts from climate change through 2100, which is consistent with the time horizon used in our recent examination of climate change effects for spotted, ringed, and bearded seals. We continue to recognize that the farther into the future the analysis extends, the greater the inherent uncertainty, and we incorporated that limitation into our assessment of the threats and the species' response. Not all potential threats to ribbon seals are climate related, and therefore not all can be regarded as foreseeable through the end of the 21st century. For example, evidence of morbillivirus (phocine distemper) exposure in sea otters has recently been reported from Alaska (Goldstein *et al.*, 2009). Thus, distemper may be considered a threat to ribbon seals, but the time frame of foreseeability of an inherently episodic and novel threat is difficult or impossible to establish. Similarly, factors that influence the magnitude and foreseeability of threats from oil and gas industry activities are difficult to predict beyond a few decades into the future because of dynamic and changing trends in the global oil and gas industry. These are only two examples of many potential threats without clear horizons of foreseeability. Therefore, although it is intuitive that foreseeability varies among threats facing ribbon seals, it is impractical to explicitly specify separate horizons of foreseeability for some of them (i.e., there is no consensus among BRT members, let alone a broader community of scientists).

Faced with the challenge of applying the "foreseeable future" terminology of the ESA to a comprehensive scientific assessment of extinction risk, the BRT opted to evaluate threats and demographic risks on two time frames within the period defined by the horizon of foreseeability for the threats of primary concern, namely those stemming from greenhouse gas (GHG) emissions: (1) the period from now to mid-century, corresponding to the time over which the IPCC considers climate warming to be essentially determined by past and near-future emissions; and (2) the period from now to the end of the century, a period in which sustained warming is anticipated under all plausible emissions scenarios, but the magnitude of that warming is more uncertain. Consideration of threats (and demographic risks) within these two time frames was intended to provide a sense of how the BRT's judgment of all the threats and the level of certainty

about those threats may vary over the period of foreseeability for climate-related threats. We agree with this threat-specific approach, which creates a more robust analysis of the best scientific and commercial data available. It is also consistent with the memorandum issued by the Department of Interior, Office of the Solicitor, regarding the meaning of the term "foreseeable future" (Opinion M-37021; January 16, 2009).

NMFS and FWS recently published a draft policy to clarify the interpretation of the phrase "significant portion of the range" in the ESA definitions of "threatened" and "endangered" (76 FR 76987; December 9, 2011). The draft policy provides that: (1) If a species is found to be endangered or threatened in only a significant portion of its range, the entire species is listed as endangered or threatened, respectively, and the ESA's protections apply across the species' entire range; (2) 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; (3) the range of a species is considered to be the general geographical area within which that species can be found at the time FWS or NMFS makes any particular status determination; and (4) if the species is not endangered or threatened throughout all of its range, but it is endangered or threatened within a significant portion of its range, and the population in that significant portion is a valid DPS, we will list the DPS rather than the entire taxonomic species or subspecies.

The Services are currently reviewing public comment received on the draft policy. While the Services' intent is to establish a legally binding interpretation of the term "significant portion of the range," the draft policy does not have legal effect until such time as it may be adopted as final policy. Here, we apply the principles of this draft policy as non-binding guidance in evaluating whether to list the ribbon seal under the ESA. If the policy changes in a material way, we will revisit the determination and assess whether the final policy would result in a different outcome.

### Species Information

A thorough review of the taxonomy, life history, and ecology of the ribbon seal is presented in the status review report (Boveng *et al.*, 2013). We provide a summary of this information below.

#### Description

The ribbon seal is a strikingly-marked member of the family Phocidae that

primarily inhabits the Sea of Okhotsk and the Bering and Chukchi seas. This species gets its common and specific (*fasciata*) names from the distinctive band or "ribbon" pattern exhibited by mature individuals, which consists of four light-colored ribbons on a background of darker pelage. Ribbon seals are medium-sized when compared to the other three species of ice-associated seals in the North Pacific; they are larger than ringed seals, smaller than bearded seals, and similar in size to spotted seals. Ribbon seals have specialized physiological features that are likely adaptations for deep diving and fast swimming, including the highest number and volume of erythrocytes (red blood cells) and the highest blood hemoglobin (oxygen-transport protein in red blood cells) of all seals, as well as larger internal organs than those of other seals.

#### Distribution, Habitat Use, and Movements

The distribution of ribbon seals is restricted to the northern North Pacific Ocean and adjoining sub-Arctic and Arctic seas, where they occur most commonly in the Sea of Okhotsk and Bering Sea. Habitat selection by ribbon seals is seasonally related to specific life history events that can be broadly divided into two periods: (1) spring and early summer (March-June) when whelping, nursing, breeding, and molting all take place in association with sea ice on which the seals haul out; and (2) mid-summer through fall and winter when ribbon seals rarely haul out and are mostly not associated with ice.

In spring and early summer, ribbon seal habitat is closely associated with the distribution and characteristics of seasonal sea ice. Ribbon seals are strongly associated with sea ice during the breeding season and not known to breed on shore (Burns, 1970; Burns, 1981). During this time, ribbon seals are concentrated in the ice front or "edge-zone" of the seasonal pack ice, to as much as 150 km north of the southern ice edge (Burns, 1970; Fay, 1974; Burns, 1981; Braham *et al.*, 1984; Lowry, 1985; Kelly, 1988). Shustov (1965a) observed that ribbon seals were most abundant in the northern part of the ice front and this north-south gradient has been observed in several other studies as well. Shustov (1965a) also found that ribbon seal abundance increased only with ice concentration and was unaffected by ice type, shape, or form. This is in contrast to most studies which show that ribbon seals generally prefer new, stable, white, clean, hummocky ice floes, invariably with an even surface; it is rare to observe them on dirty or

discolored floes, except when the ice begins to melt and haul-out options are more limited (Heptner *et al.*, 1976; Burns, 1981; Ray and Hufford, 2006). Ribbon seals also seem to choose moderately thick ice floes (Burns, 1970; Fay, 1974; Burns, 1981). These types of ice floes are often located at the inner zone of the ice front and rarely occur near shore, which may explain why ribbon seals are typically found on ice floes far away from the coasts during the breeding season (Heptner *et al.*, 1976).

In most years, the Bering Sea pack ice expands to or near the southern edge of the continental shelf. Most of this ice melts by early summer. However, Burns (1969) described a zone of sea ice that remains in the central Bering Sea until melting around mid-June. Satellite imagery has verified the presence and persistence of this zone of ice and has shown that it is located relatively close to the edge of the continental shelf. Ribbon seals are numerous in this area, which is an extremely productive region that likely provides rich foraging grounds (Burns, 1981). Prey availability could strongly influence whelping locations because females probably feed actively during the nursing period (Lowry, 1985). In spring and early summer, ribbon seals are usually found in areas where water depth does not exceed 200 m, and they appear to prefer to haul out on ice that is near or over deeper water, indicating their preference for the continental shelf slope (Heptner *et al.*, 1976). The seasonal dive-depth patterns of a small sample of ribbon seals monitored by satellite telemetry are consistent with a preference for feeding on the continental shelf slope (National Marine Mammal Laboratory (NMML), unpublished data).

During May and June, ribbon seals spend much of the day hauled out on ice floes while weaned pups develop self-sufficiency and adults complete their molt. As the ice melts, seals become more concentrated, with at least part of the Bering Sea population moving towards the Bering Strait and the southern part of the Chukchi Sea. This suggests that proximity to the shelf slope and its habitat characteristics (e.g., water depth, available prey) become less important, at least briefly around the molting period when feeding is likely reduced.

Although ribbon seals are strongly associated with sea ice during the whelping, breeding, and molting periods, they do not remain so after molting is complete. During summer, the ice melts completely in the Sea of Okhotsk, and by the time the Bering Sea ice recedes north through the Bering

Strait, there are usually only a small number of ribbon seals hauled out on the ice. Significant numbers of ribbon seals are only seen again in winter when the sea ice reforms. The widespread distribution and diving patterns of ribbon seals monitored by satellite telemetry suggest that these seals are able to exploit many different environments and can tolerate a wide range of habitat conditions in mid-summer through winter.

#### *Life History*

The rates of survival and reproduction are not well known, but the normal lifespan of a ribbon seal is probably 20 years, with a maximum of perhaps 30 years. Ribbon seals become sexually mature at 1 to 5 years of age, probably depending on environmental conditions.

Whelping in the Bering Sea and northern Sea of Okhotsk occurs on seasonal pack ice over a period of about 5–6 weeks, ranging from late March to mid-May with a peak in early to mid-April (Tikhomirov, 1964; Shustov, 1965b; Burns, 1981), perhaps with some annual variation related to weather and ice conditions (Burns, 1981). The timing of whelping in the southern Sea of Okhotsk and Tartar Strait is not known, but may occur earlier, during March–April (Tikhomirov, 1966). Pups are nursed for 3–4 weeks (Tikhomirov, 1968; Burns, 1981), during which time mothers continue to feed, sometimes leaving their pups unattended on the ice while diving. Most pups are weaned by mid-May, which occurs when the mother abandons the pup (Tikhomirov, 1964). Breeding occurs shortly after weaning.

Ribbon seals molt their coat of hair annually between late March and July, with the timing of an individual's molt depending upon its age and reproductive status (Burns, 1981). Sexually mature seals begin molting around the time of mating, and younger seals begin molting earlier.

#### *Feeding Habits*

The year-round food habits of ribbon seals are not well known, in part because almost all information about ribbon seal diet is from the months of February through July, and particularly March through June. Ribbon seals primarily consume pelagic (open ocean) and nektonic (swim near the seafloor) prey, including demersal (dwell near the seafloor) fishes, squids, and octopuses. Walleye pollock (*Theragra chalcogramma*) is a primary prey item, at least during spring, in both the Bering Sea and the Sea of Okhotsk. Other fish prey species found in

multiple studies were Arctic cod (*Boreogadus saida*), Pacific cod (*Gadus macrocephalus*), saffron cod (*Aleginus gracilis*), Pacific sand lance (*Ammodytes hexapterus*), smooth lump sucker (*Aptocyclus ventricosus*), eelpouts, capelin (*Mallotus villosus*), and flatfish species. Several species of both squid and octopus make up a significant part of ribbon seal diets throughout their range. Some studies have also found that crustaceans are an important part of the ribbon seal's diet. Several studies indicate that pups and juveniles mainly feed on small crustaceans and adults primarily consume fish and nektonic prey, like walleye pollock, octopuses, and squids.

#### *Current Abundance and Trends*

Ribbon seal abundance estimates have been based on catch data from sealing vessels, aerial surveys, and shipboard observations when seals are hauled out on the ice to whelp and molt. Russian estimates of Bering Sea abundance and trends were determined in the early 1960s from commercial catch data. Aerial survey data were often inappropriately extrapolated to the entire area based on densities and ice concentration estimates without behavioral research to determine factors affecting habitat selection. Very few details of the aerial survey methods or data have been published, so it is difficult to judge the reliability of the reported numbers. No suitable behavior data have been available to correct for the proportion of seals in the water at the time of surveys. Current research is just beginning to address these limitations and no current and reliable abundance estimates have been published.

Aerial surveys were conducted in portions or all of the ice-covered Bering Sea east of the international date line by NMML in 2003 (Simpkins *et al.*, 2003), 2007 (Cameron and Boveng, 2007; Moreland *et al.*, 2008; Ver Hoef *et al.*, 2013), 2008, and 2012. A partial population estimate of 61,100 ribbon seals in the eastern and central Bering Sea (95 percent confidence interval: 35,200–189,300) was derived from the surveys conducted in 2007 (Ver Hoef *et al.*, 2013). Using restrictive assumptions, the BRT scaled this number according to distributions of ribbon seal breeding areas in 1987 (Fedoseev *et al.*, 1988), to produce total Bering Sea estimates ranging from 121,000 to 235,000. Similar scaling based on a range-wide distribution presented by Fedoseev (1973) produced Bering Sea, Sea of Okhotsk, and total-range estimates of 143,000, 124,000, and 267,000, respectively. Based on

application of the 95 percent confidence interval reported by Ver Hoef *et al.* (2013) to the scaled range-wide estimate of 267,000 animals, the total range-wide abundance estimate could be as low as 154,000 or as high as 827,000. Aerial surveys conducted during the spring of 2012 and 2013 in the Bering Sea and Sea of Okhotsk included many sightings of ribbon seals, and preliminary analyses suggest that abundance estimates derived from these data will be higher than those obtained in the more limited survey reported by Ver Hoef *et al.* (2013).

Within the scaled range-wide estimate of 267,000, the Sea of Okhotsk component of about 124,000 is lower than all but one previous estimate for that region, and dramatically lower than the most recent estimates from Russian surveys during 1979–1990, which ranged from 410,000 to 630,000 (Fedoseev, 2000). This difference may reflect a failure of assumptions rather than a population decline. The BRT's estimate for the Sea of Okhotsk was derived from a recent density estimate in the Bering Sea, scaled by a much generalized distribution from the 1960s of seals in the Sea of Okhotsk. The density estimate for the Bering Sea may simply not be applicable to the distribution, and vice versa. Lacking details about the Russian survey methods that produced the larger numbers, and lacking any data on abundance in Russian waters more recent than 1990, the BRT opted to use the smaller number for the Sea of Okhotsk.

The BRT concluded that the current population trend of ribbon seals cannot be determined, but that strong upward or downward trends in the recent past seem unlikely. High rates of sightings in recent surveys, and reports from Alaska Native subsistence hunters (Quakenbush and Sheffield, 2007) that indicate stable or rising numbers, suggest that there has not been a recent dramatic decline.

### Species Delineation

Under our DPS policy (61 FR 4722; February 7, 1996), two elements are considered in a decision regarding the potential identification of a DPS: (1) the discreteness of the population segment in relation to the remainder of the species or subspecies to which it belongs; and (2) the significance of the population segment to the species or subspecies to which it belongs. If a population segment is discrete and significant (i.e., it is a DPS) its evaluation for threatened or endangered status will be based on the ESA's definitions of those terms and a review

of the factors enumerated in ESA section 4(a)(1).

A population segment of a vertebrate species may be considered discrete if it satisfies either one of the following conditions: (1) "It is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors. Quantitative measures of genetic or morphological discontinuity may provide evidence of this separation"; or (2) "It is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D)" of the ESA.

With respect to discreteness criterion 1, the BRT concluded, and we concur, that although there are two main breeding areas for ribbon seals, one in the Sea of Okhotsk and one in the Bering Sea, there is currently no evidence of discrete populations on which to base a separation into DPSs (see Boveng *et al.*, 2013 for additional details). As noted above, under the DPS policy, discreteness of a DPS may also be considered based on delimitation by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are notable in light of section 4(a)(1)(D) of the ESA. Ribbon seals occur throughout a vast area of international waters and waters under the jurisdiction of the United States, the Russian Federation, and the State of Alaska. The primary breeding locations are in the territorial seas and exclusive economic zones of the United States and the Russian Federation. There are differences between the United States and the Russian Federation in the control of exploitation, management of habitat, and regulatory mechanisms that influence ribbon seal conservation status. For example, as noted in the threats assessment below, and discussed in more detail in the status review report, measures to control exploitation of ribbons seals appear to be substantially different between the two nations. While commercial hunting for ribbon seals is not allowed in the United States, such harvests are permitted by the Russian Federation. Regulations which govern commercial harvest of ice seals in Russia are over 20 years old and quotas on ribbon seals in Russian waters would allow large harvests. It is thus unclear what regulatory mechanisms are currently in place to ensure that potential commercial harvests remain within sustainable levels. Still, current

commercial harvest levels remain low because of poor economic viability, and unless efforts to develop new uses and markets for seal products are successful, commercial harvest of ribbon seals is unlikely to increase in the near future. As discussed above, downward trends in ribbon seal population abundance in the recent past seem unlikely, which suggests that the differences in management between the United States and the Russian Federation are not significant, and the potential for this to change is uncertain. We find that the differences in management do not rise to a level that provides a sufficient basis to justify the use of international boundaries to satisfy the discreteness criterion of our DPS Policy (i.e., we found that inadequacy of existing regulatory mechanisms does not pose a significant threat to the persistence of the ribbon seal and is not likely to do so in the foreseeable future). In addition, we note that the maritime boundary between the United States and the Russian Federation does not specifically delimit the Sea of Okhotsk breeding area. Rather, this international boundary divides the eastern and central Bering Sea portion of the ribbon seal range (i.e., U.S.) from the western Bering Sea and Sea of Okhotsk (i.e., Russian) portion. In other words, delimitation by international governmental boundaries would place the division in the Bering Sea, where the distribution of ribbon seal breeding areas appears to be continuous and where ribbon seals move routinely without regard to the maritime boundary. We therefore conclude that there are no population segments that satisfy the discreteness criteria of our DPS Policy. Since there are no discrete population segments, we cannot take the next step of determining whether any discrete population segment is significant to the taxon to which it belongs.

### Summary of Factors Affecting the Ribbon Seal

The following sections discuss threats to the ribbon seal under each of the five factors specified in Section 4(a)(1) of the ESA and 50 CFR 424. The reader is also directed to section 4.2 of the status review report (Boveng *et al.*, 2013) for a more detailed discussion of the factors affecting the ribbon seal. As discussed above, the data on ribbon seal abundance and trends in abundance are very imprecise, and there is little basis for quantitatively linking projected environmental conditions or other factors to ribbon seal survival or reproduction. Our risk assessment therefore primarily evaluated important habitat features and was based upon the

best available scientific and commercial data and the expert opinion of the BRT members.

A structured approach was used to elicit the BRT members' judgment about the significance of the threats facing ribbon seals (excluding Factor D). The primary threats identified were grouped by each ESA Section 4(a)(1) factor, and each individual threat was scored for its significance, in two components (each on a 5-level scale): (1) extent (portion of the population that would experience reduced survival or reproductive success if the threat condition were to occur), and (2) likelihood of occurrence within a specified time period in the foreseeable future. For many threats, such as oil spills, there are a broad range of plausible extents with little or no consensus about what scenarios are most plausible. Consequently, for such threats, the process of judging significance was often an iterative one in which extent was not always judged before likelihood, and vice-versa. Because of potential differences in the strengths of the threats between the Bering Sea and Sea of Okhotsk, the BRT assigned scores separately for these two portions of the ribbon seal's range.

Each BRT member assigned extent and likelihood scores for each threat for the time period of now to mid-century, and now to the year 2100. Consideration of threats within these two time frames was intended to provide a sense of how the BRT's judgment of all the threats and the level of certainty about those threats may vary over the period of foreseeability for climate-related threats. For the period now to 2100, a threat score was also computed for each threat by multiplying the extent score by the likelihood score. The range of these threat scores was divided into significance categories of "low" (1–4), "moderate" (5–10), "high" (11–15), "very high" (16–20), and "extreme" (21–25). Using the same scale as for the threat scores, each BRT member also considered the individual threat scores in assigning an overall score for each ESA section 4(a)(1) factor (excluding Factor D). These overall factor scores reflect the BRT's judgment about the significance of each factor as a whole, including cumulative impacts. The average score and range of scores among BRT members are reported in the status review report. In this listing determination we summarize the average threat and overall factor scores. Additional details are contained in the status review report.

#### *A. Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat or Range*

The main concerns about the conservation status of the ribbon seal stem from the likelihood that its sea ice habitat has been modified by the warming climate and, more so, that the scientific consensus projections are for continued and perhaps accelerated warming in the foreseeable future which could make large areas of habitat less suitable for ribbon seals. A second concern, related by the common driver of carbon dioxide (CO<sub>2</sub>) emissions, is the modification of habitat by ocean acidification, which may alter prey populations and other important aspects of the marine environment. A reliable assessment of the future conservation status of ribbon seals, therefore, requires a focus on the observed and projected changes in sea ice, ocean temperature, ocean pH (acidity), and associated changes in ribbon seal prey species. The threats associated with impacts of the warming climate on the habitat of ribbon seals, to the extent that they may pose risks to these seals, are expected to manifest throughout the current breeding and molting range (for sea ice related threats) or throughout the entire range (for ocean warming and acidification) of the ribbon seal.

#### **Effects of Climate Change on Annual Formation of the Ribbon Seal's Sea Ice Habitat**

Unlike the Arctic Ocean, where some sea ice is present year round (i.e., multi-year ice), the ice in the Bering Sea and Sea of Okhotsk is seasonal and forms every winter as first-year ice. The main thermodynamic physical influence at high latitudes is the cold and darkness that occurs in winter. Despite the recent dramatic reductions in Arctic Ocean ice extent during summer, the sea ice in the northern Bering Sea and Sea of Okhotsk is expected to continue forming annually in winter for the foreseeable future, with large interannual variations in sea ice extent and duration. The future central Arctic will also continue to be an ice-covered sea in winter, but will contain more first-year sea ice than multi-year ice.

Ice extent in marginal seas such as the Bering Sea is characterized not by summer minima, since these seas have been ice-free in summer throughout recorded history, but rather by winter maxima. Freezing conditions in the northern Bering Sea persist from December through April. Mean monthly maximum temperatures at Nome, Alaska are  $-3^{\circ}\text{C}$  or below for all months November through April. Freezing

rather than thawing should still predominate in these months even if a hypothesized  $\sim 3^{\circ}\text{C}$  global warming signal is realized. The result is that the seasonal formation of sea ice in the northern Bering Sea and Sea of Okhotsk is substantially decoupled from the summer ice extent in the Arctic Ocean, and is expected to continue annually through the foreseeable future, along with large interannual variations in extent and duration of persistence.

#### **IPCC Model Projections**

Comprehensive Atmosphere-Ocean General Circulation Models (AOGCMs) are the major objective tools that scientists use to understand the complex interaction of processes that determine future climate change. The IPCC used the simulations from about two dozen AOGCMs developed by 17 international modeling centers as the basis for the AR4 (IPCC, 2007). The analysis and synthesis of information presented by the IPCC in its AR4 represents the scientific consensus view on the causes and future of climate change. The AR4 used a range of future GHG emissions produced under six illustrative "marker" scenarios from the *Special Report on Emissions Scenarios* (SRES) (IPCC, 2000) to project plausible outcomes under clearly-stated assumptions about socio-economic factors that will influence the emissions. Conditional on each scenario, the best estimate and likely range of emissions were projected through the end of the 21st century. It is important to note that these scenarios do not contain explicit assumptions about the implementation of agreements or protocols on emission limits beyond current mitigation policies and related sustainable development practices.

More recent climate model projection experiments are in progress in preparation for publication of the IPCC's Fifth Assessment Report (AR5) in 2014. However, the AR5 is not yet available. Therefore, the BRT used the modeling results from the AR4 in the status review. Knutti and Sedlacek (2012) found that projected global temperature change from the new models that will be used in the AR5 is remarkably similar to that from those models used in the AR4 after accounting for the different underlying emissions scenarios, and the spatial patterns of temperature and precipitation change were also very consistent. The AOGCMs provide reliable projections because they are built on well-known dynamical and physical principles, and they simulate quite well many large scale aspects of present-day conditions. However, the coarse resolution of most

current climate models dictates careful application on small scales in heterogeneous regions, such as along coastlines.

There are three main contributors to divergence in AOGCM climate projections: large natural variations, across-model differences, and the range in emissions scenarios. The first of these, variability from natural variation, can be incorporated by averaging the projections over decades, or, preferably, by forming ensemble averages from several runs of the same model. The second source of variation, across-model differences, results from differences among models in factors such as spatial resolution. This variation can be addressed and mitigated in part by using the ensemble means from multiple models.

The third source of variation arises from the range in plausible emissions scenarios. Conditions such as surface air temperature and sea ice area are linked in the IPCC climate models to GHG emissions by the physics of radiation processes. When CO<sub>2</sub> is added to the atmosphere, it has a long residence time and is only slowly removed by ocean absorption and other processes. Based on IPCC AR4 climate models, expected increases in global warming—defined as the change in global mean surface air temperature (SAT)—by the year 2100 depend strongly on the assumed emissions of CO<sub>2</sub> and other GHGs, versus natural variations across-model differences (IPCC, 2007). By contrast, global warming projected out to about 2040–2050 will be primarily due to emissions that have already occurred and those that will occur over the next decade. Thus, conditions projected to mid-century are less sensitive to assumed future emission scenarios than are longer-term projections to the end of the century. Uncertainty in the amount of warming out to mid-century is primarily a function of model-to-model differences in the way that the physical processes are incorporated, and this uncertainty can be addressed in predicting ecological responses by incorporating the range in projections from different models. Because the current consensus is to treat all SRES emissions scenarios as equally likely, one option for representing the full range of variability in potential outcomes would be to project from any model under all of the six “marker” scenarios. This can be impractical in many situations, so the typical procedure for projecting impacts is to use an intermediate scenario to predict trends, or one intermediate and one extreme scenario to represent a significant range of variability.

There is no universal method for combining AOGCMs for climate projections, and there is no one best model. The approach taken by the BRT for selecting the models used to project future sea ice in the status review report is summarized below.

#### *Data and Analytical Methods*

Many of the anticipated effects of GHG emissions have been projected through the end of the 21st century, subject to certain inputs and assumptions, and these projections currently form the most widely accepted version of the best available data about future environmental conditions. In our risk assessment for ribbon seals, we therefore considered climate model projections through the end of the 21st century to analyze the threats stemming from climate change.

The IPCC model simulations used in the BRT analyses were obtained from the Program for Climate Model Diagnosis and Intercomparison (PCMDI) on-line (at <http://www.pcmdi.llnl.gov/>). Wang and Overland (2009) identified a subgroup of six of these models that met performance criteria for reasonably reproducing the observed magnitude of the seasonal cycle of Northern Hemisphere sea ice extent. Climate models generally perform better on continental or larger scales, but because habitat changes are not uniform throughout the hemisphere, using similar performance criteria, the BRT further evaluated each of these six IPCC models independently on their performance at reproducing the observed seasonal cycle of sea ice extent during April and May in each of four regions—the Sea of Okhotsk, western Bering Sea, eastern Bering Sea, and Chukchi Sea.

All six of the models met the performance criteria for sea ice in the Chukchi Sea and four of the six models met the criteria for the eastern Bering Sea. Only one of the six models was in reasonable agreement with observations for the western Bering Sea; this single model was therefore used to project sea ice in this region with caveats about the reliability as noted below. Due to model deficiencies and the small size of the Sea of Okhotsk region relative to the spatial resolution of the climate models, none of the models met the performance criteria for this region. Instead, for the Sea of Okhotsk, comparison of SAT projections with current climate conditions was considered. Thirteen models, which were selected based on their ability to represent the climate of the North Pacific (Overland and Wang, 2007), were used to project future SATs in the Sea of Okhotsk. Whether future

monthly mean SATs are above or below the freezing point of sea water provides a reasonable indicator of the presence or absence of sea ice. Projections of SATs for the Sea of Okhotsk were considered under both a medium and a high emissions scenario; similarly, model output under both of these emissions scenarios was considered for the other three regions.

While our inferences about future regional ice conditions are based upon the best available scientific and commercial data, we recognize that there are uncertainties associated with predictions based on hemispheric projections or indirect means. We also note that judging the timing of onset of potential impacts to ribbons seals is complicated by the coarse resolution of the IPCC models. For example, in June 2008 the NOAA ship *Oscar Dyson* encountered a field of ice with numerous ribbon and spotted seals near St. Matthew Island in an area where no ice was visible on the relatively high resolution (12.5 km) satellite images of sea ice for that day. Nevertheless, NMFS concluded that the models reflect reasonable assumptions regarding habitat alterations to be faced by ribbon seals in the foreseeable future.

#### *Regional Sea Ice Projections*

The projections indicate that within this century there will be no significant ice reductions in the Chukchi Sea in winter through early spring (January to May). A downward trend in ice extent is evident in the Chukchi Sea in June toward the end of the century, by which time the difference between the emissions scenarios becomes a major contributor to the trends. Interannual variability of the model projections is larger in the Chukchi Sea after mid-century. In the eastern Bering Sea, a gradual downward trend in the sea ice extent is apparent over the century in March through May, albeit with a large degree of interannual variability. The average sea ice extent in the eastern Bering Sea during these months is projected to be at 58 percent of the present day value by 2050, and at 37 percent of the present day value by 2075. As discussed above, ice projections were only available for the western Bering Sea from a single model, so the results must be interpreted in the context of possibly large bias and lack of model-to-model variation. Compared with observations, this model overestimated sea ice extent in both March and April, but performed reasonably well for May and June. The model projected a rapid decline in sea ice extent in the western Bering Sea over the first half of this century in

March and April, then relative stability to the end of the century. The model projected that the western Bering Sea will continue to have ice in March and April through nearly the end of the 21st century; however, the average sea ice extent in the latter half of this century in these months is projected to be approximately 25 percent of the present-day extent. The projection for May indicates that there will commonly be years when the western Bering Sea will have little or no ice beyond mid-century. Mapped projections of sea ice concentrations in the two Bering Sea regions indicate that by mid-century and beyond, the Bering Sea can be expected to have essentially no ice during May in some years, and by 2090 May sea ice can be expected only in the northern Bering Sea.

As noted above, none of the IPCC models performed satisfactorily at projecting ice for the Sea of Okhotsk, and so projected SATs were considered relative to current climate conditions as a proxy to predict sea ice extent and duration. The Sea of Okhotsk lies to the southwest of the Bering Sea and thus can be expected to have earlier radiative heating in spring. However, this region is dominated by cold continental air masses and offshore flow for much of the winter and spring. Therefore, the present seasonal cycle of the formation of first-year sea ice during winter is expected to continue annually in the foreseeable future. Based on the temperature proxies, a continuation of sea ice formation or presence is expected for March through the end of this century, though the ice may be limited to the northern portion of this region in most years after mid-century. Conditions for sea ice in April are likely to be limited to the far northern reaches of the Sea of Okhotsk, or non-existent if the projected warming occurs by 2100. Recent climate data indicate that during May, sea ice has warmed to the melting point throughout the Sea of Okhotsk region.

In summary, within the ribbon seal's range large areas of annual sea ice are expected to form and persist through April in most years throughout this century. However, in the Sea of Okhotsk conditions for sea ice in April are likely to be limited to the far northern reaches or non-existent if the projected warming occurs by 2100. In May, ice is projected to continue to occur in the Bering Sea in most years through mid-century, but in the latter half of the century many years are expected to have little or no ice. Sea ice extent in June is expected to be highly variable through mid-century, as it has been in the past, but the models project essentially no ice in

the Bering Sea in June during the latter half of the century.

#### *Potential Impacts of Changes in Sea Ice on Ribbon Seals*

In association with a long-term warming trend, there will likely be changes in the frequency of years with extensive ice, the quality of ice, and the duration of its persistence that may impact the amount of suitable habitat in the geographic areas that ribbon seals have preferred in the past. An assessment of the risks posed by these changes must consider the ribbon seal life-history functions associated with sea ice and the potential effects on the vital rates of reproduction and survival. As discussed above, the sea ice regimes in the Bering Sea and Sea of Okhotsk will continue to be subject to large interannual variations in extent and seasonal duration, as they have been throughout recorded history. While there may be more frequent years in which sea ice coverage is reduced, the late-March to early-May period in which the peak of ribbon seal reproduction occurs will continue to have substantial ice for the foreseeable future. Still, there will likely be more frequent years in which the ice is confined to the northern regions of the observed breeding range.

In contrast to harp seals (*Pagophilus groenlandicus*), which are their closest relatives, ribbon seals appear much less closely tied to traditional geographic locations for important life history functions such as whelping and molting. In years of low ice it is likely that ribbon seals will adjust, at least in part, by shifting their breeding locations in response to the position of the ice edge, as they have likely done in the past in response to interannual variability (e.g., Fedoseev, 1973; Braham *et al.*, 1984; Fedoseev *et al.*, 1988), at least in the Bering Sea (this may not be possible in the Sea of Okhotsk, where there is no northern access to higher-latitude ice-covered seas because the sea is bounded to the north by land). For example, observations indicate that extreme dispersal of ribbon seals within their effective range is associated with years of unusual ice conditions. The formation of extensive ice in the Bering Sea and Sea of Okhotsk has been found to result in the occurrence of large numbers of these seals farther south than they normally occur; the reverse is also true (Burns, 1981).

There has not been, however, any study that would verify whether vital rates of reproduction or survival have been affected by these interannual variations in ice extent and breeding. Whelping, nursing of pups, and

maturation of weaned pups could conceivably be impacted in years when the ice does not extend as far south as it has typically in the past, because the breeding areas would be farther from the continental shelf break, a zone that seems to be a preferred foraging area during spring. If these conditions occur more frequently, as is anticipated from projections of future climate and sea ice conditions, reproduction and survival of young would likely be impacted. Lacking relevant data, the most conservative approach is to assume that the population has been at equilibrium with respect to conditions in the past, and that a change such as more frequent breeding farther from preferred foraging habitats will have some impact on vital rates. Even given the uncertainties, we conclude that the anticipated increase in frequency of years with low ice extent in April and May is likely to have some impact on recruitment. The mechanisms for depressed recruitment from increased frequency of years with less ice could include reduced nutrition during the nursing period caused by mothers unable to reach preferred shelf-break foraging areas; pup mortality caused by more frequent failures for mothers to reunite with pups left on the ice during foraging trips; and mortality or reduced condition of maturing weaned pups caused by reduced availability of suitable ice for hauling out.

As discussed above, ribbon seals have an apparent affinity for stable, clean, moderate-sized ice floes that are slightly, but not deeply interior to the pack ice edge. Ice of this type is likely to occur annually in the Bering Sea and Sea of Okhotsk through the middle of this century, but it may more frequently be confined to smaller areas or areas farther north than in the past. It is more difficult to determine whether this type of ice will be relatively more or less available as the amount of ice declines as projected through the latter half of the century. The availability of moderately-thick, stable ice floes could potentially influence ribbon seal demography, particularly in May, via survival rates of weaned pups. Pups spend a great deal of time on the ice during a transition period of 2 to 3 weeks following weaning, presumably developing their capabilities for self-sufficient foraging (Burns, 1981). However, they also enter the water frequently during this period, and therefore may not be particularly sensitive to modest reductions in ice coverage or quality. Thus, although they are likely dependent on ice, weaned pups may not require ice floes that can

persist for weeks to meet their basic haul-out needs. They may, however, be relatively limited in their capability to respond to rapidly deteriorating ice fields by relocating over large distances, a factor that could occur more frequently in the foreseeable future.

Subadult ribbon seals, which molt earlier than adults during March to mid-May, and which are not constrained by habitat requirements for whelping and breeding, may be the least sensitive to the availability and quality of sea ice. For example, in 2007, NMFS research cruises in the Bering Sea encountered subadult ribbon seals in approximately the expected age class proportions. The obvious presence of seals in the subadult age class indicated that catastrophic losses had not occurred in the ribbon seal cohorts produced during the warm years of 2001–2005.

Adult ribbon seals, which are the last to molt, might be expected to be the most sensitive to timing of the ice melt. Tikhomirov (1964) suggested that molting ribbon seals rarely enter the water and that stable ice is critical during this period. The pelage molt of phocid seals is generally thought to be facilitated or enhanced by elevated skin temperatures that can be achieved when hauled out versus in the water (Feltz and Fay, 1966). For example, it has been suggested that the harbor seal (*Phoca vitulina*, a small phocid, similar in size and body composition to a ribbon seal), could not complete its molt entirely in the water at temperatures that the species would normally encounter in the wild (Boily, 1995). Analysis of haul-out records (section 2.6 of the status review report) indicate that individual adult ribbon seals haul out almost continuously for a period of weeks, mostly during mid-May to late June, corresponding to the observed peak in molting. Sea ice coverage in June is expected to be low or absent more frequently in the foreseeable future. The implications of a loss of access to a haul-out substrate during this period are unknown, but they may include energetic costs, reduced fertility, increased susceptibility to skin disorders and pathogens, and possibly increased exposure to any risks from which the hair normally protects a seal (e.g., abrasion from crawling over snow and ice). Many reports of ribbon seals out of their normal range or habitat have been associated with some pelage abnormalities, usually consistent with a disrupted or delayed molt. However, adult ribbon seals may also be less constrained to a specific geographic area or region of the ice pack once breeding is complete, around the onset of the

adult molt (Boveng *et al.*, 2007). They may therefore be capable of considerable shifts in distribution to ensure contact with suitable ice through the molt period, especially in the Bering Sea where there is access through the Bering Strait to the Chukchi Sea, where ice is expected to persist more frequently in June. The ultimate effect of decreased availability of stable platforms for adults to complete their molt out of the water on adult survival rate is currently difficult or impossible to model.

The impacts discussed above on ribbon seal survival and reproduction in years of low ice extent, poor ice quality, or early melting are all of a sort that would not necessarily be significant in any one year; a year of low ice extent seems unlikely to cause widespread mortality through disruption of the adult molt, or increased energetic costs for pups developing their foraging capabilities. Rather, the overall strength of the impacts is likely a function of the frequency of years in which they are anticipated to occur, and the proportion of the population's range over which they would occur. Also, the effects on different age classes might be expected to be correlated, though not always in concert, because they involve ice characteristics at different times in the breeding-molting period; low ice extent during breeding may not always be accompanied by early melting, and vice versa. As above, in the assessment of impacts on reproduction, we conclude that the anticipated increase in frequency of years with low ice extent in April, May, and June is likely to have an impact on survival rates.

The extent to which ribbon seals might adapt to more frequent years with early ice melt by shifting the timing of reproduction and molting is unknown. There are many examples in the scientific literature of shifts in the timing of reproduction by pinnipeds and terrestrial mammals in response to body condition and food availability. In most of these cases, sub-optimal conditions led to later reproduction, which would not likely be beneficial to ribbon seals as a response to earlier spring ice melt. Over the longer term (i.e., beyond the foreseeable future) a shift to an earlier mean melt date may provide selection pressure for an evolutionary response over many generations toward earlier reproduction.

In summary, more frequent future years of reduced spring ice extent or ice quality could result in reduced vital rates of ribbon seal reproduction and survival. These potential impacts are premised on the assumption of a population at equilibrium with

conditions in the recent (cooler) past and the related possibility that changes such as displacement of breeding locations or reduced availability of preferred ice types will have some energetic costs that will ultimately be reflected in vital rates. The age of maturation for ribbon seal females has been very low and pregnancy rates have been high in the recent past (Quakenbush and Citta, 2008), implying that foraging conditions have been favorable, a scenario more likely to reflect population growth rather than equilibrium; if so, there may be some capacity to withstand a reduction in vital rates without incurring an actual population decline. In the absence of relevant data, it is not feasible to estimate quantitatively the magnitude of the anticipated impacts. The significance of demographic risks to the persistence of ribbon seals within the foreseeable future is assessed qualitatively below (see *Demographic Risks Assessment*).

The threats associated with decreases in sea ice habitat that were judged by the BRT to be of high significance include reductions in sea ice habitat suitable for molting in both the Bering Sea and the Sea of Okhotsk; and reductions in sea ice habitat suitable for whelping and nursing, pup maturation, and mating in the Sea of Okhotsk. Reductions in sea ice habitat suitable for whelping and nursing, pup maturation, and mating in the Bering Sea were judged by the BRT to be of moderate significance. We concur with the BRT's assessment.

#### **Impacts on Ribbon Seals Related to Changes in Ocean Conditions**

Ocean acidification is an ongoing process whereby chemical reactions occur that lower seawater pH and carbonate saturation due to CO<sub>2</sub> absorption by the ocean. Ocean acidification is likely to affect the ecosystem structure in the ribbon seals' habitats in the foreseeable future. The exact nature of these impacts cannot be predicted, and some likely will amplify more than others. As discussed above, ribbon seals eat a variety of fishes, squids, octopuses, and crustaceans. In addition to interfering with calcification of organisms at lower trophic levels, changes in ocean chemistry can have direct effects on the physiology of marine invertebrates and fish. Among invertebrates, squid are expected to be particularly sensitive to increases in CO<sub>2</sub>. These ecosystem responses may have very long lags as they propagate through trophic webs.

Although the ribbon seal's varied diet would appear to confer some resilience

to shifts in prey availability, major disruptions in the amount of productivity reaching pelagic, upper trophic species would be expected to have demographic impacts. Survival of juvenile ribbon seals would be expected to be the most sensitive, as their diet is narrower and more skewed toward invertebrates. Sufficiently large ecosystem shifts that persist more than a few years could also impact adult survival and reproductive rates. The range of potential ecological scenarios, however, is extremely complex and may even include some that could be ameliorative or beneficial to ribbon seals. The vast preponderance of ocean acidification impacts that have been identified, however, seem negative for ribbon seal prey. In the absence of compelling evidence for specific positive effects, the net effect of ocean acidification on ribbon seals is expected to be negative. The threat posed to ribbon seals from decreases in prey density and/or availability due to ocean acidification was judged by the BRT to be of moderate significance in both the Bering Sea and Sea of Okhotsk, and we agree with this assessment.

Changes in ribbon seal prey, anticipated in response to habitat changes resulting from ocean warming and loss of sea ice, have the potential for negative impacts, but these impacts are not well understood. Some changes already documented in the Bering Sea and the North Atlantic Ocean are of a nature that could be ameliorative or beneficial to ribbon seals. For example, warming and decrease in ice extent could increase pelagic productivity in favor of pelagic foraging by ribbon seals. Such ecosystem responses may have very long lags as they propagate through trophic webs. The apparent flexibility in ribbon seal foraging locations and habits may make the threats posed from changes in prey due to ocean warming and loss of ice of lower concern than more direct impacts from changes in sea ice. The BRT judged the threats posed to ribbon seals from decreases in prey density and/or availability due to changes in ice cover and ocean warming to be of moderate significance in both the Bering Sea and the Sea of Okhotsk, and we agree with this assessment.

#### Summary of Factor A

The BRT judged the threats to ribbon seal persistence from destruction or modification of habitat to be of greater significance than the threats posed from all other factors. Overall, the BRT judged the threats posed under Factor A to be of high significance in the Bering Sea and of very high significance in the Sea of Okhotsk. The BRT concluded that

although it is impossible to project the trajectory of ribbon seal abundance with any certainty, it is likely that the combined effects of diminished sea ice habitat and disrupted prey communities will reduce ribbon seals' vital rates of survival and reproduction gradually throughout the foreseeable future. We agree with the BRT's findings. However, as discussed below, our analysis did not indicate these anticipated impacts on ribbon seal vital rates render the species likely to become an endangered species within the foreseeable future (threatened). Relevant considerations supporting this conclusion include: (1) There is evidence from some recent years with unusual ice conditions that ribbon seals may compensate for changes in sea ice, at least in part, by moving to areas with better ice, at least in the Bering Sea; (2) ribbon seals are known to have a diet that is ecologically and trophically diverse and they are able to forage over a wide range of ocean depths, which should enhance resilience to climate-related changes in prey communities; and (3) individual ribbon seals have the capability to undertake large seasonal movements and shifts between pelagic and pack ice habitats, which may mitigate some anticipated impacts of anthropogenic climate change. The demographic risks to the persistence of ribbon seals within the foreseeable future are considered further below (see *Demographic Risks Assessment*).

#### B. Overutilization for Commercial, Subsistence, Recreational, Scientific, or Educational Purposes

While commercial hunting for ribbon seals is not allowed in the United States, such harvests are permitted by the Russian Federation. Commercial harvests by Russian sealers have at times been high enough to cause significant reductions in abundance and catch-per-unit-effort. The population apparently rebounded from a period of high harvest in the 1960s. Substantial but lower numbers were harvested for a few years in the early 1990s. Although Russian government quotas were recently put in place that would allow large harvests (~18,000 annually), the actual takes are low because of poor economic viability. There is some effort in Russia to develop new uses and markets for seal products, but unless this effort is successful, the harvest is unlikely to increase in the near future. The numbers of ribbon seals harvested for subsistence use by indigenous hunters in Russia and Alaska are considered insignificant by most researchers, primarily due to the difficulty of accessing the seals in far

offshore ice. Subsistence harvest levels have been low historically in Russia, and the current subsistence harvest is not thought to be a threat to ribbon seals there. Although estimates of subsistence harvest in Alaska are varied, all are low and sustainable relative to the population size. Subsistence harvest levels could potentially increase in the future if ribbon seals are forced to use a reduced and more northerly ice field, which could put them in closer proximity to Alaska Native communities near the Bering Strait. Changes in subsistence or commercial takes cannot be predicted with any certainty at this time. Scientific and educational utilization of ribbon seals is currently at very low levels and is not projected to increase to significant threat levels in the foreseeable future. Overall, the significance of the threats posed to ribbon seal persistence from overutilization were judged by the BRT to be low in both the Bering Sea and the Sea of Okhotsk, and we concur with this finding.

#### C. Diseases, Parasites, and Predation

A variety of pathogens (or antibodies), diseases, helminthes, cestodes, and nematodes have been found in ribbon seals. The prevalence of these agents is not unusual among seals, but the population impact is unknown. Beginning in July and August 2011, higher than normal numbers of sick and dead ringed seals along the coast of the North Slope of Alaska led to the declaration of an unusual mortality event (UME). Most pinnipeds with UME symptoms were ringed seals from the North Slope, but sick walrus (*Odobenus rosmarus*), spotted seals, and bearded seals were also found on the North Slope and in the Bering Strait region. Only one ribbon seal, a yearling, was reported with UME symptoms. The cause of the UME is still unknown, but additional bacterial and fungal testing and advanced molecular screening for unknown viruses are being conducted in a continuing effort to determine an explanation. There are a couple possibilities that may explain why only one sick ribbon seal was found during this UME. Ribbon seals are primarily pelagic and solitary during the summer and fall months when most of the UME seals were found. Thus, they might not have become sick in the same numbers as other ice seals because disease transmission among individuals may be limited due to their solitary lifestyle. However, it is also possible that many ribbon seals did become sick during the UME, but because they are pelagic they may have died out at sea and not stranded in areas where they could be

counted. There may be an increased risk of outbreaks of novel pathogens or parasites as climate-related shifts in species distributions lead to new modes of transmission. For both the Bering Sea and the Sea of Okhotsk, the BRT judged the potential threats to ribbon seals from increased infection or disease to be of moderate significance, and from an increase in parasites to be of low significance, and we agree with these findings.

There is little or no direct evidence of significant predation on ribbon seals, and they are not thought to be a primary prey of any predators. Polar bears (*Ursus maritimus*) and killer whales (*Orcinus orca*) may be the most likely opportunistic predators in the current sea ice regime, but walrus and sharks could pose a potentially greater risk if reduced sea ice conditions force these species into closer proximity in the future. The BRT judged the significance of the threat posed to ribbon seals from increased predation associated with changes in sea ice cover to be low in both the Bering Sea and the Sea of Okhotsk, and we agree with this assessment.

#### *D. Inadequacy of Existing Regulatory Mechanisms*

As noted above in the discussion of Factor A, a primary concern about the conservation status of the ribbon seal stems from the likelihood that its sea ice habitat has been modified by the warming climate and, more so, that the scientific consensus projections are for continued and perhaps accelerated warming in the foreseeable future combined with modification of habitat by ocean acidification and warming water temperatures. Current mechanisms do not effectively regulate GHG emissions, which are contributing to global climate change and associated modifications to ribbon seal habitat. The projections we used to assess risks from GHG emissions were based on the assumption that no new regulation will take place (the underlying IPCC emissions scenarios were all “non-mitigated” scenarios). Therefore, the inadequacy of mechanisms to regulate GHG emissions is already included in our risk assessment, and contributes to the risks posed to ribbon seals by these emissions.

We also note that regulations which govern commercial harvest of ice seals in Russia are over 20 years old and we do not have good information regarding whether regulatory mechanisms are in place to ensure that potential commercial harvests in Russian waters are conducted in a sustainable fashion. As noted above, currently there is some

effort in Russia to develop new uses and markets for seal products, but unless this effort is successful, the harvest is unlikely to increase in the near future. The BRT considered the threat posed to ribbon seal persistence by commercial harvest to be low in both the Bering Sea and the Sea of Okhotsk. We conclude that the data currently available do not suggest that inadequacy of mechanisms to regulate commercial harvest poses a significant threat to ribbon seals.

#### *E. Other Natural or Manmade Factors Affecting the Species' Continued Existence*

Although some pollutants are elevated in ribbon seals, there is no conspicuous evidence of toxicity or other significant impacts to the species. Continued and expanded monitoring would be prudent to document any trends in the contaminants of greatest concern.

Oil and gas exploration and development activities may include drilling operations, pipeline construction and operation, seismic surveys, and vessel and aircraft operations. The main issues for evaluating the impacts of exploration and development activities on ribbon seals are the effects of noise, physical disturbance, and potential oil spills produced from these activities. Any negative effects on ribbon seals from noise and disturbance associated with development activities are likely to be minor and localized. Ribbon seals are also highly dispersed during the summer open-water season, so the rate of interactions with seismic surveys would likely be low, and, in any case, seals have not been shown to be significantly impacted by oil and gas seismic surveys. The threat posed to ribbon seals by oil spills will increase if offshore oil and gas development and shipping activities increase across their range as predicted. The potential impacts would be greatest during April–June when the seals are relatively aggregated, and substantially lower during the remainder of the year when they are dispersed in the open water throughout the North Pacific Ocean, Sea of Okhotsk, and Bering and Chukchi seas.

Estimates from observed bycatch in commercial fisheries indicate that less than 200 ribbon seals per year are taken, though mortalities may be under-reported in some fisheries. This level of estimated bycatch of ribbon seals represents less than 0.1 percent of their estimated population. Because there is little or no fishery activity near the widely distributed low densities of ribbon seals when they are associated

with ice, and they are highly dispersed during the remainder of the year, bycatch is unlikely to be a significant threat to ribbon seal populations. For the same reason, competition from fisheries that reduce local abundance of ribbon seal prey is unlikely to be a significant threat to ribbon seal populations. Broad-scale reduction in a commercially-fished, primary prey species could have a significant impact, but the large groundfish fisheries in Alaskan waters are managed to prevent depletion of the stocks; none of those fisheries is in an overfished status.

The extraordinary reduction in Arctic sea ice that has occurred in recent years has renewed interest in trans-Arctic navigation routes connecting the Atlantic and Pacific Oceans via the Northwest Passage and the Northern Sea Route. Climate models predict that the warming trend in the Arctic will accelerate, causing the ice to melt earlier in the spring and resume freezing later in the fall, resulting in an expansion of potential shipping routes and lengthening the potential navigation season. Though few details are available regarding actual shipping levels in the Sea of Okhotsk, resource development over the last decade stands out as a likely significant contributor. It is clear that considerable ship traffic is needed to support present oil and gas operations, primarily off the northeastern coast of Sakhalin Island and the western coast of the Kamchatka Peninsula, with future developments pointing to an ever-growing shipping industry to support the area's energy and minerals commerce. Large-scale commercial fishing, which occurs in many parts of the Sea of Okhotsk, also contributes to ship traffic there.

The most significant risk posed by shipping activities to ribbon seals is the accidental or illegal discharge of oil or other toxic substances carried by ships due to their immediate and potentially long-term effects on individual animals, populations, food webs, and the environment. Shipping activities can also affect ribbon seals directly through noise and physical disturbance (e.g., icebreaking vessels), as well as indirectly through ship emissions and possible effects of introduction of invasive species.

Current and future shipping activities in the Arctic pose varying levels of threat to ribbon seals depending on the type and intensity of the shipping activity and its degree of spatial and temporal overlap with the seals. These factors are inherently difficult to know or predict, making threat assessment uncertain. Ribbon seals are typically reported to be widely distributed in low

densities on sea ice during the spring reproductive season, are likely even more dispersed during the summer and fall open-water seasons, and are not known to congregate in large numbers. Their highly dispersed distribution may help mitigate the risks of localized shipping threats, such as oil spills or physical disturbance, since the impacts from such events would be less likely to affect large numbers of seals. The fact that nearly all shipping activity in the Arctic purposefully avoids areas of ice and primarily occurs during the ice-free or low-ice seasons may also help mitigate the threats of shipping to ribbon seals since this species is closely associated with ice during the whelping, nursing, and molting periods when the seals (especially young pups) may be most vulnerable to shipping impacts. Icebreakers may pose special risks to ribbon seals since they are capable of operating year-round in all but the heaviest ice conditions and are sometimes used to escort other types of vessels (e.g., tankers and bulk carriers) through ice-covered areas. If icebreaking activities increase in the Arctic in the future as expected, the likelihood of negative impacts (e.g., oil spills, pollution, noise, and disturbance) occurring in ice-covered areas where ribbon seals reside will likely also increase. Shipping impacts alone may comprise a low risk to entire populations, but when combined with the effects related to diminishing ice cover, such as increasingly denser aggregations, the impacts may be magnified and may play an important role in affecting the future health of populations.

Overall, the BRT judged the threats posed to ribbon seals from other natural or man-made factors to be of moderate significance in both the Bering Sea and the Sea of Okhotsk. We agree with the BRT's finding.

#### Demographic Risks Assessment

Threats to a species' long-term persistence are manifested demographically as risks to its abundance; productivity; spatial structure and connectivity; and genetic and ecological diversity. These viability criteria, outlined in McElhany *et al.* (2000), reflect concepts that are well-founded in conservation biology and that individually and collectively provide the most direct indices or proxies of extinction risk. A species at very low levels of abundance and with few populations will be less tolerant to environmental variation, catastrophic events, genetic processes, demographic stochasticity (variability in population growth rates arising from random

differences among individuals in survival and reproduction), ecological interactions, and other processes. A rate of productivity that is unstable or declining over a long period of time can indicate poor resiliency to future environmental change. A species that is not widely distributed across a variety of well-connected habitats is at increased risk of extinction due to environmental perturbations, including catastrophic events. A species that has lost locally adapted genetic and ecological diversity may lack the raw resources necessary to exploit a wide array of environments and endure short- and long-term environmental changes.

The BRT members' assessments of the significance of demographic risks to the persistence of ribbon seals were summarized qualitatively using a numerical scoring system. This scoring system, which was modeled on similar approaches used in other ESA status reviews (e.g., Atlantic Wolffish BRT, 2009; Butler *et al.*, 2009; Cameron *et al.*, 2010; Kelly *et al.*, 2010), was designed to elicit expert judgment about the likelihood that the known and potential threats will impact the species' persistence. Specifically, each BRT member considered the risk that the population may be placed in danger of extinction by demographic problems with abundance, productivity, spatial structure, or diversity, within the next 50 years and the next 100 years, and then assigned a score to each of these demographic risk categories using the following values: 1—very low or zero risk, 2—low risk, 3—medium risk, 4—high risk, and 5—very high risk. The average score and the range of scores were tabulated for each of the four demographic risk categories.

The BRT judged the demographic risks to the persistence of the ribbon seal between now and 2050 to be very low (abundance, productivity, and diversity) to low (spatial structure); and between now and 2100 to be low (abundance, productivity, and diversity) to medium (spatial structure). The medium risk score for demographic problems associated with spatial structure primarily reflects the anticipated direct impacts to ribbon seals stemming from loss of habitat patches and connectivity. We concur with the BRT's findings.

To supplement the demographic risks assessment and express a single, summarized judgment about extinction risk, each BRT member also allocated 10 likelihood points among five time interval categories (now to 2025, 2026 to 2050, 2051 to 2075, 2076 to 2100, and beyond 2100) to indicate his or her judgment about the time until ribbon

seals would reach a population level of 5,000 individuals, representing a hypothetical minimum viable population (MVP). Degree of uncertainty in this judgment is expressed by spreading the points across the time interval categories. In other words, if a member believed that ribbon seals will never decline to 5,000 individuals, or at least not for a very long time, all 10 likelihood points would be allocated to the interval "beyond 2100." Or, if the member believed strongly that ribbon seals will reach that level in the latter half of this century, and it is equally likely to happen in either the time interval "2051 to 2075" or "2076 to 2100," five likelihood points would be allocated to each of those two categories. Thus, this assignment of likelihood points represents the opinion of BRT members as to whether the population may decline below the hypothetical MVP in the specified time intervals based on reasoned expert judgment. The level of 5,000 individuals was selected without regard to specific aspects of ribbon seal life history that would determine the species' MVP size (which are largely unknown). Rather, it was chosen as a value that has been asserted to be useful because of its derivation as the approximate median from a meta-analysis of MVPs for many species (Traill *et al.*, 2007; Traill *et al.*, 2010). We note, however, that some have cautioned about placing confidence in this value (Flather *et al.*, 2011). The BRT members assigned all likelihood points to the three time intervals beyond 2050. Among the eleven BRT members, 0 percent of the likelihood points was ascribed to the combined intervals from now to 2050, four percent was ascribed to the interval 2051 to 2075, 13 percent was ascribed to 2076 to 2100, and 83 percent was ascribed to the period beyond 2100. In other words, the BRT's collective distribution of points among time intervals indicating when the ribbon seal population may decline to a hypothetical MVP was concentrated in the time interval beyond the end of the current century. The range among BRT members in the percentage of likelihood points assigned to the combined time interval categories from now to 2100 was 0 percent (five BRT members) to 50 percent (i.e., 5 points; one BRT member), reflecting the variation in this judgment that results from sparse and uncertain information underlying this assessment (the 5 other BRT members assigned from 1 to 4 points). The BRT's scoring was of course subjective, but it offers an indication of the BRT members' professional judgment that

there is a low near-term extinction risk. We compared the scoring here with the BRT's demographic risk assessment and our evaluation of the ESA section 4(a)(1) factors above and found them consistent.

### Conservation Efforts

When considering the listing of a species, section 4(b)(1)(A) of the ESA requires consideration of efforts by any state, foreign nation, or political subdivision of a state or foreign nation to protect the species. Such efforts would include measures by Native American tribes and organizations, local governments, and private organizations. Also, Federal, tribal, state, and foreign recovery actions (16 U.S.C. 1533(f)), and Federal consultation requirements (16 U.S.C. 1536) constitute conservation measures. In addition to identifying these efforts, under the ESA and our Policy on the Evaluation of Conservation Efforts (PECE; 68 FR 15100; March 28, 2003), we must evaluate the certainty of implementing the conservation efforts and the certainty that the conservation efforts will be effective on the basis of whether the effort or plan establishes specific conservation objectives, identifies the necessary steps to reduce threats or factors for decline, includes quantifiable performance measures for monitoring compliance and effectiveness, incorporates the principles of adaptive management, and is likely to improve the species' viability at the time of the listing determination.

At this time, we are not aware of any formalized conservation efforts for ribbon seals that have yet to be implemented, or which have recently been implemented, but have yet to show their effectiveness in removing threats to the species. Therefore, we do not need to evaluate any domestic conservation efforts under the PECE.

NMFS has an agreement with the Ice Seal Committee (ISC) under section 119 of the Marine Mammal Protection Act to conserve and provide co-management of subsistence use of ice seals by Alaska Natives. The ISC co-manages ice seals with NMFS by monitoring subsistence harvest and cooperating on needed research and education programs pertaining to ice seals. NMFS's National Marine Mammal Laboratory is engaged in an active research program for ribbon seals. The new information from research will be used to enhance our understanding of the risk factors affecting ribbon seals, thereby improving our ability to develop effective management measures for the species.

ESA section 4(b)(1)(B) requires us to give consideration to species which have been designated as requiring protection from unrestricted commerce by any foreign nation, or pursuant to any international agreement; or identified as in danger of extinction, or likely to become so within the foreseeable future, by any state agency or any agency of a foreign nation that is responsible for the conservation of the species. We are not aware of any such special protections or designations, or of any conservation efforts undertaken by foreign nations specifically to protect ribbon seals. Ribbon seals are not afforded any protective measures or special status via the Convention for the International Trade in Endangered Species or the International Union for Conservation of Nature.

### Listing Determination

We have reviewed the status of the ribbon seal, fully considering the best scientific and commercial data available, including the status review report. We have reviewed the threats to the ribbon seal, as well as other relevant factors, and given consideration to conservation efforts and special designations for ribbon seals by states and foreign nations. The best available information indicates that the threats posed to the persistence of the ribbon seal from foreseeable future destruction or modification of habitat attributable to climate change are of greater significance than threats from other factors. Although the trajectory of ribbon seal abundance is impossible to project with certainty, it is likely that the effects of diminished sea ice habitat and disrupted prey communities will reduce ribbon seal's vital rates of reproduction and survival gradually throughout the foreseeable future. However, our analysis did not indicate that the ribbon seal is in danger of extinction (endangered) or that the anticipated impacts on ribbon seal vital rates render the species likely to become an endangered species within the foreseeable future (threatened) throughout its range. Relevant considerations supporting this conclusion include: (1) There is evidence from some recent years with unusual ice conditions that ribbon seals may compensate for changes in sea ice, as least in part, by moving to areas with better ice, at least in the Bering Sea; (2) ribbon seals are known to have a diet that is ecologically and trophically diverse and they are able to forage over a wide range of ocean depths, which should enhance resilience to climate-related changes in prey communities; (3) ribbon seals tend to be highly

dispersed and mostly solitary during the ice-free season, which would provide a hedge against localized threats such as oil spills, concentrations of fishery activity, and interactions with shipping; and (4) individual ribbon seals have the capability to undertake large seasonal movements and shifts between pelagic and pack ice habitats, which may mitigate some anticipated impacts of anthropogenic climate change. We therefore find that the ribbon seal does not warrant listing as threatened or endangered throughout its range at this time.

### Significant Portion of the Range Evaluation

Under the ESA and our implementing regulations, a species warrants listing if it is threatened or endangered throughout all or a significant portion of its range. In our analysis for this listing determination, we initially evaluated the status of and threats to the ribbon seal throughout its entire range. We found that the consequences of habitat change associated with a warming climate can be expected to manifest throughout the current breeding and molting ranges of ribbon seals, and that the ongoing and projected changes in sea ice habitat are likely to reduce the ribbon seal's vital rates of reproduction and survival gradually through the foreseeable future. However, despite the expectation of a gradual decline, we concluded that the ribbon seal is not endangered nor is it likely to become so within the foreseeable future throughout its range.

The magnitude of the threats posed to the persistence of ribbon seals, including from changes in sea ice habitat, is likely to vary to some degree across the range of the species depending on a number of factors, including where affected populations occur. In light of the potential differences in the magnitude of the threats to specific areas or populations, we next evaluated whether the ribbon seal might be threatened or endangered in any significant portion of its range. In accordance with our draft policy on "significant portion of its range," our first step in this evaluation was to review the entire supporting record for this listing determination to "identify any portions of the range[s] of the [DPSs] that warrant further consideration" (76 FR 77002; December 9, 2011). We evaluated whether substantial information indicated "that (i) the portions may be significant [within the meaning of the draft policy] and (ii) the species [occupying those portions] may be in danger of extinction or likely to become so within the

foreseeable future” (76 FR 77002; December 9, 2011). Depending on the biology of a 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 occupying that portion is threatened or endangered there; if we determine that the members of a species occupying a portion of its range are not threatened or endangered, we do not need to determine if that portion is “significant.” In practice, a key part of the determination as to whether 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. Finally, if threats, even though acting only in a portion of the range of the species, would cause the entire species to be threatened or endangered, the conclusion would be that the species is threatened or endangered throughout its range (rather than only in a significant portion of its range).

All of the ESA threat factors assigned scores by the BRT (Factors A, B, C, and E) were judged to be of relatively higher significance in the Sea of Okhotsk than in the Bering Sea, and we concur with this assessment. Therefore, we evaluated whether there is substantial information suggesting that the hypothetical loss of the portion of the species residing in the Sea of Okhotsk would reasonably be expected to increase the demographic risks to the point that the species would then be in danger of extinction, i.e., whether the Sea of Okhotsk portion of the species’ range should be considered “significant.” At present, the numbers of ribbon seals in both the Bering Sea and Sea of Okhotsk portions of the range are on the order of 100,000 or more in each sea basin. As discussed in more detail in the status review report, populations or sub-populations of this magnitude and with the life history characteristics of the ribbon seal are typically immune to demographic risks that are associated with or exacerbated by low abundance, such as year-to-year

environmental fluctuations, loss of diversity, failure of breeding systems, and lack of potential for productivity. The climate related threats facing ribbon seals are expected to increase more or less in parallel between the Bering Sea and Sea of Okhotsk, albeit more quickly in the latter. If ribbon seal numbers in the Bering Sea decrease in the future to levels at which the demographic risks discussed above become significant, then the loss of either the Sea of Okhotsk or the Bering Sea portions would likely place the entire species in danger of extinction. However, at least in the near term, the BRT concluded, and we agree, that the loss of the Sea of Okhotsk portion of the ribbon seal population would not place the remainder, the Bering Sea portion, in danger of extinction (Boveng *et al.*, 2013, section 4.3.3.3). Because the portion of the ribbon seal population residing in the Sea of Okhotsk is not so significant that its hypothetical loss would render the species endangered, we conclude that the Sea of Okhotsk portion does not constitute a significant portion of the ribbon seal’s range. Consequently, we need not address the question of whether the portion of the species occupying the Sea of Okhotsk is threatened or endangered.

#### Conclusion

Our review of the information pertaining to the five ESA section 4(a)(1) factors does not support the assertion that there are threats acting on the species or its habitat that have rendered the ribbon seal to be in danger of extinction or likely to become so in the foreseeable future, throughout all or a significant portion of its range. Therefore, listing the ribbon seal as threatened or endangered under the ESA is not warranted at this time.

We will continue to monitor the status of the ribbon seal. If conditions change in the future, we will re-evaluate the status of this species to determine whether it should be listed as threatened or endangered under the ESA. Because of the remaining uncertainties regarding the effects of climate change, sea ice cover, and potential Russian harvests, following the 2008 status review of the ribbon seal, this species was added to our Species of Concern list (<http://www.nmfs.noaa.gov/pr/species/concern/>). The Species of Concern list serves to: (1) Increase public awareness about the species; (2) further identify data deficiencies and uncertainties in the species’ status and the threats it faces; and (3) stimulate cooperative research efforts to obtain the information necessary to evaluate the

species’ status and threats. As resources permit, we will conduct further studies of ribbon seal abundance and status. We will evaluate results of these and any other studies that may be conducted and undertake a new status review, if warranted.

#### References Cited

A complete list of all references cited in this rulemaking can be found on our Web site at <http://alaskafisheries.noaa.gov> and is available upon request from the NMFS office in Juneau, Alaska (see ADDRESSES).

#### Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: July 3, 2013.

**Alan D. Risenhoover,**

*Director, Office of Sustainable Fisheries, performing the functions and duties of the Deputy Assistant Administrator for Regulatory Programs.*

[FR Doc. 2013-16601 Filed 7-9-13; 8:45 am]

**BILLING CODE 3510-22-P**

## COMMODITY FUTURES TRADING COMMISSION

### Agricultural Advisory Committee Meeting

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice of Meeting.

**SUMMARY:** The Commodity Futures Trading Commission’s (CFTC) Agricultural Advisory Committee (AAC) is providing notice that it will hold a public meeting on Thursday, July 25, 2013, from 9:00 a.m. to 2:30 p.m., at the CFTC’s Washington, DC, headquarters. The AAC will discuss issues related to customer protection and the Dodd-Frank Wall Street Reform and Consumer Protection Act. The meeting is open to the public with seating on a first-come, first-served basis. Members of the public who wish to listen to the meeting by telephone may do so by calling a domestic toll-free or international toll or toll-free number. The domestic toll-free number, which is listed in this Notice, will connect to a live, listen-only audio feed. The international toll and toll-free numbers will be posted on the CFTC Web site in advance of the meeting. Call-in participants should be prepared to provide their first name, last name, and affiliation. Persons requiring special accommodations to attend the meeting because of a disability should notify the contact person below. The public is invited to submit written statements to

the AAC. The meeting will be recorded and later posted on the CFTC Web site, [www.cftc.gov](http://www.cftc.gov).

**DATES:** The meeting will be held on Thursday, July 25, from 9 a.m. to 2:30 p.m. Members of the public who wish to submit written statements in connection with the meeting should submit them by July 18, 2013.

**ADDRESSES:** The meeting will take place in the first floor Conference Center at the Commission's headquarters, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581. Written statements should be submitted to: Agricultural Advisory Committee, c/o Christa Lachenmayr, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581. Statements may also be submitted by electronic mail to: [clachenmayr@cftc.gov](mailto:clachenmayr@cftc.gov). Any statements submitted in connection with the committee meeting may be made available to the public, including publication on the CFTC Web site, [www.cftc.gov](http://www.cftc.gov).

**FOR FURTHER INFORMATION CONTACT:** Nicole McNair; Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581; (202) 418-5070.

**SUPPLEMENTARY INFORMATION:** After the meeting, a transcript of the meeting will be published on the CFTC Web site, [www.cftc.gov](http://www.cftc.gov). The telephone call-in information for the live, listen-only audio feed of the meeting is as follows:

Domestic Toll-Free: 1-866-844-9416.

Call Leader Name: Mr. Michael Jones.

International Toll and Toll-Free: The international toll and toll-free numbers will be posted on the CFTC Web site, [www.cftc.gov](http://www.cftc.gov), on the page for this meeting, under Related Links.

Pass Code/Pin Code: CFTC

**Authority:** 5 U.S.C. Appendix 2 § 10(a)(2).

Dated: July 5, 2013.

**Melissa D. Jurgens,**

*Secretary of the Commission.*

[FR Doc. 2013-16545 Filed 7-9-13; 8:45 am]

**BILLING CODE 6351-01-P**

## COMMODITY FUTURES TRADING COMMISSION

### Sunshine Act Meetings

**TIME AND DATE:** 9:30 a.m., Friday, July 12, 2013.

**PLACE:** CFTC Headquarters Conference Center, Three Lafayette Centre, 1155 21st St. NW., Washington, DC.

**STATUS:** Open.

**MATTERS TO BE CONSIDERED:** The Commission has scheduled this meeting

to consider various rulemaking matters, including the issuance of cross-border final guidance and exemptive order. The agenda for this meeting is available to the public and posted on the Commission's Web site at <http://www.cftc.gov>. In the event that the time, date, or place of the meeting changes, an announcement of the change, along with the new time, date, or place of the meeting, will be posted on the Commission's Web site.

**CONTACT PERSON FOR MORE INFORMATION:** Melissa D. Jurgens, Secretary of the Commission, 202-418-5516.

**Melissa D. Jurgens,**

*Secretary of the Commission.*

[FR Doc. 2013-16607 Filed 7-8-13; 11:15 am]

**BILLING CODE 6351-01-P**

## CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

### Information Collection; Submission for OMB Review, Comment Request

**AGENCY:** Corporation for National and Community Service.

**ACTION:** Notice.

**SUMMARY:** The Corporation for National and Community Service (CNCS) has submitted a public information collection request (ICR) entitled Assessing the Impact of Training and Technical Assistance (TTA) for review and approval in accordance with the Paperwork Reduction Act of 1995, Public Law 104-13, (44 U.S.C. Chapter 35). Copies of this ICR, with applicable supporting documentation, may be obtained by calling CNCS, Marlene Zakai, at 202-606-6692 or email to [mzakai@cns.gov](mailto:mzakai@cns.gov). Individuals who use a telecommunications device for the deaf (TTY-TDD) may call 1-800-833-3722 between 8:00 a.m. and 8:00 p.m. Eastern Time, Monday through Friday.

**ADDRESSES:** Comments may be submitted, identified by the title of the information collection activity, to the Office of Information and Regulatory Affairs, Attn: Ms. Sharon Mar, OMB Desk Officer for CNCS, by any of the following two methods within 30 days from the date of publication in the **Federal Register**:

(1) By fax to (202) 395-6974, Attention: Ms. Sharon Mar, OMB Desk Officer; and

(2) By email to: [smar@omb.eop.gov](mailto:smar@omb.eop.gov).

**SUPPLEMENTARY INFORMATION:** The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the

functions of CNCS, 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;
- Propose ways to enhance the quality, utility, and clarity of the information to be collected; and
- Propose ways to minimize the burden of the collection of information on those who are expected to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (e.g., permitting electronic submissions of responses).

### Comments

A 60-day public comment Notice was published in the **Federal Register** on January 16, 2013. This comment period ended February 8, 2013. CNCS received three public comments asking how CNCS intends to use the data and another question asking if CNCS will require commissions to use the same information collection to assess commission-sponsored trainings. In addition, a corrected answer was submitted for one of the questions on the sample assessment instrument. Responses to the questions raised during the public comment period are covered in the attached Data Collection Protocol. Requirements for external parties, including state commissions, to participate in this information collection will be outlined in future requests for proposals and notices of funding opportunity. The final proposed assessment questions are attached and correct answers identified for each item.

**Description:** CNCS is seeking approval of Assessing the Impact of Training and Technical Assistance which will be used by CNCS sponsors of trainings to evaluate the knowledge gains of participants for the purposes of determining the value of the TTA investment and to improve the quality of training.

**Type of Review:** New.

**Agency:** Corporation for National and Community Service.

**Title:** Assessing the Impact of Training and Technical Assistance.

**OMB Number:** New.

**Agency Number:** None.

**Affected Public:** Current/prospective training and technical assistance providers and participants.

**Total respondents:** 10,000.

**Frequency:** Annually.

*Average Time per Response:* Five minutes for the pre-test and 5 minutes for the post-test for a total of 10 minutes.

*Estimated Total Burden Hours:* 1666.67 hours.

*Total Burden Cost (capital/startup):* None.

*Total Burden Cost (operating/maintenance):* None.

Dated: July 3, 2013.

**Marlene Zakai,**

*Director, Strategic Initiatives.*

[FR Doc. 2013-16595 Filed 7-9-13; 8:45 am]

**BILLING CODE 6050-28-P**

## CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

### Proposed Information Collection; Comment Request

**AGENCY:** Corporation for National and Community Service.

**ACTION:** Notice.

**SUMMARY:** The Corporation for National and Community Service (CNCS), as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) (44 U.S.C. 3506(c)(2)(A)). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirement on respondents can be properly assessed.

Currently, CNCS is soliciting comments concerning the new eGrants performance measurement module for the Social Innovation Fund (SIF), instructions for completing the performance measurement module, and the revised SIF performance progress report. Grantees will use the new performance measurement module to select targets for measures when applying for new or continuation funds. Grantees will report progress on these measures through the revised performance progress report. Completion of quarterly progress reports is required as a condition of the award.

Copies of the information collection request can be obtained by contacting the office listed in the addresses section of this Notice.

**DATES:** Written comments must be submitted to the individual and office

listed in the **ADDRESSES** section by September 9, 2013.

**ADDRESSES:** You may submit comments, identified by the title of the information collection activity, by any of the following methods:

(1) By mail sent to: Corporation for National and Community Service, Social Innovation Fund; Attention: Keisha Kersey, Program Officer, Room 9611; 1201 New York Avenue NW., Washington, DC, 20525.

(2) By hand delivery or by courier to the CNCS mailroom at Room 8100 at the street address given in paragraph (1) above, between 9:00 a.m. and 4:00 p.m. Eastern Time, Monday through Friday, except Federal holidays.

(3) By fax to: (202) 606-3477, Attention: Keisha Kersey, Program Officer.

(4) Electronically through the CNCS email address system: [kkersey@cns.gov](mailto:kkersey@cns.gov) or [www.regulations.gov](http://www.regulations.gov). Individuals who use a telecommunications device for the deaf (TTY-TDD) may call 1-800-833-3722 between 8:00 a.m. and 8:00 p.m. Eastern Time, Monday through Friday.

#### FOR FURTHER INFORMATION CONTACT:

Keisha Kersey, (202) 606-3905, or by email at [kkersey@cns.gov](mailto:kkersey@cns.gov).

**SUPPLEMENTARY INFORMATION:** CNCS is particularly interested in comments that:

- Evaluate the questions being asked and data being collected.
- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of CNCS, 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 expected to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (e.g., permitting electronic submissions of responses).

#### Background

The new performance measure module and revised performance progress report will be completed by Social Innovation Fund grantees. The purpose of this information collection is to obtain performance data from Social

Innovation Fund grantees that is aligned with agency priorities.

#### Current Action

CNCS seeks to implement the new performance measure module in eGrants and the related application instructions. In addition, CNCS seeks to revise the quarterly performance progress report.

*Type of Review:* New.

*Agency:* Corporation for National and Community Service.

*Title:* Social Innovation Fund Performance Measure Module Instructions and Quarterly Progress Report.

*OMB Number:* None.

*Agency Number:* None.

*Affected Public:* Current/prospective recipients of Social Innovation Fund grants.

*Total Respondents:* 20.

*Frequency:* Quarterly.

*Average Time per Response:* 2 hours.

*Estimated Total Burden Hours:* 40 hours.

*Total Burden Cost (capital/startup):* None.

*Total Burden Cost (operating/maintenance):* None.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: July 5, 2013.

**Lois Nembhard,**

*Acting Director, Social Innovation Fund.*

[FR Doc. 2013-16593 Filed 7-9-13; 8:45 am]

**BILLING CODE 6050-28-P**

## DEPARTMENT OF EDUCATION

[Docket No. ED-2013-ICCD-0089]

### Agency Information Collection Activities; Comment Request; A Study of Feedback in Teacher Evaluation Systems

**AGENCY:** Institute of Education Sciences/National Center for Education Statistics (IES), Department of Education (ED).

**ACTION:** Notice.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 3501 *et seq.*), ED is proposing a new information collection.

**DATES:** Interested persons are invited to submit comments on or before September 9, 2013.

**ADDRESSES:** Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at <http://www.regulations.gov> by selecting

Docket ID number ED–2013–ICCD–0089 or via postal mail, commercial delivery, or hand delivery. Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 2E105, Washington, DC 20202–4537.

**FOR FURTHER INFORMATION CONTACT:**

Electronically mail [ICDocketMgr@ed.gov](mailto:ICDocketMgr@ed.gov). Please do not send comments here.

**SUPPLEMENTARY INFORMATION:** The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

*Title of Collection:* A Study of Feedback in Teacher Evaluation Systems.

*OMB Control Number:* 1850—NEW.

*Type of Review:* A new information collection.

*Respondents/Affected Public:* Individuals or households.

*Total Estimated Number of Annual Responses:* 11,604.

*Total Estimated Number of Annual Burden Hours:* 4,213.

*Abstract:* This study will collect information in teacher evaluation systems in states in the Central Region.

The study will collect information about (1) How teachers perceive the feedback they receive including its utility, accuracy and credibility; (2) how teachers respond to feedback, including their access to learning opportunities related to feedback received; and (3) how teacher responsiveness to feedback relates to their performance in the classroom. The study will examine data from a teacher survey and data from evaluations of teacher performance in districts that are implementing teacher evaluation systems during the 2012–14 school year, researchers will pilot the teacher survey. The study will be implemented during the 2014–15 school year. The findings will be used by state and district leaders to prioritize needs both at the state and district level for training and guidance on providing feedback as part of teacher evaluation systems, and also for informing the state and districts of additional data collection needed to further understand feedback characteristics. This study will result in a report intended for district and state leaders who are responsible for selecting, developing, and implementing teacher evaluation systems and overseeing support for teachers professional growth and effectiveness.

Dated: July 3, 2013.

**Stephanie Valentine,**

*Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.*

[FR Doc. 2013–16526 Filed 7–9–13; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF ENERGY

### Office of Energy Efficiency and Renewable Energy

[Case No. CD–008]

#### Petition for Waiver and Notice of Granting the Application for Interim Waiver of ASKO Appliances Inc. From the DOE Residential Clothes Dryer Test Procedure

**AGENCY:** Office of Energy Efficiency and Renewable Energy, Department of Energy.

**ACTION:** Notice of Petition for Waiver, Granting of Application for Interim Waiver, and Request for Public Comments.

**SUMMARY:** This notice announces receipt of and publishes the ASKO Appliances Inc. (ASKO) petition for waiver from specified portions of the U.S. Department of Energy (DOE) test

procedure for determining the energy consumption of residential clothes dryers. The waiver request pertains to ASKO's specified models of condensing residential clothes dryers. The existing test procedure does not apply to condensing clothes dryers. In addition, today's notice grants ASKO an interim waiver from the DOE test procedure applicable to residential clothes dryers. DOE solicits comments, data, and information concerning ASKO's petition.

**DATES:** DOE will accept comments, data, and information with respect to ASKO's Petition until August 9, 2013.

**ADDRESSES:** You may submit comments, identified by case number CD–008, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Email:* [AS\\_Waiver\\_Requests@ee.doe.gov](mailto:AS_Waiver_Requests@ee.doe.gov). Include the case number [Case No. CD–008] in the subject line of the message.

- *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, Petition for Waiver Case No. CD–008, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–2945. Please submit one signed original paper copy.

- *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza SW., Suite 600, Washington, DC 20024. Please submit one signed original paper copy.

*Docket:* For access to the docket to review the background documents relevant to this matter and comments received, you may visit the U.S. Department of Energy, 950 L'Enfant Plaza SW., (Resource Room of the Building Technologies Program), Washington, DC, 20024; (202) 586–2945, between 9:00 a.m. and 4:00 p.m., Monday through Friday, except Federal holidays. Please call Ms. Brenda Edwards at the above telephone number for additional information regarding visiting the Resource Room.

**FOR FURTHER INFORMATION CONTACT:** Mr. Bryan Berringer, U.S. Department of Energy, Building Technologies Program, Mail Stop EE–2J, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–0371. Email: [Bryan.Berringer@ee.doe.gov](mailto:Bryan.Berringer@ee.doe.gov).

Mr. James Silvestro, U.S. Department of Energy, Office of the General Counsel, Mail Stop GC–71, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585–0103.

Telephone: (202) 286-4224. Email: [James.Silvestro@hq.doe.gov](mailto:James.Silvestro@hq.doe.gov).

#### SUPPLEMENTARY INFORMATION:

### I. Background and Authority

Title III, Part B of the Energy Policy and Conservation Act of 1975 (EPCA), Public Law 94-163 (42 U.S.C. 6291-6309, as codified), established the Energy Conservation Program for Consumer Products Other Than Automobiles, a program covering most major household appliances, which includes the residential clothes dryers that are the focus of this notice.<sup>1</sup> Part B includes definitions, test procedures, labeling provisions, energy conservation standards, and the authority to require information and reports from manufacturers. Further, Part B authorizes the Secretary of Energy to prescribe test procedures that are reasonably designed to produce results which measure energy efficiency, energy use, or estimated operating costs, and that are not unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)). The test procedure for clothes dryers is contained in 10 CFR part 430, subpart B, appendix D.

DOE's regulations set forth in 10 CFR 430.27 contain provisions that enable a person to seek a waiver from the test procedure requirements for covered consumer products. A waiver will be granted by the Assistant Secretary for Energy Efficiency and Renewable Energy (the Assistant Secretary) if it is determined that the basic model for which the petition for waiver was submitted contains one or more design characteristics that prevents testing of the basic model according to the prescribed test procedures, or if the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data. 10 CFR 430.27(a)(1). Petitioners must include in their petition any alternate test procedures known to the petitioner to evaluate the basic model in a manner representative of its energy consumption. 10 CFR 430.27(b)(1)(iii). The Assistant Secretary may grant the waiver subject to conditions, including adherence to alternate test procedures. 10 CFR 430.27(l). Waivers remain in effect pursuant to the provisions of 10 CFR 430.27(m).

The waiver process also allows the Assistant Secretary to grant an interim waiver from test procedure requirements to manufacturers that have

petitioned DOE for a waiver of such prescribed test procedures if it is determined that the applicant will experience economic hardship if the application for interim waiver is denied, if it appears likely that the petition for waiver will be granted, and/or if the Assistant Secretary determines that it would be desirable for public policy reasons to grant immediate relief pending a determination on the petition for waiver. 10 CFR 430.27(a)(2); 430.27(g). An interim waiver remains in effect for a period of 180 days or until DOE issues its determination on the petition for waiver, whichever is sooner, and may be extended for an additional 180 days, if necessary. 10 CFR 430.27(h).

Please note that on January 6, 2011, DOE published a test procedure final rule (76 FR 1032) to include provisions for testing ventless clothes dryers. The rule became effective on February 7, 2011, and requires compliance on or after January 1, 2015. Ventless clothes dryers manufactured on or after January 1, 2015, must be tested with the new DOE test procedure.

### II. Petition for Waiver of Test Procedure

On June 19, 2013, ASKO filed a petition for waiver and an application for interim waiver from the test procedure applicable to residential clothes dryers set forth in 10 CFR Part 430, subpart B, appendix D. ASKO seeks a waiver from the applicable test procedure for its Bosch T744C, T754C, and T794C condensing clothes dryers because, ASKO asserts, design characteristics of these models prevent testing in accordance with the currently prescribed test procedure, as described in greater detail in the following paragraph. DOE granted similar waivers for the same type of clothes dryer to Bosch (BSH) (76 FR 33271, June 8, 2011), Miele Appliance, Inc. (Miele) (60 FR 9330, February 17, 1995; 76 FR 17637, March 30, 2011), LG Electronics (73 FR 66641, November 10, 2008), Whirlpool Corporation (74 FR 66334, December 15, 2009), and General Electric (75 FR 13122, March 18, 2010). ASKO claims that its condensing clothes dryers cannot be tested pursuant to the DOE procedure and requests that the same waiver granted to other manufacturers be granted for ASKO's T744C, T754C, and T794C models.

In support of its petition, ASKO claims that the current clothes dryer test procedure applies only to vented clothes dryers because the test procedure requires the use of an exhaust restrictor on the exhaust port of the clothes dryer during testing. Because condensing clothes dryers operate by

blowing air through the wet clothes, condensing the water vapor in the airstream, and pumping the collected water into either a drain line or an in-unit container, these products do not use an exhaust port like a vented dryer does. ASKO plans to market its condensing clothes dryers for situations in which a conventional vented clothes dryer cannot be used, such as high-rise apartments and other buildings where exhaust venting is not practical or is cost prohibitive.

The ASKO petition requests that DOE grant a waiver from the existing test procedure to allow for the sale of three new models (T744C, T754C, and T794C) until DOE prescribes final test procedures and minimum energy conservation standards appropriate to condensing clothes dryers. Similar to the other manufacturers of condensing clothes dryers, ASKO did not include an alternate test procedure in its petition.

### III. Application for Interim Waiver

ASKO also requests an interim waiver from the existing DOE test procedure for immediate relief. Under 10 CFR 430.27(b)(2), each application for interim waiver "shall demonstrate likely success of the Petition for Waiver and shall address what economic hardship and/or competitive disadvantage is likely to result absent a favorable determination on the Application for Interim Waiver." An interim waiver may be granted if it is determined that the applicant will experience economic hardship if the application for interim waiver is denied, if it appears likely that the petition for waiver will be granted, and/or if the Assistant Secretary determines that it would be desirable for public policy reasons to grant immediate relief pending a determination of the petition for waiver. 10 CFR 430.27(g).

DOE has determined that ASKO's application for interim waiver does not provide sufficient market, equipment price, shipments, and other manufacturer impact information to permit DOE to evaluate the economic hardship ASKO might experience absent a favorable determination on its application for interim waiver. DOE understands, however, that the ASKO condensing clothes dryers have a feature that prevents testing them according to the existing DOE test procedure. In addition, as stated in the previous section, DOE has previously granted waivers to BSH, Miele, LG, Whirlpool and GE for similar products. It is in the public interest to have similar products tested and rated for energy consumption on a comparable basis, where possible. Further, DOE has determined that

<sup>1</sup> For editorial reasons, upon codification in the U.S. Code, Part B was re-designated Part A.

ASKO is likely to succeed on the merits of its petition for waiver and that it is desirable for policy reasons to grant immediate relief.

#### IV. Interim Waiver Granted

For the reasons stated above, DOE grants ASKO's application for interim waiver from testing of its condensing clothes dryer product line. Therefore, *it is ordered that:*

The application for interim waiver filed by ASKO is hereby granted for ASKO's T744C, T754C, and T794C condensing clothes dryers. Until a final decision is made on its petition for waiver, ASKO shall not be required to test its T744C, T754C, and T794C condensing clothes dryers on the basis of the test procedure under 10 CFR part 430 subpart B, appendix D.

DOE makes decisions on waivers and interim waivers for only those models specifically set out in the petition, not future models that may or may not be manufactured by the petitioner. ASKO may submit a new or amended petition for waiver and request for grant of interim waiver, as appropriate, for additional models of clothes dryers for which it seeks a waiver from the DOE test procedure. In addition, DOE notes that grant of an interim waiver or waiver does not release a petitioner from the certification requirements set forth at 10 CFR 430.62.

Further, this interim waiver is conditioned upon the presumed validity of statements, representations, and documents provided by the petitioner. DOE may revoke or modify this interim waiver at any time upon a determination that the factual basis underlying the petition for waiver is incorrect, or upon a determination that the results from the alternate test procedure are unrepresentative of the basic models' true energy consumption characteristics.

#### V. Summary and Request for Comments

Through today's notice, DOE grants ASKO an interim waiver from the specified portions of the test procedure applicable to ASKO's T744C, T754C, and T794C condensing clothes dryers and announces receipt of ASKO's petition for waiver from those same portions of the test procedure. DOE publishes ASKO's petition for waiver in its entirety pursuant to 10 CFR 430.27(b)(1)(iv). The petition contains no confidential information.

DOE solicits comments from interested parties on all aspects of the petition. Pursuant to 10 CFR 430.27(b)(1)(iv), any person submitting written comments to DOE must also send a copy of such comments to the

petitioner. The contact information for the petitioner is: Mr. Michael Wasson, ASKO Appliances, Inc., P.O. Box 940609, Plano, TX 75094-0609. All submissions received must include the agency name and case number for this proceeding. Submit electronic comments in WordPerfect, Microsoft Word, Portable Document Format (PDF), or text (American Standard Code for Information Interchange (ASCII)) file format and avoid the use of special characters or any form of encryption. Wherever possible, include the electronic signature of the author. DOE does not accept telefacsimiles (faxes).

According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit two copies to DOE: One copy of the document including all the information believed to be confidential and one copy of the document with the information believed to be confidential deleted. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Issued in Washington, DC, on July 3, 2013.

**Kathleen B. Hogan,**

*Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy*

June 19, 2013

Dr. David Danielson  
Assistant Secretary, Energy Efficiency & Renewable Energy  
U.S. Department of Energy  
Mail Station EE-1  
1000 Independence Avenue, SW  
Washington, DC 20585  
[Daivid.danielson@ee.doe.com](mailto:Daivid.danielson@ee.doe.com)

Re: Petition of Waiver and Application for Interim Waiver, ASKO Condenser Dryers

Dear Assistant Secretary Danielson, ASKO Appliances Inc. (ASKO) hereby submits this Petition of Waiver and Application for Interim Waiver, pursuant to 10 CFR 430.27, for new condenser clothes dryers.

ASKO manufactures washers, dryers, and dishwashers sold in the United States. This petition and application based on the following major points:

1. ASKO's petition for new dryer base models T744C, T754C, and T794C for introduction 2013.
2. Petitions for similar products issued to manufacturers such as Miele, Bosch, and Whirlpool.
3. ASKO's condenser dryers are the same concept and principle, except for external venting, in relation to the test procedures in 10 CFR, part 430, subpart B, appendix D Uniform Test Method for Measuring the Energy Consumption of Clothes Dryers.
4. The test procedure does not define or mention measuring the energy for condenser dryers.

Additional information is that the same test performed on condenser and vented dryers and condenser dryers have virtually the same energy use as vented dryers.

The lack of relief would impose an economic hardship by not allowing ASKO to compete with competition with similar products in USA.

The petition and application warrants approval on the grounds of design characteristics that prevent the testing according to 10 CFR, part 430, subpart B, appendix D.

ASKO would be available for any further discussions on the design and use of condenser dryers with DOE. ASKO will notify all Clothes dryer manufacturers of domestically marketed units known to ASKO of this petition and application by mail.

Sincerely,  
Michael Wasson, CTO  
[michaelwasson@askousa.com](mailto:michaelwasson@askousa.com)  
Phone (972) 941-1948  
ASKO Appliances, Inc.  
Street Address:  
4001 E. Plano Pkwy Ste. 100  
Plano, TX 75074  
972-941-1900  
Fax 972-941-1901  
[www.askousa.com](http://www.askousa.com)  
Mailing Address:  
P.O. Box 940609  
Plano, TX 75094-0609

[FR Doc. 2013-16566 Filed 7-9-13; 8:45 am]

**BILLING CODE 6450-01-P**

#### DEPARTMENT OF ENERGY

#### Federal Energy Regulatory Commission

[Project No. 13346-003]

#### Free Flow Power Corporation; Notice of Application Ready for Environmental Analysis and Soliciting Comments, Recommendations, Terms and Conditions, and Prescriptions

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Original Major License.

b. *Project No.:* P-13346-003.

c. *Date filed:* December 3, 2012.

d. *Applicant:* Free Flow Power Corporation (Free Flow Power), on behalf of its subsidiary PayneBridge, LLC.

e. *Name of Project:* Williams Dam Water Power Project.

f. *Location:* At the existing Williams dam owned by the Indiana Department of Natural Resources on the East Fork White River in Lawrence County, Indiana. No federal lands are occupied by the project works or located within the project boundary.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791 (a)—825(r)

h. *Applicant Contacts*: Ramya Swaminathan, Chief Operating Officer, Free Flow Power Corporation, 239 Causeway Street, Suite 300, Boston, MA 02114; or at (978) 283-2822.

Daniel Lissner, General Counsel, Free Flow Power Corporation, 239 Causeway Street, Suite 300, Boston, MA 02114; or at (978) 283-2822.

i. *FERC Contact*: Aaron Liberty at (202) 502-6862 or by email at Aaron.Liberty@ferc.gov.

j. *Deadline for filing comments, recommendations, terms and conditions, and prescriptions*: 60 days from the issuance date of this notice; reply comments are due 105 days from the issuance date of this notice.

All 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 at FERCOOnlineSupport@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 five copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The Commission's Rules of Practice and Procedures require all intervenors filing documents with the Commission to serve a copy of that document on each person on 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.

k. This application has been accepted for filing and is now ready for environmental analysis.

l. The 21.3-foot-high, 294-foot-long Williams dam is currently owned by the Indiana Department of Natural Resources and impounds a 553-acre reservoir at a normal pool elevation of 472.2 North American Vertical Datum of 1988 (NAVD 88). In addition to the dam, the Williams Dam Water Power Project would consist of the following new facilities: (1) An 80-foot-long, 21.5-foot-high, 100-foot-wide intake structure with trashracks having 3-inch clear bar

spacing; (2) a 126-foot-long, 81-foot-wide powerhouse integral to the dam; (3) four turbine-generator units with a combined installed capacity of 4.0 megawatts; (4) a 40-foot by 40-foot substation; (5) a 265-foot-long, three-phase, 12.5-kilovolt overhead transmission line connecting the project's substation to local utility distribution lines; and (6) other appurtenant facilities.

The proposed project would operate in a run-of-river mode and the water surface elevation of the impoundment would be maintained at the existing normal pool elevation (crest of the dam spillway) or above. The average annual generation would be about 17,850 megawatt-hours.

m. 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. A copy is also available for inspection and reproduction at the address in item h above.

All filings must (1) bear in all capital letters the title "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 submitting the filing; 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. Each filing must be accompanied by proof of service on all persons listed on the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b), and 385.2010.

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.

n. Public notice of the filing of the initial development application, which has already been given, established the due date for filing competing applications or notices of intent. Under

the Commission's regulations, any competing development application must be filed in response to and in compliance with public notice of the initial development application. No competing applications or notices of intent may be filed in response to this notice.

o. A license applicant must file no later than 60 days following the date of issuance of this notice: (1) A copy of the water quality certification; (2) a copy of the request for certification, including proof of the date on which the certifying agency received the request; or (3) evidence of waiver of water quality certification.

Dated: July 2, 2013.

**Kimberly D. Bose,**  
*Secretary.*

[FR Doc. 2013-16503 Filed 7-9-13; 8:45 am]

**BILLING CODE 6717-01-P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Project No. 14327-000]

#### Pershing County Water Conservation District; Notice of Application Tendered for Filing with the Commission and Soliciting Additional Study Requests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application*: Minor Original License.

b. *Project No.*: 14327-000.

c. *Date filed*: June 26, 2013.

d. *Applicant*: Pershing County Water Conservation District.

e. *Name of Project*: Humboldt River Hydro Power Project.

f. *Location*: At the existing U.S. Bureau of Reclamation's (Reclamation) Rye Patch dam on the Humboldt River, nearby the Town of Lovelock, Pershing County, Nevada. The project would occupy 0.25 acre of Reclamation lands.

g. *Filed Pursuant to*: Federal Power Act, 16 U.S.C. 791 (a)—825(r).

h. *Applicant Contact*: Mr. Greg Lyman, P.E., Farr West Engineering, 5442 Longley Lane, Suite B, Reno, NV 89511; (775)-853-7259.

i. *FERC Contact*: Adam Beeco at (202)-502-8655; email—adam.beeco@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 l 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. Pursuant to § 4.32(b)(7) of 18 CFR of the Commission's regulations, if any resource agency, Indian Tribe, or person believes that an additional scientific study should be conducted in order to form an adequate factual basis for a complete analysis of the application on its merit, the resource agency, Indian Tribe, or person must file a request for a study with the Commission not later than 60 days from the date of filing of the application, and serve a copy of the request on the applicant.

l. *Deadline for filing additional study requests and requests for cooperating agency status:* August 26, 2013.

All 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 at [FERCOnlineSupport@ferc.gov](mailto: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 five copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

m. The application is not ready for environmental analysis at this time.

n. The proposed project would utilize the existing Reclamation's Rye Patch dam, gates, and penstocks. The hydropower development would include: (1) 16-foot by 16-foot powerhouse; (2) a single Kaplan turbine-generator at the end of one of the existing 48-inch-diameter steel penstocks with an installed capacity of 750 kilowatts; (3) a new 13.4-kilovolt transmission line; and (4) appurtenant facilities. The average annual generation is estimated to be 2.9 gigawatt-hours.

o. 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. A copy is also available for inspection and reproduction at the address in item h above.

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.

p. With this notice, we are initiating consultation with the Nevada State Historic Preservation Officer (SHPO), as required by section 106 of the National Historic Preservation Act and the regulations of the Advisory Council on Historic Preservation, 36 CFR 800.4.

q. *Procedural schedule and final amendments:* The application will be processed according to the following Hydro Licensing Schedule. Revisions to the schedule will be made as appropriate.

Issue Acceptance or Deficiency Letter .....	September 2013.
Request Additional Information .....	September 2013.
Issue Acceptance Letter .....	December 2013.
Issue Scoping Document 1 for Comments .....	January 2014.
Request Additional Information (if necessary) .....	March 2014.
Issue Scoping Document 2 (if necessary) .....	April 2014.
Notice that application is ready for environmental analysis .....	April 2014.
Notice of the availability of the EA .....	October 2014.

Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of the notice of ready for environmental analysis.

Dated: July 2, 2013.

**Kimberly D. Bose,**  
*Secretary.*

[FR Doc. 2013-16496 Filed 7-9-13; 8:45 am]

BILLING CODE 6717-01-P

**DEPARTMENT OF ENERGY**

**Federal Energy Regulatory Commission**

[Project Nos. 14531-000; 2310-193; 14530-000]

**Pacific Gas and Electric Company; Notice of Application Amendment Accepted for Filing and Soliciting Comments and Recommendations**

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

- a. *Type of Application:* Amendment to Application for New Major License.
- b. *Project No.:* P-14531-000.
- c. *Date filed:* May 31, 2013.
- d. *Applicant:* Pacific Gas and Electric Company (PG&E).
- e. *Name of Project:* Lower Drum Project.

The four developments that would be included in the Lower Drum Project are

currently part of the existing Drum-Spaulding Project (Project No. 2310-193), which is currently going through the relicensing process.

PG&E has requested that the Commission issue three separate licenses for the 10 developments that currently comprise the Drum-Spaulding Project: (1) Lower Drum Project (Project No. 14531-000) consisting of the Halsey, Wise, Wise No. 2, and Newcastle Developments; (2) Drum-Spaulding Project consisting of the Spaulding No. 3, Spaulding No. 1 and No. 2, Alta, Drum No. 1 and No. 2, and Dutch Flats Developments; and (3) Deer Creek Project (Project No. 14530-000) consisting of the Deer Creek Development (application amendment filed on June 18, 2012).

The separate docketing of these applications corresponds to the applicant's filings. It does not reflect any decision by the Commission as to whether the Lower Drum developments will be licensed separately.

f. *Location:* The Lower Drum Project would be located on the west slope of the Sierra Nevada in the Bear River Basin in Nevada County, California. The project would occupy 5.3 acres of federal lands managed by the Bureau of Reclamation.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791 (a)–825(r)

h. *Applicant Contact:* Steve Peirano, Relicensing Project Manager, Pacific Gas and Electric Company, P.O. Box 770000, San Francisco, CA 94177–0001, (415) 973–4481, or email [slp2@pge.com](mailto:slp2@pge.com).

i. *FERC Contact:* Alan Mitchnick, (202) 502–6074 or [alan.mitchnick@ferc.gov](mailto:alan.mitchnick@ferc.gov).

j. Deadline for comments and recommendations: August 22, 2013.

Previously filed interventions for P–2310 and interventions filed in response to the Commission’s May 17, 2013, *Notice of Availability of the Draft Environmental Impact Statement for the Drum-Spaulding and Yuba-Bear Hydroelectric Projects*, will apply to P–14530 and P–14531.

Comments and recommendations 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](mailto: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.

The Commission’s Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on 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.

k. This amendment to PG&E’s license application has been accepted for filing and is now ready for environmental analysis.

The Commission is particularly interested in receiving comments on how specific recommendations previously filed under P–2310 and outlined in Attachment 1 of PG&E’s May 31, 2013 license application amendment may apply to the separated projects.

l. The Lower Drum Project would have an installed capacity of 39.7 megawatts and would consist of the following developments: (1) Halsey Development consisting of the Bear River canal diversion dam, Bear River

canal, Halsey forebay, Halsey penstock, and Halsey powerhouse; (2) Wise Development consisting of the Halsey afterbay, Rock Creek reservoir, Wise canal, and Wise forebay, Wise penstock, and Wise powerhouse; (3) Wise No. 2 Development consisting of Wise No. 2 penstock and Wise No. 2 powerhouses; and (4) Newcastle Development consisting of the South canal, Newcastle powerhouse header box, Newcastle penstock, and one transmission line.

m. A copy of the application amendment 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 (P–14531) in the docket number field to access the document. For assistance, contact FERC Online Support. A copy is also available for inspection and reproduction at the address in item h above. 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.

n. *Procedural Schedule:*

The Lower Drum application will be processed in conjunction with the Yuba-Bear (P–2266–102), Drum-Spaulding (P–2310–193), and Deer Creek (P–14530–000) license applications according to the following revised Hydro Licensing Schedule. Revisions to the schedule may be made as appropriate.

Milestone	Target date
Comments and recommendations on Lower Drum application due .....	August 22, 2013.
Comments on draft environmental impact statement (EIS) for the Drum-Spaulding and Yuba-Bear Projects due .....	August 22, 2013.
Modified terms and conditions due .....	October 21, 2013.
Commission issues final EIS .....	January 8, 2014.

Dated: July 3, 2013.

**Kimberly D. Bose,**  
*Secretary.*

[FR Doc. 2013–16563 Filed 7–9–13; 8:45 am]

**BILLING CODE 6717–01–P**

**DEPARTMENT OF ENERGY**

**Federal Energy Regulatory Commission**

[Docket No. EL13–75–000]

**Indicated Load-Serving Entities v. Midcontinent Independent System Operator, Inc. and PJM Interconnection, L.L.C.; Notice of Complaint**

Take notice that on July 2, 2013, the Indicated Load-Serving Entities, (Indicated LSEs or Complainants) within the Midcontinent Independent System Operator, Inc. (MISO) filed a formal complaint against MISO and PJM Interconnection, L.L.C. (PJM or Respondents), pursuant to sections 206,

306 and 309 of the Federal Power Act, 16 USC 824e, 825c, and 825h and 18 CFR 385.206 (2013), requesting that the Commission direct PJM to repay monies to MISO, and MISO in turn, to repay monies to the Indicated LSEs. The funds in question relate to an after-the-fact Market to Market resettlement, the costs of which are borne by the Indicated LSEs, under the MISO–PJM Joint Operating Agreement (JOA), as more fully described in Indicated LSEs’ complaint.

The Indicated LSEs certify that copies of the complaint were served on the contacts for PJM and MISO as listed on the Commission’s list of Corporate Officials.

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 5 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](mailto: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 July 22, 2013.

Dated: July 3, 2013.

**Kimberly D. Bose,**  
*Secretary.*

[FR Doc. 2013-16560 Filed 7-9-13; 8:45 am]

BILLING CODE 6717-01-P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. CP13-478-000]

#### **Columbia Gas Transmission, LLC: Notice of Intent to Prepare an Environmental Assessment for the Proposed Line 1570 Project Request for Comments on Environmental Issues, and Notice of Public Scoping Meeting**

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an

environmental assessment (EA) that will discuss the environmental impacts of the Line 1570 Project involving construction and operation of facilities by Columbia Gas Transmission, LLC (Columbia) in Greene and Washington Counties, Pennsylvania. The Commission will use this EA in its decision-making process to determine whether the project is in the public convenience and necessity.

This notice announces the opening of the scoping process the Commission will use to gather input from the public and interested agencies on the project. Your input will help the Commission staff determine what issues they need to evaluate in the EA. Please note that the scoping period will close on August 1, 2013.

You may submit comments in written form or verbally. Further details on how to submit written comments are in the Public Participation section of this notice. In lieu of or in addition to sending written comments, the Commission invites you to attend the public scoping meeting(s) scheduled as follows:

#### **FERC Public Scoping Meeting**

##### *Line 1570 Project*

July 16, 2013 at 7:00 p.m.

North Franklin Township Volunteer Fire Company, 565 Sylvan Drive, Washington, Pennsylvania 15301.

This notice is being sent to the Commission's current environmental mailing list for this project. State and local government representatives should notify their constituents of this proposed project and encourage them to comment on their areas of concern.

If you are a landowner receiving this notice, a pipeline company representative may contact you about the acquisition of an easement to construct, operate, and maintain the proposed facilities. The company would seek to negotiate a mutually acceptable agreement. However, if the Commission approves the project, that approval conveys with it the right of eminent domain. Therefore, if easement negotiations fail to produce an agreement, the pipeline company could initiate condemnation proceedings where compensation would be determined in accordance with state law.

Columbia provided landowners with a fact sheet prepared by the FERC entitled "An Interstate Natural Gas Facility On My Land? What Do I Need To Know?". This fact sheet addresses a number of typically-asked questions, including the use of eminent domain

and how to participate in the Commission's proceedings. It is also available for viewing on the FERC Web site ([www.ferc.gov](http://www.ferc.gov)).

#### **Summary of the Proposed Project**

Columbia proposes to construct and operate a new replacement pipeline segment along its existing 20-inch-diameter Line 1570 pipeline system along with modifications at its existing Waynesburg Compressor Station in Greene and Washington Counties, Pennsylvania. The Line 1570 Project would provide about 99,000 dekatherms of natural gas per day to Columbia's existing Waynesburg Compressor Station in Greene County, Pennsylvania. According to Columbia, its project is part of its overall program to modernize their existing aging infrastructure. The existing Line 1570 system was constructed in 1947.

The Line 1570 Project would consist of the following facilities:

- approximately 18.52 miles of 24-inch-diameter natural gas pipeline;
- two mainline valves, seven taps, and two pig launchers/receivers<sup>1</sup>; and
- modifications at the existing

Waynesburg Compressor Station including replacing three turbine/compressor units with one new turbine unit, construction of one new auxiliary building, construction of one new compressor building, and installation of above and below ground ancillary piping.

During construction, Columbia would keep the existing Line 1570 in-service in order to still meet its firm transportation obligations to its customers. Once construction of the proposed project is complete, and the new line is placed into service, Columbia would abandon in place the corresponding segment of the existing Line 1570 pipeline.

The general location of the project facilities is shown in appendix 1.<sup>2</sup>

#### **Land Requirements for Construction**

Construction of the proposed facilities would disturb about 223.28 acres of land for the aboveground facilities and the pipeline. Following construction, Columbia would maintain about 59.07 acres for permanent operation of the

<sup>1</sup> A "pig" is a tool that the pipeline company inserts into and pushes through the pipeline for cleaning the pipeline, conducting internal inspections, or other purposes.

<sup>2</sup> The appendices referenced in this notice will not appear in the **Federal Register**. Copies of appendices were sent to all those receiving this notice in the mail and are available at [www.ferc.gov](http://www.ferc.gov) using the link called "eLibrary" or from the Commission's Public Reference Room, 888 First Street NE., Washington, DC 20426, or call (202) 502-8371. For instructions on connecting to eLibrary, refer to the last page of this notice.

project's facilities; the remaining acreage would be restored and revert to former uses.

### The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires us<sup>3</sup> to discover and address concerns the public may have about proposals. This process is referred to as "scoping." The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this notice, the Commission requests public comments on the scope of the issues to address in the EA. We will consider all filed comments during the preparation of the EA.

In the EA we will discuss impacts that could occur as a result of the construction and operation of the proposed project under these general headings:

- Geology and soils;
- land use;
- water resources, fisheries, and wetlands;
- cultural resources;
- vegetation and wildlife;
- air quality and noise;
- endangered and threatened species; and
- public safety.

We will also evaluate reasonable alternatives to the proposed project or portions of the project, and make recommendations on how to lessen or avoid impacts on the various resource areas.

The EA will present our independent analysis of the issues. The EA will be available in the public record through eLibrary. Depending on the comments received during the scoping process, we may also publish and distribute the EA to the public for an allotted comment period. We will consider all comments on the EA before making our recommendations to the Commission. To ensure we have the opportunity to consider and address your comments, please carefully follow the instructions in the Public Participation section beginning on page 5.

With this notice, we are asking agencies with jurisdiction by law and/or special expertise with respect to the environmental issues of this project to formally cooperate with us in the

preparation of the EA.<sup>4</sup> Agencies that would like to request cooperating agency status should follow the instructions for filing comments provided under the Public Participation section of this notice.

### Consultations Under Section 106 of the National Historic Preservation Act

In accordance with the Advisory Council on Historic Preservation's implementing regulations for section 106 of the National Historic Preservation Act, we are using this notice to initiate consultation with applicable State Historic Preservation Office (SHPO), and to solicit their views and those of other government agencies, interested Indian tribes, and the public on the project's potential effects on historic properties.<sup>5</sup> We will define the project-specific Area of Potential Effects (APE) in consultation with the SHPO as the project develops. On natural gas facility projects, the APE at a minimum encompasses all areas subject to ground disturbance (examples include construction right-of-way, contractor/pipe storage yards, compressor stations, and access roads). Our EA for this project will document our findings on the impacts on historic properties and summarize the status of consultations under section 106.

### Public Participation

You can make a difference by providing us with your specific comments or concerns about the project. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please send your comments so that the Commission receives them in Washington, DC on or before August 1, 2013.

For your convenience, there are three methods which you can use to submit your comments to the Commission. In all instances please reference the project docket number (CP13-478-000) with your submission. The Commission encourages electronic filing of comments and has expert staff available

<sup>4</sup>The Council on Environmental Quality regulations addressing cooperating agency responsibilities are at Title 40, Code of Federal Regulations, Part 1501.6.

<sup>5</sup>The Advisory Council on Historic Preservation's regulations are at Title 36, Code of Federal Regulations, Part 800. Those regulations define historic properties as any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places.

to assist you at (202) 502-8258 or [efiling@ferc.gov](mailto:efiling@ferc.gov).

(1) You can file your comments electronically using the *eComment* feature on the Commission's Web site ([www.ferc.gov](http://www.ferc.gov)) under the link to *Documents and Filings*. This is an easy method for interested persons to submit brief, text-only comments on a project;

(2) You can file your comments electronically using the *eFiling* feature on the Commission's Web site ([www.ferc.gov](http://www.ferc.gov)) under the link to *Documents and Filings*. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on "*eRegister*." You must select the type of filing you are making. If you are filing a comment on a particular project, please select "Comment on a Filing"; or

(3) You can file a paper copy of your comments by mailing them to the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Room 1A, Washington, DC 20426.

### Environmental Mailing List

The environmental mailing list federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American Tribes; other interested parties; and local libraries and newspapers. This list also includes all affected landowners (as defined in the Commission's regulations) who are potential right-of-way grantors, whose property may be used temporarily for project purposes, or who own homes within certain distances of aboveground facilities, and anyone who submits comments on the project. We will update the environmental mailing list as the analysis proceeds to ensure that we send the information related to this environmental review to all individuals, organizations, and government entities interested in and/or potentially affected by the proposed project.

If we publish and distribute the EA, copies will be sent to the environmental mailing list for public review and comment. If you would prefer to receive a paper copy of the document instead of the CD version or would like to remove your name from the mailing list, please return the attached Information Request (appendix 2).

### Becoming an Intervenor

In addition to involvement in the EA scoping process, you may want to become an "intervenor" which is an official party to the Commission's

<sup>3</sup>"We," "us," and "our" refer to the environmental staff of the Commission's Office of Energy Projects.

proceeding. Intervenor play a more formal role in the process and are able to file briefs, appear at hearings, and be heard by the courts if they choose to appeal the Commission's final ruling. An intervenor formally participates in the proceeding by filing a request to intervene. Instructions for becoming an intervenor are in the User's Guide under the "e-filing" link on the Commission's Web site.

#### Additional Information

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](http://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., CP13-478). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at [FercOnlineSupport@ferc.gov](mailto:FercOnlineSupport@ferc.gov) or toll free at (866) 208-3676, or for TTY, contact (202) 502-8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission now offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to [www.ferc.gov/esubscribenow.htm](http://www.ferc.gov/esubscribenow.htm).

Finally, public meetings or site visits will be posted on the Commission's calendar located at [www.ferc.gov/EventCalendar/EventsList.aspx](http://www.ferc.gov/EventCalendar/EventsList.aspx) along with other related information.

Dated: July 2, 2013.

**Kimberly D. Bose,**  
Secretary.

[FR Doc. 2013-16499 Filed 7-9-13; 8:45 am]

BILLING CODE 6717-01-P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Project No. 344-023]

#### Southern California Edison Company; Notice of Availability of Final Environmental Assessment

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory

Commission's (Commission or FERC's) regulations, 18 Code of Federal Regulations (CFR) Part 380 (Order No. 486, 52 **Federal Register** 47897), the Office of Energy Projects has prepared a final environmental assessment (EA) for an application filed by Southern California Edison Company (licensee) on September 28, 2010, requesting Commission approval to surrender the project license for the San Gorgonio Hydroelectric Power Project, located on the San Gorgonio and Whitewater rivers in San Bernardino and Riverside counties, California. Following surrender of the license, the licensee would transfer some of the project facilities to San Gorgonio Pass Water Agency, Banning Heights Mutual Water Company, and the City of Banning, California, to allow continuation of water deliveries to the local communities.

The final EA evaluates the environmental effects that would result from approving the licensee's proposed surrender. The final EA finds that approval of the application would not constitute a major federal action significantly affecting the quality of the human environment.

A copy of the final EA 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 at [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov) or toll-free at (866) 208-3676, or for TTY contact (202) 502-8695.

You may 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.

Dated: July 3, 2013.

**Kimberly D. Bose,**  
Secretary.

[FR Doc. 2013-16561 Filed 7-9-13; 8:45 am]

BILLING CODE 6717-01-P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. CP13-482-000]

#### NET Mexico Pipeline Partners, LLC: Notice of Intent To Prepare an Environmental Assessment for the Proposed NET Mexico Pipeline Project and Request for Comments on Environmental Issues

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of the NET Mexico Pipeline Project (Project) involving construction and operation of border crossing facilities at the international border between Mexico and the United States in Starr County, Texas by NET Mexico Pipeline Partners, LLC (NET Mexico). The Commission will use this EA in its decision-making process to determine whether the Project is in the public convenience and necessity.

This notice announces the opening of the scoping process the Commission will use to gather input from the public and interested agencies on the Project. Your input will help the Commission staff determine what issues they need to evaluate in the EA. Please note that the scoping period will close on August 2, 2013.

You may submit comments in written form or verbally. Further details on how to submit written comments are in the Public Participation section of this notice.

This notice is being sent to the Commission's current environmental mailing list for the Project. State and local government representatives should notify their constituents of this planned project and encourage them to comment on their areas of concern.

If you are a landowner receiving this notice, a pipeline company representative may contact you about the acquisition of an easement to construct, operate, and maintain the planned facilities. The company would seek to negotiate a mutually acceptable agreement. However, if the Commission approves the Project, that approval conveys with it the right of eminent domain. Therefore, if easement negotiations fail to produce an agreement, the pipeline company could initiate condemnation proceedings where compensation would be determined in accordance with state law.

NET Mexico provided landowners with a fact sheet prepared by the FERC

entitled “An Interstate Natural Gas Facility On My Land? What Do I Need To Know?” This fact sheet addresses a number of typically-asked questions, including the use of eminent domain and how to participate in the Commission’s proceedings. It is also available for viewing on the FERC Web site ([www.ferc.gov](http://www.ferc.gov)).

### Summary of the Proposed Project

NET Mexico proposes to construct a new border crossing at the international boundary between the United States and Mexico in Starr County, Texas. The Project would consist of approximately 1,400 feet of 48-inch-diameter natural gas pipeline, directionally drilled underneath the Rio Grande River in Starr County, Texas. The new pipeline would have a design capacity of 2.1 billion cubic feet per day (Bcf/d), and a maximum allowable operating pressure of 1,480 pounds per square inch gauge designed to transport natural gas to a new delivery interconnect with NET Mexico’s non-jurisdictional intrastate pipeline and to a new interconnection with the Los Ramones Pipeline at the United States-Mexico border.

The general location of the Project is shown in Appendix.<sup>1</sup>

### Non-Jurisdictional Facilities

In addition to the facilities described above, NET Mexico would perform activities that are not under the jurisdiction of the FERC (non-jurisdictional). NET Mexico would construct and operate approximately 124 miles of 42-inch-diameter non-jurisdictional intrastate pipeline. The non-jurisdictional intrastate pipeline would consist of a header system with 100,000 horsepower of compression in Nueces County, Texas with interconnections with six Texas intrastate pipelines and two interstate pipelines. NET Mexico would connect to four Texas processing plants in Nueces, Jim Wells, Kenedy and Starr counties, Texas.

NET Mexico would also construct about 1, 247 feet of 48-inch-diameter pipeline on the Mexican side of the international border. Los Ramones would own and operate all facilities on the Mexican side of the international border.

These related non-jurisdictional facilities are not subject to the FERC’s

review procedures. In the EA, we will provide available descriptions of the non-jurisdictional facilities and include them under our analysis of cumulative impacts.

### Land Requirements for Construction

Construction of the planned facilities would require ground disturbance of approximately 8.2 acres of land for the pipeline. NET Mexico would require approximately 3.4 acres for one temporary access road and 4.5 acres for temporary workspace. Following construction, NET Mexico would maintain 0.3 acre for operation of the Project and the remaining 7.9 acres would be revegetated to preconstruction use.

### The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires us<sup>2</sup> to discover and address concerns the public may have about proposals. This process is referred to as “scoping.” The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this notice, the Commission requests public comments on the scope of the issues to address in the EA. We will consider all filed comments during the preparation of the EA.

In the EA we will discuss impacts that could occur as a result of the construction and operation of the planned Project under these general headings:

- geology and soils;
- water resources and fisheries;
- vegetation, wildlife, and endangered and threatened species;
- land use and cumulative impacts;
- cultural resources;
- air quality and noise; and
- public safety.

We will also evaluate possible alternatives to the planned project or portions of the project, and make recommendations on how to lessen or avoid impacts on the various resource areas.

The EA will present our independent analysis of the issues. The EA will be available in the public record through eLibrary. Depending on the comments received during the scoping process, we may also publish and distribute the EA to the public for an allotted comment

period. We will consider all comments on the EA before making our recommendations to the Commission. To ensure we have the opportunity to consider and address your comments, please carefully follow the instructions in the Public Participation section beginning on page 5.

With this notice, we are asking agencies with jurisdiction by law and/or special expertise with respect to the environmental issues related to this Project to formally cooperate with us in the preparation of the EA.<sup>3</sup> Agencies that would like to request cooperating agency status should follow the instructions for filing comments provided under the Public Participation section of this notice.

### Consultations Under Section 106 of the National Historic Preservation Act

In accordance with the Advisory Council on Historic Preservation’s implementing regulations for section 106 of the National Historic Preservation Act, we are using this notice to initiate consultation with the Texas Historical Commission (THC), and to solicit their views and those of other government agencies, interested Indian tribes, and the public on the Project’s potential effects on historic properties.<sup>4</sup> We will define the Project-specific Area of Potential Effects in consultation with the State Historic Preservation Officer as the Project develops. On natural gas facility projects, the Area of Potential Effects at a minimum encompasses all areas subject to ground disturbance (examples include construction right-of-way, contractor/pipe storage yards, meter stations, and access roads). Our EA for this Project will document our findings on the impacts on historic properties and summarize the status of consultations under section 106.

### Public Participation

You can make a difference by providing us with your specific comments or concerns about the Project. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that

<sup>3</sup> The Council on Environmental Quality regulations addressing cooperating agency responsibilities are at Title 40, Code of Federal Regulations, Part 1501.6.

<sup>4</sup> The Advisory Council on Historic Preservation’s regulations are at Title 36, Code of Federal Regulations, Part 800. Those regulations define historic properties as any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places.

<sup>1</sup> The appendices referenced in this notice will not appear in the **Federal Register**. Copies of the appendices were sent to all those receiving this notice in the mail and are available at [www.ferc.gov](http://www.ferc.gov) using the link called “eLibrary” or from the Commission’s Public Reference Room, 888 First Street NE., Washington, DC 20426, or call (202) 502-8371. For instructions on connecting to eLibrary, refer to the last page of this notice.

<sup>2</sup> “We,” “us,” and “our” refer to the environmental staff of the Commission’s Office of Energy Projects.

your comments are timely and properly recorded, please send your comments so that the Commission receives them in Washington, DC on or before August 2, 2013.

For your convenience, there are three methods you can use to submit your comments to the Commission. In all instances, please reference the Project docket number (CP13-482-000) with your submission. The Commission encourages electronic filing of comments and has expert staff available to assist you at (202) 502-8258 or [efiling@ferc.gov](mailto:efiling@ferc.gov).

(1) You can file your comments electronically using the *eComment* feature located on the Commission's Web site ([www.ferc.gov](http://www.ferc.gov)) under the link to *Documents and Filings*. This is an easy method for interested persons to submit brief, text-only comments on a project;

(2) You can file your comments electronically using the *eFiling* feature located on the Commission's Web site ([www.ferc.gov](http://www.ferc.gov)) under the link to *Documents and Filings*. With *eFiling*, you can provide comments in a variety of formats by attaching them as a file with your submission. New *eFiling* users must first create an account by clicking on "*eRegister*." You must select the type of filing you are making. If you are filing a comment on a particular project, please select "Comment on a Filing"; or

(3) You can file a paper copy of your comments by mailing them to the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Room 1A, Washington, DC 20426.

#### Environmental Mailing List

The environmental mailing list includes federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American Tribes; other interested parties; and local libraries and newspapers. This list also includes all affected landowners (as defined in the Commission's regulations) who are potential right-of-way grantors, whose property may be used temporarily for project purposes, or who own homes within certain distances of aboveground facilities, and anyone who submits comments on the Project. We will update the environmental mailing list as the analysis proceeds to ensure that we send the information related to this environmental review to all individuals, organizations, and government entities interested in and/or potentially affected by the planned Project.

If we publish and distribute the EA, copies of the completed EA will be sent to the environmental mailing list for public review and comment. If you would prefer to receive a paper copy of the document instead of the CD version or would like to remove your name from the mailing list, please return the attached Information Request (Appendix 3).

#### Becoming an Intervenor

In addition to involvement in the EA scoping process, you may want to become an "intervenor," which is an official party to the Commission's proceeding. Intervenor play a more formal role in the process and are able to file briefs, appear at hearings, and be heard by the courts if they choose to appeal the Commission's final ruling. An intervenor formally participates in the proceeding by filing a request to intervene. Instructions for becoming an intervenor are in the User's Guide under the "e-filing" link on the Commission's Web site at <http://www.ferc.gov/help/how-to/intervene.asp>.

#### Additional Information

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 ([www.ferc.gov](http://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., CP13-482). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at [FercOnlineSupport@ferc.gov](mailto:FercOnlineSupport@ferc.gov) or toll free at (866) 208-3676, or for TTY, contact (202) 502-8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called *eSubscription* which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to [www.ferc.gov/esubscribenow.htm](http://www.ferc.gov/esubscribenow.htm).

Finally, public meetings or site visits will be posted on the Commission's calendar located at [www.ferc.gov/EventCalendar/EventsList.aspx](http://www.ferc.gov/EventCalendar/EventsList.aspx) along with other related information.

Dated: July 2, 2013.

**Kimberly D. Bose,**  
*Secretary.*

[FR Doc. 2013-16500 Filed 7-9-13; 8:45 am]

BILLING CODE 6717-01-P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. PR13-55-000]

#### Moss Bluff Hub, LLC; Notice of Filing

Take notice that on June 28, 2013, Moss Bluff Hub, LLC (Moss Bluff) filed a revised Statement of Operating Conditions (SOC) pursuant to sections 284.123 and 284.224 of the Commission's regulations, (18 CFR 284.123 and 284.224). Moss Bluff states the revised SOC reflects modifications to Section 22 (Electronic Communications), as more fully described in the filing.

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](mailto: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 Wednesday, July 17, 2013.

Dated: July 2, 2013.

**Kimberly D. Bose,**  
*Secretary.*

[FR Doc. 2013-16501 Filed 7-9-13; 8:45 am]

**BILLING CODE 6717-01-P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. PR13-53-000]

#### SourceGas Distribution LLC; Notice of Filing

Take notice that on June 27, 2013, SourceGas Distribution LLC (SourceGas) filed a Rate Election and revised Statement of Operating Conditions (SOC) pursuant to sections 284.123 and 284.224 of the Commission's regulations, (18 CFR 284.123 and 284.224). SourceGas proposes to revise its fuel reimbursement quantity percentage to reflect those contained in SourceGas' transportation rate schedules recently approved and on file with the Public Service Commission of Wyoming. In addition, SourceGas proposes to make certain housekeeping revisions to its SOC as more fully detailed in the filing.

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](mailto: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 Wednesday, July 17, 2013.

Dated: July 2, 2013.

**Kimberly D. Bose,**  
*Secretary.*

[FR Doc. 2013-16498 Filed 7-9-13; 8:45 am]

**BILLING CODE 6717-01-P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket Nos. PR13-54-000 and PR13-54-001]

#### NorthWestern Corporation; Notice of Petition for Rate Approval

Take notice that on June 27, 2013, NorthWestern Corporation (NorthWestern) filed a Rate Election and revised Statement of Operating Conditions (SOC) pursuant to sections 284.123 and 284.224 of the Commission's regulations, (18 CFR 284.123 and 284.224). NorthWestern states the rate election for transportation and storage service is based on rates for comparable service on file with the Montana Public Service Commission, 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](mailto: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 Wednesday, July 17, 2013.

Dated: July 2, 2013.

**Kimberly D. Bose,**  
*Secretary.*

[FR Doc. 2013-16502 Filed 7-9-13; 8:45 am]

**BILLING CODE 6717-01-P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Project No. 14529-000]

#### City of Berlin, Berlin Water Works; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On June 19, 2013, the City of Berlin, Berlin Water Works, filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Ammonoosuc Water Treatment Plant Hydroelectric Project (Project) to be located on a water supply conduit at the City of Berlin's municipal water treatment plant (WTP), in Coos County, New Hampshire. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license or exemption application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would consist of the following: (1) Installation of inline

turbine/generator(s), housed in a concrete vault immediately upstream from an existing pressure reducing valve on an existing 16 to 20-inch diameter cement-transite water main leading to the City's WTP; (2) piping, valves, control panels, and other appurtenant equipment housed in the concrete vault; and (3) a two-way net metering system installed on an existing underground interconnection transmission line leading to Public Service of New Hampshire's utility line #25WL. The estimated annual generation of the project would be 51.0 megawatt-hours. The WTP will use the power produced by the proposed project to run process equipment, lighting, and fulfill other electrical needs in the WTP.

*Applicant Contact:* Mr. Roland Viens, Superintendent, City of Berlin, Berlin Water Works, 55 Willow Street, Berlin, New Hampshire, 03570; phone: (603) 752-1677.

*FERC Contact:* John Ramer; phone: (202) 502-8969 or email: [john.ramer@ferc.gov](mailto:john.ramer@ferc.gov).

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site <http://www.ferc.gov/docs-filing/efiling.asp>. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at <http://www.ferc.gov/docs-filing/ecomment.asp>. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at [FERCOnlineSupport@ferc.gov](mailto: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 five 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-14529) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: July 2, 2013.

**Kimberly D. Bose,**  
*Secretary.*

[FR Doc. 2013-16497 Filed 7-9-13; 8:45 am]

**BILLING CODE 6717-01-P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Project No. 14524-000]

#### FFP Project 133, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On May 20, 2013, FFP Project 133, LLC filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Dashiels Lock and Dam Hydroelectric Project (Dashiels Project or project) to be located at the U.S. Army Corps of Engineers' (Corps) Dashiels Lock and Dam on the Ohio River in Allegheny County, Pennsylvania. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would consist of the following: (1) A new forebay 200 feet wide by 200 feet long; (2) a new powerhouse 200 feet wide by 200 feet long; (3) a new tailrace 200 feet wide by 400 feet long; (4) new concrete retaining walls upstream of the dam spillway and downstream of the new powerhouse; (5) five horizontal bulb turbine-generators each rated at 5 megawatts; (6) a 50-megavolt-ampere, 4.16-kilovolt (kV)/69-kV three-phase step-up transformer; (7) a new substation 40 feet wide by 60 feet long; (8) a new 69-kV transmission line approximately 2 miles long from the new substation to an existing substation; and (9) a new access road 2,000 feet in length. The estimated annual generation of the Dashiels Project would be 120 gigawatt-hours.

*Applicant Contact:* Mr. Daniel Lissner, FFP Project 133, LLC, 239 Causeway Street, Suite 300, Boston, MA 02114; phone: (978) 283-2822.

*FERC Contact:* Woohee Choi; phone: (202) 502-6336.

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](mailto: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 five 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 the Commission's Web site at <http://www.ferc.gov/docs-filing/elibrary.asp>. Enter the docket number (P-14524) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: July 3, 2013.

**Kimberly D. Bose,**  
*Secretary.*

[FR Doc. 2013-16562 Filed 7-9-13; 8:45 am]

**BILLING CODE 6717-01-P**

## FEDERAL COMMUNICATIONS COMMISSION

### Information Collections Being Submitted for Review and Approval to the Office of Management and Budget

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Federal Communications Commission (FCC), as part of its continuing effort to reduce paperwork burdens, invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act (PRA) of 1995. An agency may not conduct or sponsor a collection of information unless it displays a

currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid control number. 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 estimate; 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 control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

**DATES:** Written comments should be submitted on or before August 9, 2013. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contacts below as soon as possible.

**ADDRESSES:** Direct all PRA comments to Nicholas A. Fraser, OMB, via fax 202-395-5167, or via email [Nicholas.A.Fraser@omb.eop.gov](mailto:Nicholas.A.Fraser@omb.eop.gov); and to Cathy Williams, FCC, via email [PRA@fcc.gov](mailto:PRA@fcc.gov) and to [Cathy.Williams@fcc.gov](mailto:Cathy.Williams@fcc.gov). Include in the comments the OMB control number as shown in the **SUPPLEMENTARY INFORMATION** section below.

**FOR FURTHER INFORMATION CONTACT:** For additional information or copies of the information collection, contact Cathy Williams at (202) 418-2918. To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the Web page <http://www.reginfo.gov/public/do/PRAMain>, (2) look for the section of the Web page called "Currently Under Review," (3) click on the downward-pointing arrow in the "Select Agency" box below the "Currently Under Review" heading, (4) select "Federal Communications Commission" from the list of agencies presented in the "Select Agency" box, (5) click the "Submit" button to the right of the "Select Agency" box, (6)

when the list of FCC ICRs currently under review appears, look for the OMB control number of this ICR and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

**SUPPLEMENTARY INFORMATION:**

*OMB Control Number:* 3060-0179.  
*Title:* Section 73.1590, Equipment Performance Measurements.  
*Form Number:* N/A.  
*Type of Review:* Extension of a currently approved collection.  
*Respondents:* Business or other for-profit entities; not-for-profit institutions.  
*Number of Respondents:* 13,049.  
*Estimated Time per Response:* 0.5-18 hours.  
*Frequency of Response:* Recordkeeping requirement.  
*Total Annual Burden:* 12,335 hours.  
*Total Annual Cost:* None  
*Obligation to Respond:* Required to obtain or retain benefits. The statutory authority for this collection is contained in Section 154(i) of the Communications Act of 1934, as amended.

*Nature and Extent of Confidentiality:* There is no need for confidentiality with this collection of information.

*Privacy Impact Assessment:* No impact(s).

*Needs and Uses:* 47 CFR 73.1590(d) requires licensees of AM, FM and TV stations to make audio and video equipment performance measurements for each main transmitter. These measurements and a description of the equipment and procedures used in making the measurements must be kept on file at the transmitter or remote control point for two years. In addition, this information must be made available to the FCC upon request.

*OMB Control Number:* 3060-0500.  
*Title:* Section 76.1713, Resolution of Complaints.

*Form Number:* N/A.  
*Type of Review:* Extension of a currently approved collection.  
*Respondents:* Business or other for-profit entities.  
*Number of Respondents and Responses:* 10,750 respondents and 21,500 responses.  
*Estimated Hours per Response:* 1-17 hours.

*Frequency of Response:* Recordkeeping and third party disclosure requirements; annual reporting requirement.

*Total Annual Burden:* 193,500 hours.  
*Total Annual Cost:* None.

*Obligation to Respond:* Required to obtain or retain benefits. The statutory authority for this collection is contained in Sections 4(i), 303 and 308 of the Communications Act of 1934, as amended.

*Nature and Extent of Confidentiality:* There is no need for confidentiality with this collection of information.

*Privacy Impact Assessment:* No impact(s).

*Needs and Uses:* 47 CFR 76.1713 states cable system operators shall establish a process for resolving complaints from subscribers about the quality of the television signal delivered. Aggregate data based upon these complaints shall be made available for inspection by the Commission and franchising authorities, upon request. These records shall be maintained for at least a one-year period. Prior to being referred to the Commission, complaints from subscribers about the quality of the television signal delivered must be referred to the local franchising authority and the cable system operator.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary, Office of the Secretary, Office of Managing Director.*

[FR Doc. 2013-16511 Filed 7-9-13; 8:45 am]

**BILLING CODE 6712-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Decision To Evaluate a Petition To Designate a Class of Employees From the Kansas City Plant in Kansas City, Missouri, To Be Included in the Special Exposure Cohort

**AGENCY:** National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention, Department of Health and Human Services.

**ACTION:** Notice.

**SUMMARY:** NIOSH gives notice as required by 42 CFR 83.12(e) of a decision to evaluate a petition to designate a class of employees from the Kansas City Plant in Kansas City, Missouri, to be included in the Special Exposure Cohort under the Energy Employees Occupational Illness Compensation Program Act of 2000. The initial proposed definition for the class being evaluated, subject to revision as warranted by the evaluation, is as follows:

*Facility:* Kansas City Plant.

*Location:* Kansas City, Missouri.

*Job Titles and/or Job Duties:* All employees who worked in any area.

*Period of Employment:* January 1, 1949 through December 31, 1993.

**FOR FURTHER INFORMATION CONTACT:** Stuart L. Hinnefeld, Director, Division of Compensation Analysis and Support,

National Institute for Occupational Safety and Health, 4676 Columbia Parkway, MS C-46, Cincinnati, OH 45226, Telephone 877-222-7570. Information requests can also be submitted by email to [DCAS@CDC.GOV](mailto:DCAS@CDC.GOV).

**John Howard,**

Director, National Institute for Occupational Safety and Health.

[FR Doc. 2013-16550 Filed 7-9-13; 8:45 am]

**BILLING CODE 4163-19-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Administration for Children and Families**

**Proposed Information Collection Activity; Comment Request**

*Proposed Projects:*

*Title:* Tribal Child Support

Enforcement Direct Funding Request: 45 CFR 309-Plan.

*OMB No.:* 0970-0218.

*Description:* The final rule within 45 CFR part 309, published in the **Federal Register** on March 30, 2004, contains a regulatory reporting requirement that, in order to receive funding for a Tribal IV-D program a Tribe or Tribal organization must submit a plan describing how the

Tribe or Tribal organization meets or plans to meet the objectives of section 455(f) of the Social Security Act, including establishing paternity, establishing, modifying, and enforcing support orders, and locating noncustodial parents. The plan is required for all Tribes requesting funding; however, once a Tribe has met the requirements to operate a comprehensive program, a new plan is not required annually unless a Tribe makes changes to its title IV-D program. Tribes and Tribal organizations must respond if they wish to operate a fully funded program. This paperwork collection activity is set to expire in September, 2013.

*Respondents:* Tribes and Tribal Organizations.

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
45 CFR 309-Plan .....	60	2	480	57,600.
<i>Estimated Total Annual Burden Hours</i> .....				57,600.

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](mailto: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. 2013-16518 Filed 7-9-13; 8:45 am]

**BILLING CODE 4184-01-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Food and Drug Administration**

[Docket No. FDA-2013-N-0764]

**Agency Information Collection Activities; Proposed Collection; Comment Request; Draft Animal Feed Regulatory Program Standards; Availability**

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

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information and to allow 60 days for public comment in response to the notice. This notice solicits comments on the information collection associated with the draft Animal Feed Regulatory Program Standards (AFRPS). The draft

feed standards are neither final nor intended for implementation at this time.

**DATES:** Submit either electronic or written comments on the collection of information by September 9, 2013.

**ADDRESSES:** Submit electronic comments on the collection of information to <http://www.regulations.gov>. Submit written comments on the collection of information to the Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document. Submit written requests for single copies of the draft feed standards to the U.S. Food and Drug Administration, Office of Regulatory Affairs, Office of Partnerships, 12420 Parklawn Dr., ELEM-3033, Rockville, MD 20857. Send one self-addressed adhesive label to assist the office in processing your request, or fax your request to 301-827-3588. See the **SUPPLEMENTARY INFORMATION** section for an electronic copy of the draft feed standards.

**FOR FURTHER INFORMATION CONTACT:** With regard to the information collection:

Ila S. Mizrahi, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50-400B, Rockville, MD 20850,

301-796-7726,  
Ila.Mizachi@fda.hhs.gov.

With regard to the draft feed program standards:

Beverly Kent, Office of Partnerships,  
Food and Drug Administration, 716-  
714-9503, [Beverly.kent@fda.hhs.gov](mailto:Beverly.kent@fda.hhs.gov);

or  
Jenny Murphy, Center for Veterinary  
Medicine, Food and Drug  
Administration, 240-453-6845,  
[Jenny.murphy@fda.hhs.gov](mailto:Jenny.murphy@fda.hhs.gov).

**SUPPLEMENTARY INFORMATION:** Under the PRA (44 U.S.C. 3501-3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. "Collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

**Draft Animal Feed Regulatory Program Standards—(OMB Control Number 0910-New)**

**I. Background**

In the United States, Federal and State government Agencies ensure the safety of animal feed. FDA is responsible for ensuring that all foods and feeds moving in interstate commerce, except those under the U.S. Department of

Agriculture jurisdiction, are safe, wholesome, and labeled properly. States are responsible for conducting inspections and regulatory activities that help ensure food and feed produced, processed, and distributed within their jurisdictions are safe and in compliance with State laws and regulations. States primarily perform inspections under their own regulatory authority. Some States conduct inspections of feed facilities under contract with FDA. Because jurisdictions may overlap, FDA and States collaborate and share resources to protect animal feed.

The FDA Food Safety Modernization Act passed on January 4, 2011, calls for enhanced partnerships and provides a legal mandate for developing an Integrated Food Safety System (IFSS). FDA is committed to implementing an IFSS, thereby optimizing coordination of food and feed safety efforts with Federal, State, local, tribal, and territorial regulatory and public health agencies. Model standards provide a consistent, underlying foundation that is critical for uniformity across State and Federal Agencies to ensure credibility of food and feed programs within the IFSS.

At this time, model regulatory program standards exist for human food, but do not exist for animal feed. The draft feed standards are a major step in a long-term process of collaboration to achieve uniformity and consistency in feed safety across the nation while acknowledging State responsibilities and authorities.

**II. Significance of Feed Program Standards**

The AFRPS provide a uniform and consistent approach to feed regulation in the United States. Implementation of the feed program standards would be voluntary. States implementing the standards will identify and maintain program improvements that will strengthen the safety and integrity of the U.S. animal feed supply.

*Description:* These draft feed standards are the framework that each State should use to design, manage, and improve its feed program. Eleven standards describing regulatory foundation, training, inspection program, auditing, feed-related illness or death and emergency response, enforcement program, outreach activities, budget and planning, laboratory services, sampling program, and assessment and improvement of

standard implementation are the basis for the draft feed standards.

Each standard has a purpose statement, requirement summary, description of program elements, projected outcomes, and a list of required documentation. When a State program voluntarily agrees to implement the draft feed standards, it must fully implement and maintain the individual program elements and documentation requirements in each standard in order to fully implement the standard. The State program must fully implement the 11 standards to achieve full implementation of the AFRPS. These program standards are not intended to address the performance appraisal processes that a State agency may use to evaluate individual employee performance.

The standards have forms, worksheets, and templates to help the State program assess and meet the program elements in the standard. State programs are not obligated to use the forms, worksheets, and templates provided with the draft feed standards. Other manual or automated forms, worksheets, and templates may be used as long as the pertinent data elements are present. Records and other documents specified in the standards must be maintained in good order by the State program and must be available to verify the implementation of each standard.

In the first year of implementation, the State program uses the self-assessment worksheets to determine if the requirements for each standard are fully met, partially met, or not met. The self assessments are used to develop an improvement plan for fully implementing the requirements of the 11 standards.

Although FDA plans to provide financial support to State programs that implement the feed standards, funding opportunities are contingent upon the availability of funds. Funding opportunities may be only available to State feed regulatory programs that currently have an FDA feed inspection contract. State programs receiving financial support to implement the feed standards will be audited by FDA.

**III. Electronic Access**

Persons with access to the Internet may submit email requests for a single copy of the draft feed standards to [OP-ORA@fda.hhs.gov](mailto:OP-ORA@fda.hhs.gov).

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL RECORDKEEPING BURDEN<sup>1</sup>

Respondent	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
State Feed Regulatory Programs in the United States .....	50	1	50	3,000	150,000

<sup>1</sup> There are no capital costs or operating and maintenance costs associated with this collection of information.

The burden has been calculated to 3,000 hours per respondent. The estimate includes time for reviewing the standards, gathering and maintaining the data and documents for each standard, and completing and reviewing the data and documents that would be spent to fully implement the 11 standards. FDA recognizes that full use and implementation of the feed standards by State feed programs will occur over many years and the number of years to fully implement the feed standards will vary among States. This burden was determined by averaging the burden estimates received from five respondents. The five respondents are representative of the State feed programs in the United States.

Dated: July 3, 2013.

**Leslie Kux,**

*Assistant Commissioner for Policy.*

[FR Doc. 2013–16517 Filed 7–9–13; 8:45 am]

**BILLING CODE 4160–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. FDA–2013–N–0797]

#### Agency Information Collection Activities; Proposed Collection; Comment Request; Human Tissue Intended for Transplantation

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

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the information collection requirements relating to FDA regulations for human tissue intended for transplantation.

**DATES:** Submit either electronic or written comments on the collection of information by September 9, 2013.

**ADDRESSES:** Submit electronic comments on the collection of information to <http://www.regulations.gov>. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

**FOR FURTHER INFORMATION CONTACT:** Ila S. Mizrahi, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–7726, [Ila.Mizrahi@fda.hhs.gov](mailto:Ila.Mizrahi@fda.hhs.gov).

**SUPPLEMENTARY INFORMATION:** Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. “Collection of information” is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA’s functions, including whether the information will have practical utility; (2) the accuracy of FDA’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the

information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

#### Human Tissue Intended for Transplantation—21 CFR Part 1270 (OMB Control Number 0910–0302)—Extension

Under section 361 of the Public Health Services (PHS) Act (42 U.S.C. 264), FDA issued regulations under part 1270 (21 CFR part 1270) to prevent the transmission of human immunodeficiency virus, hepatitis B, and hepatitis C, through the use of human tissue for transplantation. The regulations provide for inspection by FDA of persons and tissue establishments engaged in the recovery, screening, testing, processing, storage, or distribution of human tissue. These facilities are required to meet provisions intended to ensure appropriate screening and testing of human tissue donors and to ensure that records are kept documenting that the appropriate screening and testing have been completed.

Sections 1270.31(a) through (d) require written procedures to be prepared and followed for the following steps: (1) All significant steps in the infectious disease testing process under § 1270.21; (2) all significant steps for obtaining, reviewing, and assessing the relevant medical records of the donor as prescribed in § 1270.21; (3) designating and identifying quarantined tissue; and (4) for prevention of infectious disease contamination or cross-contamination by tissue during processing. Sections 1270.31(a) and (b) also requires recording and justification of any deviation from the written procedures. Section 1270.33(a) requires records to be maintained concurrently with the performance of each significant step required in the performance of infectious disease screening and testing of human tissue donors. Section 1270.33(f) requires records to be retained regarding the determination of the suitability of the donors and of the records required under § 1270.21. Section 1270.33(h) requires all records

to be retained for at least 10 years beyond the date of transplantation if known, distribution, disposition, or expiration of the tissue, whichever is the latest. Section 1270.35(a) through (d) requires specific records to be maintained to document the following: (1) The results and interpretation of all required infectious disease tests; (2) information on the identity and relevant medical records of the donor; (3) the receipt and/or distribution of human tissue, and (4) the destruction or other disposition of human tissue.

Respondents to this collection of information are manufacturers of human tissue intended for transplantation. Based on information from the Center for Biologics Evaluation and Research's (CBER's) database system, FDA estimates that there are approximately 281 tissue establishments, of which 185 are conventional tissue banks and 96 are eye tissue banks. Based on information provided by industry, there are an estimated total of 1,959,270 conventional tissue products and 82,741 eye tissue products recovered per year with an average of 25 percent of the

tissue discarded due to unsuitability for transplant. In addition, there are an estimated 73,075 donors of conventional tissue and 49,026 donors of eye tissue each year.

Accredited members of the American Association of Tissue Banks (AATB) and Eye Bank Association of America (EBAA) adhere to standards of those organizations that are comparable to the recordkeeping requirements in part 1270. Based on information provided by CBER's database system, 90 percent of the conventional tissue banks are members of AATB (185 × 90 percent = 166), and 85 percent of eye tissue banks are members of EBAA (96 × 85 percent = 82). Therefore, recordkeeping by these 248 establishments (166 + 82 = 248) is excluded from the burden estimates as usual and customary business activities (5 CFR 1320.3(b)(2)). The recordkeeping burden, thus, is estimated for the remaining 33 establishments, which is 12 percent of all establishments (281 – 248 = 33, or 33/281 = 12 percent).

FDA assumes that all current tissue establishments have developed written procedures in compliance with part

1270. Therefore, their information collection burden is for the general review and update of written procedures estimated to take an annual average of 24 hours, and for the recording and justifying of any deviations from the written procedures under § 1270.31(a) and (b), estimated to take an annual average of 1 hour. The information collection burden for maintaining records concurrently with the performance of each significant screening and testing step and for retaining records for 10 years under § 1270.33(a), (f), and (h) include documenting the results and interpretation of all required infectious disease tests and results and the identity and relevant medical records of the donor required under § 1270.35(a) and (b). Therefore, the burden under these provisions is calculated together in table 1 of this document. The recordkeeping estimates for the number of total annual records and hours per record are based on information provided by industry and FDA experience.

FDA estimates the burden of this information collection as follows:

TABLE 1—ESTIMATED ANNUAL RECORDKEEPING BURDEN <sup>1</sup>

21 CFR Section	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
1270.31(a), (b), (c), and (d) <sup>2</sup> .....	33	1	33	24	792
1270.31(a) and 1270.31(b) <sup>3</sup> .....	33	2	66	1	66
1270.33(a), (f), and (h), and 1270.35(a) and (b) .....	33	7,869.48	259,693	1	259,693
1270.35(c) .....	33	14,850.96	490,082	1	490,082
1270.35(d) .....	33	1,856.36	61,260	1	61,260
Total .....					811,893

<sup>1</sup> There are no capital costs or operating and maintenance costs associated with this collection of information.

<sup>2</sup> Review and update of standard operating procedures (SOPs).

<sup>3</sup> Documentation of deviations from SOPs.

Dated: July 3, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013-16556 Filed 7-9-13; 8:45 am]

BILLING CODE 4160-01-P

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Health Resources and Services Administration**

**Agency Information Collection Activities; Submission to OMB for Review and Approval; Public Comment Request**

**AGENCY:** Health Resources and Services Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** In compliance with Section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the Health Resources and Services Administration (HRSA) has submitted an Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and approval. Comments submitted during the first public review of this ICR will be provided to OMB. OMB will accept further comments from the public during the review and approval period.

**DATES:** Comments on this ICR should be received within 30 days of this notice.

**ADDRESSES:** Submit your comments, including the Information Collection Request Title, to the desk officer for HRSA, either by email to [OIRA\\_submission@omb.eop.gov](mailto:OIRA_submission@omb.eop.gov) or by fax to 202-395-5806.

**FOR FURTHER INFORMATION CONTACT:** To request a copy of the clearance requests submitted to OMB for review, email the HRSA Information Collection Clearance Officer at [paperwork@hrsa.gov](mailto:paperwork@hrsa.gov) or call (301) 443-1984.

**SUPPLEMENTARY INFORMATION:**

*Information Collection Request Title:* Evaluating the Impact of 1115 Medicaid Waivers on Ryan White HIV/AIDS Program and Its Clients and Providers OMB No. 0915-xxxx-NEW

*Abstract:* Section 1115 of the Social Security Act allows states to develop, test, and implement new approaches to providing Medicaid coverage outside of federal program rules. Leading up to full implementation of the Affordable Care Act, states have begun to use Section 1115 Medicaid demonstration waivers as a “bridge” to 2014. This project will

examine 1115 Medicaid waivers that have expanded eligibility to include specifically people living with HIV/AIDS (PLWH) who are not otherwise eligible for Medicaid services. Since 1990, the Ryan White HIV/AIDS Program (RWHAP) has provided funding for primary care, medications, and support services for PLWH, helping fill the health care and service gap for those who are uninsured or ineligible for Medicaid.

As part of this project, case studies will be conducted in eight states that have implemented 1115 Medicaid waivers to expand Medicaid eligibility for PLWH. The case studies will include site visits and discussions with the state Medicaid programs and with RWHAP grantees and service providers to examine the waivers and their impact on PLWH. In addition, the studies will explore whether and how the 1115

Medicaid waivers have helped states and RWHAP grantees and providers prepare for implementation of the Affordable Care Act, including providing insights into Medicaid expansion.

**Need and Proposed Use of the Information:** Given the important role of the RWHAP and Medicaid in meeting the health care needs of PLWH, there is a need to understand better, how Medicaid expansion and the 1115 Medicaid waivers will affect the RWHAP and how the waivers have prepared states for implementation of the Affordable Care Act.

**Likely Respondents:** Data will be collected through qualitative interviews, guided by discussion tools with questions tailored for four specific groups of individuals from: (1) State Medicaid agencies; (2) RWHAP Part B grantees and service providers; (3)

RWHAP Part A grantees and service providers; and (4) and RWHAP White Part C grantees and clinical providers.

**Burden Statement:** Burden in this context means the time expended by persons to generate, maintain, retain, disclose, or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN—HOURS

Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
Qualitative Interview Data Collection Tool for State Medicaid Agency Groups .....	40	1	40	2	80
Qualitative Interview Data Collection Tool for Ryan White Part A Administrators and Members of Planning Councils .....	64	1	64	2	128
Qualitative Interview Data Collection Tool for Ryan White Part A Administrators and Members of Planning Councils .....	16	1	16	2	32
Qualitative Interview Data Collection Tool for Ryan White Part B and ADAP (AIDS Directors, Part B Coordinators and ADAP Coordinators) .....	80	1	80	2	160
Qualitative Interview Data Collection Tool for Ryan White Clinical Providers (RW Part C Grantees in clinical settings or Similar Clinical Care Providers) .....	80	1	80	2	160
<b>Total .....</b>	<b>280</b>	<b>.....</b>	<b>.....</b>	<b>.....</b>	<b>560</b>

Dated: July 3, 2013.

**Bahar Niakan,**

*Director, Division of Policy and Information Coordination.*

[FR Doc. 2013-16599 Filed 7-9-13; 8:45 am]

**BILLING CODE 4165-15-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Health Resources and Services Administration**

**Agency Information Collection Activities; Proposed Collection; Public Comment Request**

**AGENCY:** Health Resources and Services Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** In compliance with the requirement for opportunity for public comment on proposed data collection projects (Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995), the Health Resources and Services Administration (HRSA) announces plans to submit an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). Prior to submitting the ICR to OMB, HRSA seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR.

**DATES:** Comments on this Information Collection Request must be received within 60 days of this notice.

**ADDRESSES:** Submit your comments to [paperwork@hrsa.gov](mailto:paperwork@hrsa.gov) or mail the HRSA Information Collection Clearance

Officer, Room 10-29, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857.

**FOR FURTHER INFORMATION CONTACT:** To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email [paperwork@hrsa.gov](mailto:paperwork@hrsa.gov) or call the HRSA Information Collection Clearance Officer at (301) 443-1984.

**SUPPLEMENTARY INFORMATION:** When submitting comments or requesting information, please include the information request collection title for reference.

**Information Collection Request Title: Scholarships for Disadvantaged Students Program OMB No. 0915-0149—Renewal**

The purpose of the Scholarships for Disadvantaged Students (SDS) Program is to provide funds to eligible schools to provide scholarships to full-time, financially needy students from disadvantaged backgrounds enrolled in health professions and nursing programs.

To qualify for participation in the SDS program, a school must be carrying out a program for recruiting and retaining students from disadvantaged backgrounds, including students who are members of racial and ethnic

minority groups (section 737(d)(1)(B) of the PHS Act). A school must meet the eligibility criteria to demonstrate that the program has achieved success based on the number and/or percentage of disadvantaged students who graduate from the school. In awarding SDS funds to eligible schools, funding points must be given to schools based on the proportion of graduating students going into primary care, the proportion of underrepresented minority students, and the proportion of graduates working in medically underserved communities (section 737(c) of the PHS Act).

*Burden Statement:* Burden in this context means the time expended by persons to generate, maintain, retain,

disclose or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this Information Collection Request are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

Form	Number of respondents	Number of responses per respondent	Total responses	Hours per response	Total hour burden
Application .....	400	1	400	13	5,200
Total .....	400	1	400	13	5,200

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Dated: July 3, 2013.

**Bahar Niakan,**

*Director, Division of Policy and Information Coordination.*

[FR Doc. 2013-16559 Filed 7-9-13; 8:45 am]

**BILLING CODE 4165-15-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Health Resources and Services Administration**

**Agency Information Collection Activities; Submission to OMB for Review and Approval; Public Comment Request**

**AGENCY:** Health Resources and Services Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** In compliance with Section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the Health Resources and Services Administration (HRSA) has submitted an Information

Collection Request (ICR) to the Office of Management and Budget (OMB) for review and approval. Comments submitted during the first public review of this ICR will be provided to OMB. OMB will accept further comments from the public during the review and approval period.

**DATES:** Comments on this ICR should be received within 30 days of this notice.

**ADDRESSES:** Submit your comments, including the Information Collection Request Title, to the desk officer for HRSA, either by email to *OIRA\_submission@omb.eop.gov* or by fax to 202-395-5806.

**FOR FURTHER INFORMATION CONTACT:** To request a copy of the clearance requests submitted to OMB for review, email the HRSA Information Collection Clearance Officer at *paperwork@hrsa.gov* or call (301) 443-1984.

**SUPPLEMENTARY INFORMATION:**

**Information Collection Request Title: Health Center Program Application Forms**

OMB No. 0915-0285—Revision  
*Abstract:* Health centers (section 330 grant funded and Federally Qualified Health Center Look-Alikes) deliver comprehensive, high quality, cost-effective primary health care to patients regardless of their ability to pay. Health centers have become an essential primary care provider for America's most vulnerable populations. Health centers advance the preventive and primary medical/health care home

model of coordinated, comprehensive, and patient-centered care, coordinating a wide range of medical, dental, behavioral, and social services. More than 1,200 health centers operate nearly 9,000 service delivery sites that provide care in every state, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and the Pacific Basin.

The Health Centers Program is administered by HRSA's Bureau of Primary Health Care (BPHC). HRSA/BPHC uses the following application forms to oversee the Health Center Program. These application forms are used by new and existing health centers to apply for various grant and non-grant opportunities, renew their grant or non-grant designation, and change their scope of project.

*Burden Statement:* Burden in this context means the time expended by persons to generate, maintain, retain, disclose or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden

hours estimated for this ICR are summarized in the table below.

## TOTAL ESTIMATED ANNUALIZED BURDEN—HOURS

Type of application form	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
Form 1A: General Information Worksheet .....	1,700	1	1,700	2.0	3,400
Form 1B: BPHC Funding Request Summary .....	400	1	400	1.0	400
Form 1C: Documents on File .....	650	1	650	1.0	650
Form 2: Staffing Profile .....	1,600	1	1,600	2.0	3,200
Form 3: Income Analysis .....	1,600	1	1,600	3.0	4,800
Form 4: Community Characteristics .....	650	1	650	1.0	650
Form 5A: Services Provided .....	1,600	1	1,600	1.0	1,600
Form 5B: Service Sites .....	1,600	1	1,600	1.0	1,600
Form 5C: Other Activities/Locations .....	1,600	1	1,600	0.5	800
Form 6A: Current Board Member Characteristics .....	1,600	1	1,600	1.0	1,600
Form 6B: Request for Waiver of Governance Requirements .....	150	1	150	1.0	150
Form 8: Health Center Agreements .....	250	1	250	1.0	250
Form 9: Need for Assistance Worksheet .....	650	1	650	5.0	3,250
Form 10: Annual Emergency Preparedness Report .....	1,600	1	1,600	1.0	1,600
Form 12: Organization Contacts .....	1,600	1	1,600	0.5	800
Clinical Performance Measures .....	1,600	1	1,600	2	3,200
Financial Performance Measures .....	1,600	1	1,600	1	1,600
Checklist for Adding a New Service Delivery Site .....	700	1	700	2.0	1,400
Checklist for Deleting Existing Service Delivery Site .....	700	1	700	2.0	1,400
Checklist for Adding New Service .....	700	1	700	2.0	1,400
Checklist for Deleting Existing Service .....	700	1	700	2.0	1,400
Checklist for Replacing Existing Service Delivery Site .....	700	1	700	2.0	1,400
Proposal Cover Page .....	400	1	400	1.0	400
Project Cover Page .....	400	1	400	1.0	400
Equipment List .....	400	1	400	1.0	400
Other Requirements for Sites .....	400	1	400	0.5	200
Checklist for Adding a New Target Population .....	50	1	50	1.0	50
Increased Demand for Services .....	1,200	1	1,200	1	1,200
Funding Sources .....	400	1	400	0.5	200
Project Qualification Criteria .....	400	1	400	1.0	400
Implementation Plan .....	400	1	400	3.0	1,200
Project Work Plan .....	100	1	100	4.0	400
Verification Checklist .....	200	1	200	0.5	100
EHR Readiness Checklist .....	50	1	50	0.5	25
Look Alike Budget .....	100	1	100	1.0	100
O&E Supplemental .....	1,200	1	1,200	1.0	1,200
O&E Progress Report .....	1,200	1	1,200	1.0	1,200
<b>Total</b> .....	<b>30,850</b>	<b>.....</b>	<b>30,850</b>	<b>.....</b>	<b>44,025</b>

Dated: July 3, 2013.

**Bahar Niakan,**

Director, Division of Policy and Information Coordination.

[FR Doc. 2013-16604 Filed 7-9-13; 8:45 am]

BILLING CODE 4165-15-P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

#### Agency Information Collection Activities; Proposed Collection; Public Comment Request

**AGENCY:** Health Resources and Services Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** In compliance with the requirement for opportunity for public comment on proposed data collection projects (Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995), the Health Resources and Services Administration (HRSA) announces plans to submit an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). Prior to submitting the ICR to OMB, HRSA seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR.

**DATES:** Comments on this Information Collection Request must be received within 60 days of this notice.

**ADDRESSES:** Submit your comments to [paperwork@hrsa.gov](mailto:paperwork@hrsa.gov) or mail the HRSA

Information Collection Clearance Officer, Room 10-29, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857.

**FOR FURTHER INFORMATION CONTACT:** To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email [paperwork@hrsa.gov](mailto:paperwork@hrsa.gov) or call the HRSA Information Collection Clearance Officer at (301) 443-1984.

**SUPPLEMENTARY INFORMATION:** When submitting comments or requesting information, please include the information request collection title for reference.

**Information Collection Request Title:  
The Division of Independent Review  
Grant Reviewer Recruitment Form**

OMB No. 0915-0295 Revision

*Abstract:* HRSA's Division of Independent Review (DIR) is responsible for administering the review of eligible grant applications submitted to HRSA. DIR ensures that the objective review process is independent, efficient, effective, economical, and complies with the applicable statutes, regulations, and policies. Applications are reviewed by subject experts knowledgeable in health and public health disciplines for which support is requested. Review findings are advisory to HRSA programs responsible for making award decisions.

This announcement is a request for comments on the proposed information collection system, the Reviewer Recruitment Module (RRM). HRSA utilizes an existing web-based data collection form and database to gather critical reviewer information. The existing on-line *Grant Reviewer Recruitment Form* uses standardized categories of information in drop down menu format for data such as: Degree, specialty, occupation, work setting, and in select instances affiliations with organizations and institutions that serve special populations. Some program regulations require that application objective review panels contain consumers of health services. Other demographic data may be voluntarily provided by a potential reviewer. Defined data elements help HRSA find and select expert grant reviewers for objective review committees. The web-based system also permits reviewers to access and update their information at will and as needed. HRSA maintains a roster of approximately 9,000 qualified individuals who have actively served on HRSA objective review committees. The updated RRM simplifies reviewer

application entry using: A user-friendly Graphical User Interface (GUI) with fewer data drop down menu choices, and a search engine that supports key word queries in the actual resume text. The RRM will be 508 compliant and accessible by the general public via a link on the HRSA internet site, or by keying the RRM URL into their browser. The RRM will be accessible using any of the commonly used internet browsers.

*Need and Proposed Use of the Information:* HRSA currently utilizes a web-based data collection *Grant Reviewer Recruitment Form* to collect information from individuals who wish to volunteer as objective review committee participants for the agency's discretionary and competitive grant or cooperative agreement funding opportunities. The RRM will replace the original with a revised web-based application that is easier and much less burdensome to use for potential reviewers. RRM will also provide HRSA with more robust, efficient, and effective search and communication functionality with which to identify and contact qualified potential grant reviewers. The RRM will have an enhanced search and reporting capability to help DIR ensure that HRSA's reviewer pool has the necessary skills and diversity to meet our ever-evolving need for qualified reviewers. If DIR identifies either an expertise or demographic that is underrepresented in the RRM pool, DIR can recruit specifically to address those needs. Expertise is always the primary determinant in selecting potential reviewers for any specific grant review; no reviewer is required to provide demographic information to join the reviewer pool or be selected as a reviewer for any competition.

*Likely Respondents:* All HRSA reviewers must possess the technical

skill and ability to access the internet on a secure desktop laptop, or touch pad, and either a land line or VOIP capability in order to participate in HRSA objective review committees. The reviewer expertise and experience needed varies with each competitive grant program but is consistent with the HRSA mission to address the availability and delivery of quality health care to all Americans. Generally, our reviewers are current or retired professionals with backgrounds in health care; health service delivery; education and career development in relevant professions; and health center facilities' financing, planning, construction, and management. Certain HRSA programs require by legislation the inclusion of consumers of specific health care services in the objective review committee. In these instances consumers of those specified services are qualified per se to be considered for certain objective reviews.

*Burden Statement:* Burden in this context means the time expended by persons to generate, maintain, retain, disclose or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this Information Collection Request are summarized in the table below.

Total Estimated Annualized burden hours:

Form name	Number of respondents	Responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
New reviewer .....	5,000	1	5,000	.333	1,665
Updating reviewer information .....	250	1	250	.166	42
<b>Total .....</b>	<b>5,250</b>	<b>.....</b>	<b>.....</b>	<b>.....</b>	<b>1,707</b>

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques

or other forms of information technology to minimize the information collection burden.

Dated: July 3, 2013.

**Bahar Niakan,**  
*Director, Division of Policy and Information Coordination.*

[FR Doc. 2013-16602 Filed 7-9-13; 8:45 am]

**BILLING CODE 4165-15-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Health Resources and Services Administration**

**Agency Information Collection Activities: Submission to OMB for Review and Approval; Public Comment Request**

**AGENCY:** Health Resources and Services Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** In compliance with Section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the Health Resources and Services Administration (HRSA) has submitted an Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and approval. Comments submitted during the first public review of this ICR will be provided to OMB. OMB will accept further comments from the public during the review and approval period.

**DATES:** Comments on this ICR should be received within 30 days of this notice.

**ADDRESSES:** Submit your comments, including the Information Collection Request Title, to the desk officer for HRSA, either by email to [OIRA\\_submission@omb.eop.gov](mailto:OIRA_submission@omb.eop.gov) or by fax to 202-395-5806.

**FOR FURTHER INFORMATION CONTACT:** To request a copy of the clearance requests

submitted to OMB for review, email the HRSA Information Collection Clearance Officer at [paperwork@hrsa.gov](mailto:paperwork@hrsa.gov) or call (301) 443-1984.

**SUPPLEMENTARY INFORMATION:**

*Information Collection Request Title:* Data Collection Tool for State Offices of Rural Health Grant Program (SORH).

*OMB No.* 0915-0322—Extension.  
*Abstract:* The mission of the Office of Rural Health Policy (ORHP) is to sustain and improve access to quality care services for rural communities. In its authorizing language (Sec. 711 of the Social Security Act [42 U.S.C. 912]), Congress charged ORHP with administering grants, cooperative agreements, and contracts to provide technical assistance and other activities as necessary to support activities related to improving health care in rural areas.

In accordance with the Public Health Service Act, Section 338J; 42 U.S.C. 254r, the Health Resources and Services Administration proposes to revise the State Offices of Rural Health Grant Program—Funding Opportunity Announcement (FOA) and Forms for the Application. The FOA is used annually by 50 states in preparing applications for grants under the State Offices of Rural Health Grant Program of the Public Health Service Act, and in preparing the required report.

*Need and Proposed Use of the Information:* ORHP seeks to continue gathering information from grantees on their efforts to provide technical

assistance to clients within their state. SORH grantees would be required to submit a Technical Assistance Report that includes: (1) The total number of technical assistance encounters provided directly by the grantee; and, (2) the total number of unduplicated clients that received direct technical assistance from the grantee. Submission of the Technical Assistance Report would be done via submission to the HRSA Electronic Handbook no later than 30 days after the end of each twelve month budget period.

**Likely Respondents:** Fifty State Offices of Rural Health grantees.

**Burden Statement:** Burden in this context means the time expended by persons to generate, maintain, retain, disclose or provide the information requested. This includes the time needed to review instructions, to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information, to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information, and to transmit or otherwise disclose the information. The total annual burden hours estimated for this Information Collection Request are summarized in the table below.

**TOTAL ESTIMATED ANNUALIZED BURDEN—HOURS**

Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
Technical Assistance Report .....	50	1	50	12.5	625
<b>Total</b> .....	50	1	50	12.5	625

Dated: July 2, 2013.

**Bahar Niakan,**

*Director, Division of Policy and Information Coordination.*

[FR Doc. 2013-16494 Filed 7-9-13; 8:45 am]

**BILLING CODE 4165-15-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Health Resources and Services Administration**

**Agency Information Collection Activities; Submission to OMB for Review and Approval; Public Comment Request**

**AGENCY:** Health Resources and Services Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** In compliance with Section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the Health Resources and Services Administration

(HRSA) has submitted an Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and approval. Comments submitted during the first public review of this ICR will be provided to OMB. OMB will accept further comments from the public during the review and approval period.

**DATES:** Comments on this ICR should be received within 30 days of this notice.

**ADDRESSES:** Submit your comments, including the Information Collection Request Title, to the desk officer for HRSA, either by email to [OIRA\\_submission@omb.eop.gov](mailto:OIRA_submission@omb.eop.gov) or by fax to 202-395-5806.

**FOR FURTHER INFORMATION CONTACT:** To request a copy of the clearance requests submitted to OMB for review, email the HRSA Information Collection Clearance Officer at *paperwork@hrsa.gov* or call (301) 443-1984.

**SUPPLEMENTARY INFORMATION:**

*Information Collection Request Title:* Survey of Eligible Users of the National Practitioner Data Bank.

*OMB No.* 0915-xxxx—New.

*Abstract:* The Health Resources and Services Administration (HRSA) plans to conduct a survey of eligible users of the National Practitioner Data Bank (NPDB). The respondent universe is comprised of both users and non-users that are eligible to report to the NPDB, query the NPDB, or both, between January 1, 2010, and December 31, 2012. The survey aims to assess the overall satisfaction of NPDB users with regard to reporting and querying processes. Additionally, the survey will evaluate the effectiveness of the NPDB as an information source and measure user perception of the utility of NPDB information when hiring, licensing, credentialing, and monitoring health care practitioners. The survey will also collect information from eligible non-users of the NPDB to assess what can be done to motivate eligible non-users to register, access, and use the information available in the NPDB.

The survey will be administered to three populations of interest: Eligible users, eligible non-users, and self-queriers. First, eligible users of the NPDB include entities who queried the NPDB, reported to the NPDB, or both, during the defined time frame. Entities that used an authorized agent to fulfill their reporting or querying requirements will be considered eligible users. Second, eligible non-users of the NPDB are those that: (i) Never registered with the NPDB; (ii) registered prior to 2010 and were not currently registered during the survey time frame; and (iii) were registered but not using the NPDB directly or through an authorized agent. Third, those that self-query the NPDB include health care practitioners that submitted a query during the specified time frame to either verify their own status or to provide a copy of the results to a third party. The majority of self-queriers are health care practitioners; however, this population can include medical service providers and medical suppliers.

Eligible NPDB users and eligible non-users who were previously registered or were currently registered but not using the NPDB will be asked to complete a web-based survey. Eligible non-users that were never registered with the NPDB will be contacted via telephone to obtain email information so that they

will be able to complete a web-based survey. The survey will collect additional information from users that receive a matched response. A matched response occurs when an eligible user queries the NPDB and, in turn, receives a response that the subject of the query has a report in the NPDB. This survey is a follow-up to the NPDB users and non-users survey of 2008. Data gathered from the survey will be compared with previous surveys results. This survey will provide HRSA with the information necessary to improve the usability and effectiveness of the NPDB.

*Burden Statement:* Burden in this context means the time expended by persons to generate, maintain, retain, disclose or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

**TOTAL ESTIMATED ANNUALIZED BURDEN—HOURS**

Respondents type	Respondents description	Number of respondents	Number of responses per respondent	Total responses	Hours per response	Total burden (hours)
NPDB Users .....	Reporters Queriers (non-matched responses).	11,832	1	11,832	.333	3,940
	Queriers (matched responses).	1,768	1	1,768	.383	677
Non-Users .....	Ever registered .....	1,200	1	1,200	.133	160
	Never-registered .....	400	1	400	.10	40
NPDB Self Queriers .....	Non-matched responses ....	1,080	1	1,080	.10	108
	Matched .....	120	1	120	.216	26
Total .....	.....	16,400	.....	16,400	.....	4,951

Dated: July 3, 2013.  
**Bahar Niakan,**  
*Director, Division of Policy and Information Coordination.*  
 [FR Doc. 2013-16600 Filed 7-9-13; 8:45 am]  
**BILLING CODE 4165-15-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**  
**Health Resources and Services Administration**  
**Agency Information Collection Activities; Submission to OMB for Review and Approval; Public Comment Request**  
**AGENCY:** Health Resources and Services Administration, HHS.  
**ACTION:** Notice.

**SUMMARY:** In compliance with Section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the Health Resources and Services Administration (HRSA) has submitted an Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and approval. Comments submitted during the first public review of this ICR will be provided to OMB. OMB will accept further comments from the public during the review and approval period.  
**DATES:** Comments on this ICR should be received within 30 days of this notice.

**ADDRESSES:** Submit your comments, including the Information Collection Request Title, to the desk officer for HRSA, either by email to *OIRA\_submission@omb.eop.gov* or by fax to 202-395-5806.

**FOR FURTHER INFORMATION CONTACT:** To request a copy of the clearance requests submitted to OMB for review, email the HRSA Information Collection Clearance Officer at *paperwork@hrsa.gov* or call (301) 443-1984.

**SUPPLEMENTARY INFORMATION:**

*Information Collection Request Title:* Ryan White HIV/AIDS Program, Part A Minority AIDS Initiative Report (the *Part A MAI Report*).

*OMB No.* 0915-0304—Extension.

*Abstract:* HRSA’s HIV/AIDS Bureau administers the Ryan White HIV/AIDS Part A Program authorized under Title XXVI of the Public Health Service (PHS) Act (Ryan White HIV/AIDS Program). Part A provides emergency relief for areas with substantial need for HIV/AIDS care and support services that are most severely affected by the HIV/AIDS epidemic, including eligible metropolitan areas (EMAs) and transitional grant areas (TGAs). As a component of Part A, the purpose of the MAI funding is to improve access to high quality HIV care, services, and outcomes for individuals in disproportionately impacted communities of color who are living with HIV disease, including African Americans, Latinos, Native Americans, Asian Americans, Native Hawaiians, and Pacific Islanders (Section 2693(b)(2)(A) of the PHS Act). Since the purpose of the Part A MAI is to expand access to medical, health, and social support services for disproportionately impacted racial/ethnic minority populations living with HIV/AIDS, it is important that HRSA is able to report on minorities served by the Part A MAI.

The Part A MAI Report is a data collection instrument in which grantees

report on the number and characteristics of clients served and services provided. The Part A MAI Report, first approved for use in March 2006, is designed to collect performance data from Part A grantees. The report has two parts: (1) A web-based data entry application that collects standardized quantitative and qualitative information and (2) an accompanying narrative report. Grantees submit two Part A MAI Reports annually: The Part A MAI Plan (Plan) and the Part A MAI Year-End Annual Report (Annual Report). The Plan and Annual Report components of the report are linked to minimize the reporting burden and include drop-down menu responses; fields for reporting budget, expenditure, and aggregated client level data; and open-ended responses for describing client or service-level outcomes. Together, the Plan and Annual Report components collect information from grantees on MAI-funded services, expenditure patterns, the number and demographics of clients served, and client-level outcomes.

The MAI Plan Narrative that accompanies the Plan web forms provides: (1) An explanation of the data submitted in the Plan web forms; (2) a summary of the Plan, including the Plan and timeline for disbursing funds, monitoring service delivery, and implementing any service-related capacity development or technical assistance activities; and (3) the Plan and timeline for documenting client-level outcome measures. In addition, if the EMA/TGA revised any planned services, allocation amounts, or target communities after their grant application was submitted, the changes must be highlighted and explained. The accompanying MAI Annual Report Narrative describes: (1) Progress towards achieving specific goals and objectives identified in the grantee’s approved MAI Plan for that fiscal year and in linking MAI services/activities to Part A

and other Ryan White HIV/AIDS Program services; (2) achievements in relation to client-level health outcomes; (3) summary of challenges or barriers at the provider or grantee levels, the strategies and/or action steps implemented to address them, and lessons learned; and (4) discussion of MAI technical assistance needs identified by the EMA/TGA.

This information is needed to monitor and assess: (1) Changes in the type and amount of HIV/AIDS health care and related services being provided to each disproportionately impacted community of color; (2) the aggregate number of persons receiving HIV/AIDS services within each racial and ethnic community; and (3) the impact of Part A MAI-funded services in terms of client-level and service-level health outcomes. This information also is used to plan new technical assistance and capacity development activities, and influence the HRSA policy and program management functions. The data provided to HRSA does not contain individual or personally identifiable information. No changes have been made to the Part A MAI Report.

*Burden Statement:* Burden in this context means the time expended by persons to generate, maintain, retain, disclose or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN—HOURS

Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
Part A MAI Report .....	53	2	106	23.9	2,532.87

Dated: July 3, 2013.

**Bahar Niakan,**

*Director, Division of Policy and Information Coordination.*

[FR Doc. 2013-16557 Filed 7-9-13; 8:45 am]

**BILLING CODE 4165-15-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

#### Notice of Availability of Policy Document

**AGENCY:** Health Resources and Services Administration (HRSA), HHS.

**ACTION:** Final Agency Guidance and Opportunity for Public Comments on Draft Section.

**SUMMARY:** HRSA is publishing Agency Guidance (“Policy Information Notice” (PIN) 2013-01) to provide clarification on the budgeting and accounting requirements for federally-funded health centers and Look-Alikes. The PIN, “Health Center Budgeting and Accounting Requirements” is available on the Internet at <http://bphc.hrsa.gov/policiesregulations/policies/pin201301.html>.

*Background:* HHS’ Health Resources and Services Administration (HRSA) provides grants to eligible health centers under section 330 of the Public Health Service Act to support the delivery of preventive and primary care services to medically underserved communities and vulnerable populations. In 2012, grants helped fund more than 1,200 health center grantees that provided services at nearly 9,000 health care delivery sites and served more than 21 million people. There are also over 100 Look-Alikes. Look-Alikes, as described in section 1861(aa)(4) and section 1905(l)(2)(B) of the Social Security Act, do not receive federal funding under section 330 of the PHS Act; however, to receive the Look-Alike designation and benefits, Look-Alikes must meet the statutory, regulatory, and policy requirements for health centers programs under section 330.

Under 45 CFR Part 74, a key requirement of the Health Center Program is for a health center to establish a budget that reflects the cost of operations, expenses, and revenues necessary to accomplish the service delivery plan. All section 330-funded health centers and Look-Alikes must prepare a budget that meets these requirements. The purpose of this PIN is to provide clarification regarding budgeting and accounting requirements

for health centers to ensure transparency and accountability.

In addition to making the final PIN available on HRSA’s Web site, HRSA is also making available a section of this PIN for public comment. HRSA will review and analyze all comments on this section and issue final PIN. When finalized, this section of the PIN will supersede all other previous Health Center Program guidance and policy issued on this program requirement.

**FOR FURTHER INFORMATION CONTACT:** For questions regarding this notice, please contact the Office of Policy and Program Development, Bureau of Primary Health Care, HRSA, at [OPPDBudgetPIN@hrsa.gov](mailto:OPPDBudgetPIN@hrsa.gov).

Dated: July 2, 2013.

**Mary K. Wakefield,**

*Administrator.*

[FR Doc. 2013-16505 Filed 7-9-13; 8:45 am]

**BILLING CODE 4165-15-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

#### National Advisory Council on Migrant Health; Notice of Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), notice is hereby given of the following meeting:

*Name:* National Advisory Council on Migrant Health.

*Dates and Times:* August 19, 2013, 8:30 a.m. to 4:30 p.m. August 20, 2013, 8:00 a.m. to 5:00 p.m.

*Place:* Health Resources and Services Administration, 5600 Fishers Lane, Room 14-72, Rockville, Maryland 20857, Telephone: 301-594-0367, Fax: 301-443-9477.

*Status:* The meeting will be open to the public.

*Purpose:* The purpose of the meeting is to discuss services and issues related to the health of migrant and seasonal agricultural workers and their families and to formulate recommendations for the Secretary of Health and Human Services.

*Agenda:* The agenda includes an overview of the Council’s general business activities. The Council will also hear presentations from experts on agricultural worker issues, including the status of agricultural worker health at the local and national levels.

In addition, the council will be holding a public hearing at which migrant agricultural workers will have the opportunity to testify before the Council regarding matters that affect the health of migrant agricultural workers. The hearing is scheduled for Monday, August 19, from 1:30 p.m. to 4:30 p.m., at the Health Resources and Services Administration.

Agenda items are subject to change as priorities indicate.

**FOR FURTHER INFORMATION**

**CONTACT:** Gladys Cate, Office of National Assistance and Special Populations, Bureau of Primary Health Care, Health Resources and Services Administration, 5600 Fishers Lane, Room 6-41, Maryland 20857; telephone (301) 594-0367.

Dated: July 3, 2013.

**Bahar Niakan,**

*Director, Division of Policy and Information Coordination.*

[FR Doc. 2013-16558 Filed 7-9-13; 8:45 am]

**BILLING CODE 4165-15-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

#### Advisory Commission of Childhood Vaccines; Request for Nominations for Voting Members

**AGENCY:** Health Resources and Services Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Health Resources and Services Administration (HRSA) is requesting nominations to fill three vacancies on the Advisory Commission on Childhood Vaccines (ACCV). The ACCV was established by Title XXI of the Public Health Service Act (the Act), as enacted by Public Law (Pub. L.) 99-660 and as subsequently amended, and advises the Secretary of Health and Human Services (the Secretary) on issues related to implementation of the National Vaccine Injury Compensation Program (VICP).

**DATES:** The agency must receive nominations on or before August 9, 2013.

**ADDRESSES:** All nominations are to be submitted to the Director, Division of Vaccine Injury Compensation, Healthcare Systems Bureau (HSB), HRSA, Parklawn Building, Room 11C-26, 5600 Fishers Lane, Rockville, Maryland 20857.

**FOR FURTHER INFORMATION CONTACT:** Ms. Annie Herzog, Principal Staff Liaison, Division of Vaccine Injury Compensation, HSB, HRSA, at (301) 443-6634 or email: [aherzog@hrsa.gov](mailto:aherzog@hrsa.gov).

**SUPPLEMENTARY INFORMATION:** Under the authorities that established the ACCV, the Federal Advisory Committee Act of October 6, 1972 (Pub. L. 92-463) and section 2119 of the Act, 42 U.S.C. 300aa-19, as added by Public Law 99-660 and amended, HRSA is requesting nominations for three voting members of the ACCV.

The ACCV advises the Secretary on the implementation of the VICP. The activities of the ACCV include: Recommending changes in the Vaccine Injury Table at its own initiative or as the result of the filing of a petition; advising the Secretary in implementing section 2127 regarding the need for childhood vaccination products that result in fewer or no significant adverse reactions; surveying federal, state, and local programs and activities related to gathering information on injuries associated with the administration of childhood vaccines, including the adverse reaction reporting requirements of section 2125(b); advising the Secretary on the methods of obtaining, compiling, publishing, and using credible data related to the frequency and severity of adverse reactions associated with childhood vaccines; consulting on the development or revision of the Vaccine Information Statements; and recommending to the Director of the National Vaccine Program that vaccine safety research be conducted on various vaccine injuries.

The ACCV consists of nine voting members appointed by the Secretary as follows:

(1) Three health professionals, who are not employees of the United States Government, and who have expertise in the health care of children, and the epidemiology, etiology, and prevention of childhood diseases, and the adverse reactions associated with vaccines, of whom at least two shall be pediatricians; (2) three members from the general public, of whom at least two shall be legal representatives (parents or guardians) of children who have suffered a vaccine related injury or death; and (3) three attorneys, of whom at least one shall be an attorney whose specialty includes representation of persons who have suffered a vaccine-related injury or death, and of whom one shall be an attorney whose specialty includes representation of vaccine manufacturers. In addition, the Director of the National Institutes of Health, the Assistant Secretary for Health, the Director of the Centers for Disease Control and Prevention, and the Commissioner of the Food and Drug Administration (or the designees of such officials) serve as nonvoting ex officio members.

Specifically, HRSA is requesting nominations for three voting members of the ACCV representing: (1) A health professional, who has expertise in the health care of children and the epidemiology, etiology, and prevention of childhood diseases; (2) a member of the general public who is the legal representative (parent or guardian) of a

child who has suffered a vaccine related injury or death; and (3) an attorney with no specific affiliation. Nominees will be invited to serve a 3-year term beginning January 1, 2014, and ending December 31, 2016.

Interested persons may nominate one or more qualified persons for membership on the ACCV. Nominations shall state that the nominee is willing to serve as a member of the ACCV and appears to have no conflict of interest that would preclude the ACCV membership. Potential candidates will be asked to provide detailed information concerning consultancies, research grants, or contracts to permit evaluation of possible sources of conflicts of interest. A curriculum vitae or resume should be submitted with the nomination.

The Department of Health and Human Services (HHS) strives to ensure that the membership of the HHS Federal Advisory Committee is fairly balanced in terms of points of view presented and the committee's function. Every effort is made to ensure that the views of women, all ethnic and racial groups, and people with disabilities are represented on HHS Federal Advisory Committees and, therefore, the Department encourages nominations of qualified candidates from these groups. The Department also encourages geographic diversity in the composition of the Committee. Appointment to this Committee shall be made without discrimination on basis of age, race, ethnicity, gender, sexual orientation, disability, and cultural, religious, or socioeconomic status.

Dated: July 3, 2013.

**Bahar Niakan,**

*Director, Division of Policy and Information Coordination.*

[FR Doc. 2013-16603 Filed 7-9-13; 8:45 am]

**BILLING CODE 4165-15-P**

**DEPARTMENT OF HOMELAND SECURITY**

**Federal Emergency Management Agency**

**[Internal Agency Docket No. FEMA-4085-DR; Docket ID FEMA-2013-0001]**

**New York; Amendment No. 10 to Notice of a Disaster Declaration**

**AGENCY:** Federal Emergency Management Agency, DHS.

**ACTION:** Notice.

**SUMMARY:** This notice amends the notice of a major disaster declaration for State of New York (FEMA-4085-DR), dated

October 30, 2012, and related determinations.

**DATES:** *Effective Date:* June 24, 2013.

**FOR FURTHER INFORMATION CONTACT:**

Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646-2833.

**SUPPLEMENTARY INFORMATION:** The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Willie G. Nunn, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Michael F. Byrne as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

**W. Craig Fugate,**

*Administrator, Federal Emergency Management Agency.*

[FR Doc. 2013-16472 Filed 7-9-13; 8:45 am]

**BILLING CODE 9111-23-P**

**DEPARTMENT OF HOMELAND SECURITY**

**Transportation Security Administration**

**[Docket No. TSA-2011-0008]**

**Aviation Security Advisory Committee (ASAC) Meeting**

**AGENCY:** Transportation Security Administration, DHS.

**ACTION:** Committee Management; Notice of Federal Advisory Committee Meeting.

**SUMMARY:** The Transportation Security Administration (TSA) will hold a meeting of the Aviation Security Advisory Committee (ASAC) on Monday, July 22, to discuss the recommendations of its subcommittees. This meeting will be open to the public.

**DATES:** The Committee will meet on Monday, July 22, 2013, from 1:00 p.m.

to 4:00 p.m. This meeting may end early if all business is completed.

Submit comments by July 15, 2013, on the reports to be considered by the committee.

**ADDRESSES:** The meeting will be held at the Transportation Security Administration Systems Integration Facility, located at 3701 West Post Office Road, Ronald Reagan Washington National Airport (DCA), Arlington, VA 22202.

We invite your comments on the reports listed in the "Meeting Agenda" section below. You may submit comments on these reports, identified by the TSA docket number to this action (Docket No. TSA-2011-0008), to the Federal Docket Management System (FDMS), a government-wide, electronic docket management system, using any one of the following methods:

*Electronically:* You may submit comments through the Federal eRulemaking portal at <http://www.regulations.gov>. Follow the online instructions for submitting comments.

*Mail, In Person, or Fax:* Address, hand-deliver, or fax your written comments to the Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12-140, Washington, DC 20590-0001; fax (202) 493-2251. The Department of Transportation (DOT), which maintains and processes TSA's official regulatory dockets, will scan the submission and post it to FDMS.

For other applicable information on the meeting, comment submissions, facilities, or services, see the **SUPPLEMENTARY INFORMATION** section below.

**FOR FURTHER INFORMATION CONTACT:** Dean Walter, ASAC Designated Federal Officer, Transportation Security Administration (TSA-28), 601 12th Street South, Arlington, VA 20598-4028, [Dean.Walter@dhs.gov](mailto:Dean.Walter@dhs.gov), 571-227-2645.

**SUPPLEMENTARY INFORMATION:**  
**Comments Invited**

TSA invites interested persons to participate in this action by submitting written comments, data, or views on the issues to be considered by the committee as listed in the "Meeting Summary" section below. We also invite comments relating to the economic, environmental, energy, or federalism impacts that might result from the subcommittee reports being considered. See **ADDRESSES** above for information on where to submit comments.

With each comment, please identify the docket number at the beginning of your comments. TSA encourages commenters to provide their names and addresses. The most helpful comments reference a specific portion of the document, explain the reason for any recommended change, and include supporting data. You may submit comments and material electronically, in person, by mail, or fax as provided under **ADDRESSES**, but please submit your comments and material by only one means. If you submit comments by mail or delivery, submit them in an unbound format, no larger than 8.5 by 11 inches, suitable for copying and electronic filing.

If you would like TSA to acknowledge receipt of comments submitted by mail, include with your comments a self-addressed, stamped postcard on which the docket number appears. We will stamp the date on the postcard and mail it to you.

TSA will file all comments to our docket address, as well as items sent to the address or email under **FOR FURTHER INFORMATION CONTACT**, in the public docket, except for comments containing confidential information and sensitive security information (SSI).<sup>1</sup> Should you wish your personally identifiable information redacted prior to filing in the docket, please so state. TSA will consider all comments that are in the docket on or before the closing date for comments and will consider comments filed late to the extent practicable. The docket is available for public inspection before and after the comment closing date.

*Handling of Confidential or Proprietary Information and Sensitive Security Information (SSI) Submitted in Public Comments*

Do not submit comments that include trade secrets, confidential commercial or financial information, or SSI to the public regulatory docket. Please submit such comments separately from other comments on the action. Comments containing this type of information should be appropriately marked as containing such information and submitted by mail to the address listed in **FOR FURTHER INFORMATION CONTACT** section.

TSA will not place comments containing SSI in the public docket and

<sup>1</sup> "Sensitive Security Information" or "SSI" is information obtained or developed in the conduct of security activities, the disclosure of which would constitute an unwarranted invasion of privacy, reveal trade secrets or privileged or confidential information, or be detrimental to the security of transportation. The protection of SSI is governed by 49 CFR part 1520.

will handle them in accordance with applicable safeguards and restrictions on access. TSA will hold documents containing SSI, confidential business information, or trade secrets in a separate file to which the public does not have access, and place a note in the public docket explaining that commenters have submitted such documents. TSA may include a redacted version of the comment in the public docket. If an individual requests to examine or copy information that is not in the public docket, TSA will treat it as any other request under the Freedom of Information Act (FOIA) (5 U.S.C. 552) and the Department of Homeland Security's (DHS') FOIA regulation found in 6 CFR part 5.

**Reviewing Comments in the Docket**

Please be aware that anyone is able to search the electronic form of all comments in any of our dockets by the name of the individual who submitted the comment (or signed the comment, if an association, business, labor union, etc., submitted the comment). You may review the applicable Privacy Act Statement published in the **Federal Register** on April 11, 2000 (65 FR 19477), or you may visit <http://DocketInfo.dot.gov>.

You may review TSA's electronic public docket on the Internet at <http://www.regulations.gov>. In addition, DOT's Docket Management Facility provides a physical facility, staff, equipment, and assistance to the public. To obtain assistance or to review comments in TSA's public docket, you may visit this facility between 9:00 a.m. to 5:00 p.m., Monday through Friday, excluding legal holidays, or call (202) 366-9826. This docket operations facility is located in the West Building Ground Floor, Room W12-140 at 1200 New Jersey Avenue SE., Washington, DC 20590.

**Availability of Committee Documents**

You can get an electronic copy using the Internet by—

(1) Searching the electronic Federal Docket Management System (FDMS) Web page at <http://www.regulations.gov>; or

(2) Accessing the Government Printing Office's Web page at <http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=FR> to view the daily published **Federal Register** edition; or accessing the "Search the **Federal Register** by Citation" in the "Related Resources" column on the left, if you need to do a Simple or Advanced search for information, such as a type of document that crosses multiple agencies or dates.

In addition, copies are available by writing or calling the individual in the **FOR FURTHER INFORMATION CONTACT** section. Make sure to identify the docket number of this action.

### Meeting Summary

Notice of this meeting is given under section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (Pub. L. 92-463). ASAC operates under the authority of 6 U. S. C. 451 and provides advice and recommendations for improving aviation security measures to the Administrator of TSA.

This meeting is open to the public, but attendance is limited to 75 people. The meeting will be held at the TSA Systems Integration Facility, which is a secure facility, at 3701 West Post Office Road, DCA Airport, Arlington, VA 22202. Members of the public and all non-ASAC members and staff must register in advance with their full name to attend. Attendees are required to present a government-issued photo ID to verify identity.

In addition, members of the public must make advance arrangements, as stated below, to present oral or written statements specifically addressing issues pertaining to the subcommittee reports listed in the "Meeting Agenda" section below. The public comment period will be held during the meeting from approximately 3:00 p.m. to 3:30 p.m., depending on the meeting progress. Speakers are requested to limit their comments to three minutes. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section no later than July 15, 2013, to register to attend the meeting and/or to present oral or written statements on the reports being considered by the committee at the meeting. Anyone in need of assistance or a reasonable accommodation for the meeting should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

### Meeting Agenda

The agenda for the meeting is as follows (reports are available in the Supporting Documents section at <http://www.regulations.gov/#!docketDetail;D=TSA-2011-0008>):

- General Aviation Subcommittee Recommendations Report;
- Passenger Advocacy Subcommittee Recommendations Report;
- Air Cargo Subcommittee Recommendations Report;
- Status reports on the actions of the—
  - International Subcommittee; and
  - Risk-Based Security Subcommittee.
- Public questions/comments on the Reports listed above; and

- Committee deliberation and vote on Reports.

Dated: July 3, 2013.

**John P. Sammon**,  
Assistant Administrator, Security Policy and Industry Engagement.

[FR Doc. 2013-16582 Filed 7-9-13; 8:45 am]

**BILLING CODE 9110-05-P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Safety and Environmental Enforcement

**[Docket ID BSEE-2012-0018; OMB Control Number 1014-0002; 13XE1700DX EX1SF0000.DAQ000 EEEE500000]**

#### Information Collection Activities; Submitted for Office of Management and Budget (OMB) Review; Comment Request: Oil and Gas Production Measurement, Surface Commingling, and Security

**ACTION:** 30-day Notice.

**SUMMARY:** To comply with the Paperwork Reduction Act of 1995 (PRA), Bureau of Safety and Environmental Enforcement (BSEE) is notifying the public that we have submitted to OMB an information collection request (ICR) to renew approval of the paperwork requirements in the regulations under Subpart L, *Oil and Gas Production Measurement, Surface Commingling, and Security*. This notice also provides the public a second opportunity to comment on the paperwork burden of these regulatory requirements.

**DATE:** You must submit comments by August 9, 2013.

**ADDRESSES:** Submit comments by either fax (202) 395-5806 or email ([OIRA\\_Submission@omb.eop.gov](mailto:OIRA_Submission@omb.eop.gov)) directly to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for the Department of the Interior (1014-0002). Please provide a copy of your comments to BSEE by any of the means below.

- *Electronically:* go to <http://www.regulations.gov>. In the entry titled, Enter Keyword or ID, enter BSEE-2012-0018 then click search. Follow the instructions to submit public comments and view all related materials. We will post all comments.

- Email [Nicole.Mason@bsee.gov](mailto:Nicole.Mason@bsee.gov), fax (703) 787-1546, or mail or hand-carry comments to: Department of the Interior; Bureau of Safety and Environmental Enforcement; Regulations and Standards Branch; Attention: Nicole Mason; 381 Elden Street, HE3313; Herndon, Virginia

20170-4817. Please reference 1014-0002 in your comment and include your name and return address.

**FOR FURTHER INFORMATION CONTACT:** Nicole Mason, Regulations and Standards Branch, (703) 787-1605, to request additional information about this ICR. To see a copy of the entire ICR submitted to OMB, go to <http://www.reginfo.gov> (select Information Collection Review, Currently Under Review).

#### SUPPLEMENTARY INFORMATION:

*Title:* 30 CFR 250, Subpart L, Oil and Gas Production Measurement, Surface Commingling, and Security.

*OMB Control Number:* 1014-0002.

*Abstract:* The Outer Continental Shelf (OCS) Lands Act, as amended (43 U.S.C. 1331 *et seq.* and 43 U.S.C. 1801 *et seq.*), authorizes the Secretary of the Interior (Secretary) to prescribe rules and regulations necessary for the administration of the leasing provisions of the Act related to the mineral resources on the OCS. Such rules and regulations will apply to all operations conducted under a lease. Operations on the OCS must preserve, protect, and develop oil and natural gas resources in a manner that is consistent with the need to make such resources available to meet the Nation's energy needs as rapidly as possible; to balance orderly energy resource development with protection of human, marine, and coastal environments; to ensure the public a fair and equitable return on the resources of the OCS; and to preserve and maintain free enterprise competition.

In addition to the general rulemaking authority of the OCSLA at 43 U.S.C. 1334, section 301(a) of the Federal Oil and Gas Royalty Management Act (FOGRMA), 30 U.S.C. 1751(a), grants authority to the Secretary to prescribe such rules and regulations as are reasonably necessary to carry out FOGRMA's provisions. While the majority of FOGRMA is directed to royalty collection and enforcement, some provisions apply to offshore operations. For example, section 108 of FOGRMA, 30 U.S.C. 1718, grants the Secretary broad authority to inspect lease sites for the purpose of determining whether there is compliance with the mineral leasing laws. Section 109(c)(2) and (d)(1), 30 U.S.C. 1719(c)(2) and (d)(1), impose substantial civil penalties for failure to permit lawful inspections and for knowing or willful preparation or submission of false, inaccurate, or misleading reports, records, or other information. Because the Secretary has delegated some of the authority under

FOGRMA to BSEE, 30 U.S.C. 1751 is included as additional authority for these requirements.

The Independent Offices Appropriations Act (31 U.S.C. 9701), the Omnibus Appropriations Bill (Pub. L. 104-133, 110 Stat. 1321, April 26, 1996), and OMB Circular A-25, authorize Federal agencies to recover the full cost of services that confer special benefits. Under the Department of the Interior's implementing policy, BSEE is required to charge fees for services that provide special benefits or privileges to an identifiable non-Federal recipient above and beyond those which accrue to the public at large. Applications for surface commingling and measurement are subject to cost recovery and BSEE regulations specify service fees for these requests.

Regulations at 30 CFR part 250, Subpart L, implement these statutory requirements. We use the information to ensure that the volumes of hydrocarbons produced are measured

accurately, and royalties are paid on the proper volumes. Specifically, we need the information to:

- Determine if measurement equipment is properly installed, provides accurate measurement of production on which royalty is due, and is operating properly;
- Obtain rates of production measured at royalty meters, which can be examined during field inspections;
- Ascertain if all removals of oil and condensate from the lease are reported;
- Ensure that the sales location is secure and production cannot be removed without the volumes being recorded;
- Review proving reports to verify that data on run tickets are calculated and reported accurately;
- Review gas volume statements and compare them with the Oil and Gas Operations Reports to verify accuracy.

We will protect information from respondents considered proprietary under the Freedom of Information Act

(5 U.S.C. 552) and its implementing regulations (43 CFR part 2), and under regulations at 30 CFR 250.197, *Data and information to be made available to the public or for limited inspection*. No items of a sensitive nature are collected. Responses are mandatory.

*Frequency:* Varies by section, but primarily monthly, or on occasion.

*Description of Respondents:* Potential respondents comprise Federal oil, gas and sulphur lessees and/or operators.

*Estimated Reporting and Recordkeeping Hour Burden:* The estimated annual hour burden for this information collection is a total of 30,856 hours. The following chart details the individual components and estimated hour burdens. In calculating the burdens, we assumed that respondents perform certain requirements in the normal course of their activities. We consider these to be usual and customary and took that into account in estimating the burden.

Citation 30 CFR 250 Subpart L	Reporting or recordkeeping requirement	Hour burden	Average No. of annual responses	Annual burden hours (rounded)
Non-hour cost burdens				
<b>Liquid Hydrocarbon Measurement</b>				
1202(a)(1), (b)(1); 1203(b)(1); 1204(a)(1).	Submit application for liquid hydrocarbon or gas measurement procedures or changes; or for commingling of production or changes.	Simple: 7 .....	49 Simple Applications .....	343
		\$1,271 simple fee x 49 applications = \$62,279		
		Complex: 26	75 Complex Applications ..	1,950
		\$3,760 complex fee x 75 applications = \$282,000		
No fee .....	Submit meter status and replacement notifications ....	2 .....	385 notifications .....	770
1202(a)(4) .....	Copy & send pipeline (retrograde) condensate volumes upon request.	1 .....	4 volumes .....	4
1202(c)(1), (2); 1202(e)(4); 1202(h)(1), (2), (3), (4); 1202(i)(1)(iv), (2)(iii); 1202(j).	Record observed data, correction factors & net standard volume on royalty meter and tank run tickets. Record master meter calibration runs. Record mechanical-displacement prover, master meter, or tank prover proof runs. Record liquid hydrocarbon royalty meter malfunction and repair or adjustment on proving report; record unregistered production on run ticket. List Cpl and Ctl factors on run tickets.	Respondents record these items as part of normal business records & practices to verify accuracy of production measured for sale purposes		0
1202(c)(4) * .....	Copy & send all liquid hydrocarbon run tickets monthly.	20 minutes ..	20,282 tickets .....	6,761
1202(d)(4); 1204(b)(1) .....	Request approval for proving on a schedule other than monthly; request approval for well testing on a schedule other than every 60 days.	2 .....	581 proving requests .....	1,162
		2 .....	44 well test requests .....	88
1202(d)(5) * .....	Copy & submit liquid hydrocarbon royalty meter proving reports monthly & request waiver as needed.	20 minutes ..	8,793 reports .....	2,931

Citation 30 CFR 250 Subpart L	Reporting or recordkeeping requirement	Hour burden	Average No. of annual responses	Annual burden hours (rounded)
1202(f)(2) *	Copy & submit mechanical-displacement prover & tank prover calibration reports.	20 minutes ..	77 reports ..	26
1202(l)(2) *	Copy & submit royalty tank calibration charts before using for royalty measurement.	45 minutes ..	2 charts ..	2
1202(l)(3) *	Copy & submit inventory tank calibration charts upon request; retain charts for as long as tanks are in use.	45 minutes .. 10 minutes ..	5 charts .. 126 charts ..	4 21
Subtotal .....	.....	.....	30,423 responses .....	14,062 hours
			344,279 non-hour cost burdens	

**Gas Measurement**

1203(b)(6), (8), (9) *	Copy & submit gas quality and volume statements monthly or as requested.	20 minutes ..	13,239 Statements .....	4,413
1203(c)(1) .....	Request approval for gas calibration on a schedule other than monthly.	1.2 hrs .....	529 requests .....	635
1203(c)(4) *	Copy & submit gas meter calibration reports upon request; retain for 2 years.	13 minutes .. 7.5 minutes	10 reports .. 19,431 reports ..	2 2,429
1203(e)(1) *	Copy & submit gas processing plant records upon request.	1.2 hrs .....	1 record .....	1
1203(f)(5) .....	Copy & submit measuring records of gas lost or used on lease upon request.	42 minutes ..	3 records .....	2
Subtotal .....	.....	.....	33,213 responses .....	7,482 hours

**Surface Commingling**

1204(a)(2) .....	Provide state production volumetric and/or fractional analysis data upon request.	6 hrs .....	1 report .....	6
1205(a)(2) .....	Post signs at royalty or inventory tank used in royalty determination process.	2 hrs .....	1 sign .....	2
1205(a)(4) .....	Report security problems (telephone) .....	18 minutes ..	2 calls .....	1
Subtotal .....	.....	.....	4 responses .....	9 hours

**Miscellaneous and Recordkeeping**

1200 thru 1205 .....	General departure and alternative compliance requests not specifically covered elsewhere in subpart L.	1.3 hrs .....	5 requests .....	7
1202(e)(6) .....	Retain master meter calibration reports for 2 years ...	23 minutes ..	1,200 .....	460
1202(k)(5) .....	Retain liquid hydrocarbon allocation meter proving reports for 2 years.	10 minutes ..	12,120 .....	2,020
1203(f)(4) .....	Document & retain measurement records on gas lost or used on lease for 2 years at field location and minimum 7 years at location of respondent's choice.	15 minutes ..	3,540 .....	885
1204(b)(3) .....	Retain well test data for 2 years .....	6.7 minutes	45,168 .....	5,044
1205(b)(3), (4) .....	Retain seal number lists for 2 years .....	5 minutes ...	10,644 .....	887
Subtotal .....	.....	.....	72,677 responses .....	9,303 hours
Total Burden .....	.....	.....	136,317 responses .....	30,856 hours
			\$344,279 Non-Hour Cost Burdens	

\* Respondents gather this information as part of their normal business practices. The BSEE only requires copies of readily available documents. There is no burden for testing, meter reading, etc.

*Estimated Reporting and Recordkeeping Non-Hour Cost Burden:* We have identified two non-hour cost burdens, both of which are cost recovery fees. Note that the actual fee amounts are specified in 30 CFR 250.125, which provide a consolidated table of all the fees required under the 30 CFR 250 regulations. The non-hour cost burden total in this collection of information is an estimated \$344,279. The cost burdens are for: (1) filing fees associated with submitting requests for approval of simple applications (applications to temporarily reroute production (for a duration not to exceed 6 months); production tests prior to pipeline construction; departures related to meter proving, well testing, or sampling frequency (\$1,271 per application)) or, (2) submitting a request for approval of a complex application (creation of new facility measurement points (FMPs); association of leases or units with existing FMPs; inclusion of production from additional structures; meter updates which add buyback gas meters or pigging meters; other applications which request deviations from the approved allocation procedures (\$3,760 per application)).

*Public Disclosure Statement:* The PRA (44 U.S.C. 3501, *et seq.*) provides that an agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. Until OMB approves a collection of information, you are not obligated to respond.

*Comments:* Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3501, *et seq.*) requires each agency “. . . to provide notice . . . 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 collection is necessary or useful; (b) evaluate the accuracy of the burden of the proposed collection of information; (c) enhance the quality, usefulness, and clarity of the information to be collected; and (d) minimize the burden on the respondents, including the use of technology.

To comply with the public consultation process, on November 15, 2012, we published a **Federal Register** notice (77 FR 68144) announcing that we would submit this ICR to OMB for approval. The notice provided the required 60-day comment period. In addition, § 250.199 provides the OMB control number for the information collection requirements imposed by the 30 CFR 250 regulations. The regulation also informs the public that they may comment at any time on the collections

of information and provides the address to which they should send comments. We received one comment in response to the **Federal Register** notice, but it was not germane to the paperwork burden of this collection.

*Public Comment Procedures:* 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.

*BSEE Information Collection Clearance Officer:* Cheryl Blundon (703) 787-1607.

Dated: June 20, 2013.

**Robert W. Middleton,**  
Deputy Chief, Office of Offshore Regulatory Programs.

[FR Doc. 2013-16570 Filed 7-9-13; 8:45 am]

**BILLING CODE 4310-VH-P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

[FWS-R1-R-2013-N034; 1265-0000-10137-S3]

#### Malheur National Wildlife Refuge, Harney County, OR; Record of Decision for Final Environmental Impact Statement

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

**ACTION:** Notice of availability.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce the availability of the record of decision (ROD) for the final environmental impact statement (EIS) for the Malheur National Wildlife Refuge (Refuge). We completed a thorough analysis of the environmental, social, and economic considerations and presented it in our Final Comprehensive Conservation Plan (CCP) and EIS, which we released to the public on December 21, 2012.

**DATES:** The Regional Director, Pacific Region, U.S. Fish and Wildlife Service, signed the ROD on January 24, 2013.

**ADDRESSES:** You may view or download a copy of the CCP/ROD at <http://www.fws.gov/pacific/planning>, or request a copy of the CCP/ROD by any of the following methods:

*Email:*  
[FW1PlanningComments@fws.gov](mailto:FW1PlanningComments@fws.gov). Include “Malheur NWR DCCP/EA” in the subject line.

*Fax:* Attn: Tim Bodeen, Project Leader, (541) 493-2405.

*U.S. Mail:* Tim Bodeen, Project Leader, Malheur National Wildlife Refuge, 36391 Sodhouse Lane, Princeton, OR 97221.

*In-Person Viewing or Pickup:* Call the Refuge at (541) 493-2612 to make an appointment to review or pick up a copy of the CCP/ROD during regular business hours.

Printed copies of the CCP/ROD are also available for review at Harney County Library, 80 West “D” St., Burns, OR 97720.

**FOR FURTHER INFORMATION CONTACT:** Tim Bodeen, Project Leader, Malheur National Wildlife Refuge, phone (541) 493-2612.

#### SUPPLEMENTARY INFORMATION:

##### Introduction

With this notice, we complete the CCP process for Malheur Refuge. We started this process through a **Federal Register** notice (74 FR 31046; June 29, 2009). We released the Draft CCP/EIS to the public, and requested comments on it in a notice of availability in the **Federal Register** (76 FR 55937, September 9, 2011). We also announced the availability of the final CCP/EIS in the **Federal Register** (77 FR 75644, December 21, 2012).

The Refuge was established on August 18, 1908, by President Theodore Roosevelt, as the Lake Malheur Bird Reservation; it was originally set aside to prevent plume hunters from decimating colonial nesting bird populations. The Refuge protected unclaimed lands encompassed by Malheur, Mud, and Harney Lakes “as a preserve and breeding ground for native birds.” The Refuge boundary was expanded in 1935 to include the Blitzen Valley, and again in 1941 to include the Double-O Unit. Refuge purposes include “a refuge and breeding ground for migratory birds and other wild life . . .” and “for use as an inviolate sanctuary, or for any other management purpose, for migratory birds.”

The Refuge consists of more than 187,000 acres of open water (marsh, river, and stream), wetlands, springs, riparian areas, irrigated meadows, grain fields, and shrub-steppe uplands. With its abundance of water in an otherwise arid landscape, the Refuge attracts a significant number of birds from the Pacific Flyway during spring migration. The Refuge is included in several flyway and regional bird conservation plans, and is designated an Important Bird Area by the National Audubon Society. However, populations of breeding waterfowl and waterbirds on

Refuge lakes and wetlands have dropped substantially from historic levels. The decline is widely attributed to high populations of nonnative common carp in Harney Lake and adjacent water bodies.

We announce the availability of the Refuge's Final CCP/ROD 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 in the final CCP/EIS. The CCP will guide us in managing and administering the Refuge for the next 15 years. Alternative 2, as we described in the final CCP/ROD, is the foundation for the CCP. Implementing the CCP is subject to the availability of funding and any other compliance regulations.

## Background

### *The CCP Process*

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 (Improvement Act), requires us to develop a CCP for each national wildlife refuge. The purpose for developing a CCP is to provide refuge managers with a 15-year plan for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System (NWRS), consistent with sound principles of fish and wildlife management, conservation, legal mandates, and our policies. In addition to outlining broad management direction for conserving wildlife and habitats, CCPs identify wildlife-dependent recreational opportunities available to the public, including hunting, fishing, wildlife observation and photography, and environmental education and interpretation.

The Refuge engaged a diverse stakeholder base during the CCP process. Collectively, we are committed to ongoing collaboration throughout implementation of the CCP, integrating science and active adaptive management, and improving the health of the aquatic ecosystem. In collaboration with our stakeholders, we will review and update the CCP at least every 15 years in accordance with the Improvement Act.

### **CCP Alternatives and the Selected Alternative**

In collaboration with our stakeholders, partners, and the public, we identified a number of issues in our draft CCP/EIS. We developed Refuge management alternatives to address the

issues, and to achieve the Refuge's purposes, goals, and objectives; and support the NWRS mission. In our draft and final CCP/EIS documents, we fully analyzed three alternatives for the future management of the Refuge, they included Alternative 1 (current management), Alternative 2 (our preferred alternative), and Alternative 3. Alternative 1 satisfies the NEPA required "no action" alternative, and Alternative 2 was identified as the Service's preferred alternative. More details on the alternatives are available in the final CCP/EIS.

### *Selected Alternative*

After considering the comments we received on the draft and final CCP/EIS documents, we selected Alternative 2, our preferred alternative, for implementation on the Refuge. Alternative 2 will result in the greatest amount of improvements to the Refuge's native habitat conditions, will best meet the Service's policies and directives, is compatible with Refuge purposes, and will achieve balance among the Refuge's management needs and programs.

Under Alternative 2, our management focus will be to improve the aquatic health of Refuge lakes and wetlands, primarily by controlling common carp populations. As turbidity caused by carp decreases, and vegetation and invertebrate species become more abundant, the productivity of Malheur Lake and other water bodies within the Refuge (e.g., Boca Lake and Warbler Pond) will improve for a variety of waterbirds, waterfowl, and shorebirds. With the aid of partners, a variety of tools will be used to reduce carp populations, including the application of pesticides, chemo-attractants, and chemo-repellants; and barrier placements, commercial harvest, angling, water manipulation, and other tools. We will also consider the need for continued amendments to and construction of additional in-stream traps, screens, and fish wheels that allow native fish to pass through the system, while impeding carp movement. We will also complete a riverine/wetland rehabilitation plan based on assessments of hydrologic, geomorphic, and biologic features; and pilot projects will be tested as resources become available.

Wetlands and terrestrial habitats will be managed for the life history needs of focal species identified in the CCP, with an emphasis on flexibility. Tools will include but not be limited to late summer haying and autumn/winter rakebunch grazing to meet the foraging needs of early-arriving wildlife species. During the Refuge's growing season,

tools will include prescriptive grazing, mowing, farming, and extended dewatering to reduce invasive plants such as common cattail and reed canarygrass and rehabilitate plant communities to desired conditions.

Viewing overlooks, elevated viewing platforms, and photography blinds will be upgraded and developed. The Refuge will maintain and replant cottonwoods and other trees and shrubs at six historic sites for rare and incidental passerine birds enjoyed by birders. Trails will be added, and several trails will be upgraded or built to Architectural Barriers Act (ABA) standards. Docent-led Refuge tours will occur approximately monthly at various locations, and will include opportunities for guided kayak and canoe tours on Malheur Lake. A stronger emphasis will be placed on modern media for interpretation. The George Benson Memorial Museum will be enhanced, and outdoor interpretive panels added. Additional special events, public presentations, and EE opportunities will be provided. An EE shelter will be built at Refuge Headquarters.

Increased vehicle access will be provided. Visitors will be able to drive year-round to Krumbo Reservoir, along Boat Landing Road near Refuge Headquarters, and along the southern portion of East Canal Road to the Bridge Creek confluence. Outdoor welcome and orientation panels will be provided to guide visitors. Visitor amenities, such as picnic tables, shelters, and vault toilets will be upgraded or developed. An enlarged visitor contact station and gift shop will be built at Refuge Headquarters, and a seasonal contact station will be built at P Ranch.

The upland game hunt will open approximately three weeks earlier than it does currently. The northern part of Malheur Lake and the Buena Vista hunt unit will remain open under existing regulations. We will more than double the existing waterfowl hunt area, by opening the Buena Vista Unit and a portion of Malheur Lake to waterfowl hunting. Waterfowl hunting season in the new areas will extend from the fourth Saturday in October to the end of the State waterfowl hunting season. The existing youth hunt will be promoted, and access at Saddle Butte will improve. In partnership with potential users, the Refuge will support adding facilities in the Buena Vista hunt unit that are accessible to waterfowl hunters with mobility impairments.

To reduce our administration of unmarked lands within the Boundary hunt unit, we will pursue a land exchange with the Bureau of Land

Management (BLM) to transfer unit lands located west of State Highway 205 and other small parcels to BLM. Hunting in the unit will likely continue unaffected by the potential land exchange.

Existing fishing opportunities at Krumbo Reservoir, along the upper Blitzen River, at the southern portion of East Canal, and at Mud and Bridge Creeks will continue, and vehicle access to fishing sites will increase. In addition, the Refuge will develop a pedestrian crossing at Bridge Creek, and open a late-summer bank fishing opportunity on the Blitzen River from Sodhouse Lane to the bridge on Boat Landing Road. Information will be available at fishing areas. At Krumbo Reservoir, triploid rainbow trout stocking will continue, and a redband trout genetic introgression study will be conducted.

We will improve cultural and paleontological resource programs by developing step-down management plans in cooperation with partners. Opportunities for American Indians to collect plants for traditional uses will expand. Monitoring and inventory of archaeological resources and interpretation of historic sites will increase.

We will pursue sustainable practices, energy independence, and carbon negative operations, and emphasize partnerships to maximize adaptive management. Our volunteer program will continue, with emphasis on increasing recruitment, retention, and return rates. Step-down inventory and monitoring plans will be developed, emphasizing focal species and national monitoring efforts. We will create a geodatabase to track data collected during inventory and monitoring efforts.

Dated: March 1, 2013.

**Richard R. Hannan,**  
*Acting Regional Director, Pacific Region,  
Portland, Oregon.*

[FR Doc. 2013-16311 Filed 7-9-13; 8:45 am]

**BILLING CODE 4310-55-P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

[LLNM-921200-L5110-GA0000-  
LVEMG12CG300; NMNM-126813]

#### Notice of Competitive Coal Lease Sale NMNM-126813, NM

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the Department of the Interior, Bureau

of Land Management (BLM), New Mexico State Office, in conjunction with the Farmington District Office, will offer certain coal resources in the tract described below in McKinley County, New Mexico, for competitive sale by sealed bid in accordance with the provisions of the Mineral Leasing Act of 1920, as amended.

**DATES:** The lease sale will be held at 10 a.m., Wednesday, August 14, 2013. Sealed bids must be submitted on or before 9 a.m. on August 14, 2013.

**ADDRESSES:** The lease sale will be held in the BLM Conference Room, New Mexico State Office, 301 Dinosaur Trail, Santa Fe, NM 87508. Sealed bids must be submitted to: Cashier, New Mexico State Office, 301 Dinosaur Trail, Santa Fe, NM 87508.

**FOR FURTHER INFORMATION CONTACT:** Ida T. Viarreal at 505-954-2163, or [iviareea@blm.gov](mailto:iviareea@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:** This coal lease sale is being held in response to a lease by application filed by Peabody Natural Resources Company (Peabody). The Federal coal reserves to be offered consist of all reserves recoverable by surface mining methods in the following described lands in McKinley County, New Mexico:

#### New Mexico Principal Meridian

T. 17 N., R. 9 W.,  
Sec. 34, ALL;

Containing 640 acres more or less.

The tract contains an estimated 9.2 million tons of recoverable coal reserves, occurring in five seams in the Cleary Coal Member of the basal Menefee Formation. The coal is ranked as subbituminous B or C coal. The estimated weighted average quality of all seams (as received) is as follows: 9,856 BTU/lb., 16.5 percent moisture, 13.2 percent ash, 36.9 percent fixed carbon, 33.4 percent volatile matter, and 1.32 percent sulfur. The tract will be leased to the qualified bidder submitting the highest cash offer provided that the high bid meets or exceeds the fair market value of the tracts as determined by the authorized officer after the sale. No bid that is less than \$100 per acre, or fraction thereof, will be considered. This \$100 per acre is a regulatory minimum, and is not intended to reflect fair market value of the tracts.

The sealed bids should be sent by certified mail, return receipt requested, or should be hand delivered to the Cashier, New Mexico State Office, at the address given above and clearly marked "Sealed Bid for NMNM 126813 Coal Sale—Not to be opened before 10 a.m., August 14, 2013." The cashier will issue a receipt for each hand delivered sealed bid. Bids received after 9 a.m., August 14, 2013, will not be considered. If identical high sealed bids are received, the tying bidders will be requested to submit follow-up sealed bids until a high bid is received. All tie-breaking sealed bids must be within 15 minutes following the sale official's announcement at the sale that identical sealed bids have been received. Prior to lease issuance, the high bidder, if other than the applicant, must pay the BLM the cost recovery fees in the amount of \$107,642.17 in addition to all processing costs the BLM incurs after the date of this sale notice (43 CFR 3473.2). If the high bidder is other than Peabody, the BLM would then refund to Peabody the amount of \$107,642.17 previously paid by Peabody.

There is one qualified surface owner. A consent document from the qualified surface owner has been filed and verified by the BLM and meets the criteria as required by the regulations. A copy of the consent is attached to the detailed statement of sale. The lands within the lease tract which consent is filed are shown below:

T. 17 N., R. 9 W., New Mexico Principal Meridian  
Sec. 34, ALL;

The lease issued as a result of this offering will require payment of an annual rental of \$3 per acre or fraction thereof, and a royalty payable to the United States of 12½ percent of the value of the coal removed from a surface mine and 8 percent of the value of the coal removed from an underground mine. The value of the coal will be determined in accordance with 30 CFR part 1206, subpart F, 1206.250 *et seq.* Bidding instructions for the offered tracts are included in the Detailed Statement of Coal Lease Sale. Copies of the Statement, which includes detailed geological information on the coals and surface owners, are available upon request in person or by mail from the New Mexico State Office at 301 Dinosaur Trail, Santa Fe, NM 87508 or the Farmington District Office at 6251 College Blvd. Ste. A., Farmington, NM 87402. The case files are available for inspection during normal business

hours only at the New Mexico State Office.

**Jesse J. Juen,**  
State Director.

[FR Doc. 2013-16397 Filed 7-9-13; 8:45 am]

**BILLING CODE 4310-FB-P**

## DEPARTMENT OF THE INTERIOR

### Office of Surface Mining Reclamation and Enforcement

[S1D1S SS08011000 SX066A000 67F  
134S180110; S2D2S SS08011000 SX066A00  
33F 13xs501520]

#### Notice of Proposed Information Collection; Request for Comments

**AGENCY:** Office of Surface Mining Reclamation and Enforcement, Interior.  
**ACTION:** Notice and request for comments.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995, the Office of Surface Mining Reclamation and Enforcement (OSM) is announcing its intention to request approval for the collections of information for 30 CFR Part 764—State Processes for Designating Areas Unsuited for Surface Coal Mining Operations.

**DATES:** Comments on the proposed information collection must be received by September 9, 2013, to be assured of consideration.

**ADDRESSES:** Comments may be mailed to John A. Trelease, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave. NW., Room 203—SIB, Washington, DC 20240. Comments may also be submitted electronically to [jtrelease@osmre.gov](mailto:jtrelease@osmre.gov) or by Fax to (202) 219-3276.

**FOR FURTHER INFORMATION CONTACT:** To receive a copy of the information collection request contact John Trelease, at (202) 208-2783 or by email to [jtrelease@osmre.gov](mailto:jtrelease@osmre.gov).

**SUPPLEMENTARY INFORMATION:** The Office of Management and Budget (OMB) regulations at 5 CFR part 1320, which implementing provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104-13), require that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities [see 5 CFR 1320.8(d)]. This notice identifies an information collection that OSM will be submitting to OMB for extension. This collection is contained in 30 CFR part 764.

OSM has revised burden estimates, where appropriate, to reflect current reporting levels or adjustments based on

reestimates of burden or respondents. OSM will request a 3-year term of approval for these information collection activities.

Comments are invited on: (1) The need for the collection of information for the performance of the functions of the agency; (2) the accuracy of the agency's burden estimates; (3) ways to enhance the quality, utility and clarity of the information collections; and (4) ways to minimize the information collection burden on respondents, such as use of automated means of collection of the information. A summary of the public comments will accompany OSM's submission of the information collection request to OMB.

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.

This notice provides the public with 60 days in which to comment on the following information collection activity:

**Title:** 30 CFR Part 764—State Processes for Designating Areas Unsuited for Surface Coal Mining Operations.

**OMB Control Number:** 1029-0030.

**Summary:** This Part implements the requirement of section 522 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), P.L. 95-87, which provides authority for citizens to petition States to designate lands unsuitable for surface coal mining operations, or to terminate such designation. The regulatory authority uses the information to identify, locate, compare and evaluate the area requested to be designated as unsuitable, or terminate the designation, for surface coal mining operations.

**Bureau Form Number:** None.

**Frequency of Collection:** Once.

**Description of Respondents:** Individuals, groups or businesses that petition the States, and the State regulatory authorities that must process the petitions.

**Total Annual Respondents:** 4.

**Total Annual Burden Hours:** 1,000 hours for individuals or groups, and 4,000 for State regulatory authorities.

**Total Annual Non-wage Costs:** \$400.

Dated: June 28, 2013.

**Andrew F. DeVito,**  
Chief, Division of Regulatory Support.  
[FR Doc. 2013-16584 Filed 7-9-13; 8:45 am]

**BILLING CODE 4310-05-P**

## INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701-TA-499-500 and 731-TA-1215-1223 (Preliminary)]

### Certain Oil Country Tubular Goods From India, Korea, Philippines, Saudi Arabia, Taiwan, Thailand, Turkey, Ukraine, and Vietnam; Institution of Antidumping and Countervailing Duty Investigations and Scheduling of Preliminary Phase Investigations

**AGENCY:** United States International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** The Commission hereby gives notice of the institution of investigations and commencement of preliminary phase antidumping and countervailing duty investigations Nos. 701-TA-499-500 and 731-TA-1215-1223 (Preliminary) under sections 703(a) and 733(a) of the Tariff Act of 1930 (19 U.S.C. 1671b(a) and 1673b(a)) (the Act) to determine whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from India, Korea, Philippines, Saudi Arabia, Taiwan, Thailand, Turkey, Ukraine, and Vietnam of certain oil country tubular goods, provided for in subheading 7304.29, 7305.20, and 7306.29 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value and alleged to be subsidized by the Governments of India and Turkey. Unless the Department of Commerce extends the time for initiation pursuant to sections 702(c)(1)(B) or 732(c)(1)(B) of the Act (19 U.S.C. 1671a(c)(1)(B) or 1673a(c)(1)(B)), the Commission must reach a preliminary determination in antidumping and countervailing duty investigations in 45 days, or in this case by August 16, 2013. The Commission's views are due within five business days thereafter, or by August 23, 2013.

For further information concerning the conduct of these investigations and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A and B (19 CFR part 207).

**DATES:** *Effective Date:* July 2, 2013.

**FOR FURTHER INFORMATION CONTACT:** Michael Szustakowski (202–205–3169), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter 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 (<http://www.usitc.gov>). The public record for these investigations may be viewed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>.

**SUPPLEMENTARY INFORMATION:**

*Background.*—These investigations are being instituted in response to a petition filed on July 2, 2013, by United States Steel Corporation, Pittsburgh, PA; Maverick Tube Corporation, Houston, TX; Boomerang Tube LLC, Chesterfield, MO; Energex, a division of JMC Steel Group, Chicago, IL; Northwest Pipe Company, Vancouver, WA; Tejas Tubular Products Inc., Houston, TX; TMK IPSCO, Houston, TX; Vallourec Star, L.P., Houston, TX; and Welded Tube USA, Inc.; Lackawanna, NY.

*Participation in the investigations and public service list.*—Persons (other than petitioners) wishing to participate in the investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in sections 201.11 and 207.10 of the Commission's rules, not later than seven days after publication of this notice in the **Federal Register**. Industrial users and (if the merchandise under investigation is sold at the retail level) representative consumer organizations have the right to appear as parties in Commission antidumping and countervailing duty investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to these investigations upon the expiration of the period for filing entries of appearance.

*Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.*—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in these investigations available to authorized applicants representing interested parties (as defined in 19 U.S.C. 1677(9)) who are parties to the investigations under the

APO issued in the investigations, provided that the application is made not later than seven days after the publication of this notice in the **Federal Register**. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

*Conference.*—The Commission's Director of Investigations has scheduled a conference in connection with these investigations for 9:30 a.m. on July 23, 2013, at the U.S. International Trade Commission Building, 500 E Street SW., Washington, DC. Requests to appear at the conference should be filed with [William.Bishop@usitc.gov](mailto:William.Bishop@usitc.gov) and [Sharon.Bellamy@usitc.gov](mailto:Sharon.Bellamy@usitc.gov) (do not file on EDIS) on or before July 19, 2013. Parties in support of the imposition of countervailing and antidumping duties in these investigations and parties in opposition to the imposition of such duties will each be collectively allocated one hour within which to make an oral presentation at the conference. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the conference.

*Written submissions.*—As provided in sections 201.8 and 207.15 of the Commission's rules, any person may submit to the Commission on or before July 26, 2013, a written brief containing information and arguments pertinent to the subject matter of the investigations. Parties may file written testimony in connection with their presentation at the conference no later than three days before the conference. If briefs or written testimony contain BPI, they must conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. Please be aware that the Commission's rules with respect to electronic filing have been amended. The amendments took effect on November 7, 2011. See 76 FR 61937 (Oct. 6, 2011) and the newly revised Commission's Handbook on E-Filing, available on the Commission's Web site at <http://edis.usitc.gov>.

In accordance with sections 201.16(c) and 207.3 of the rules, each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

**Authority:** These investigations are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.12 of the Commission's rules.

By order of the Commission.

Issued: July 3, 2013.

**Lisa R. Barton,**

*Acting Secretary to the Commission.*

[FR Doc. 2013–16515 Filed 7–9–13; 8:45 am]

**BILLING CODE 7020–02–P**

**DEPARTMENT OF JUSTICE**

**Notice of Lodging of Proposed Consent Decree Under the Clean Water Act**

On July 3rd, 2013, the Department of Justice lodged a proposed consent decree with the United States District Court for the Western District of Arkansas in the lawsuit entitled *United States v. Great Lakes Chemical Company*, Civil Action No. 1:13-cv-01058–SOH.

The United States filed this lawsuit under the Clean Water Act. The United States' complaint seeks injunctive relief and civil penalties for discharges of pollutants, in violation of Section 301 of the Clean Water Act, at property located southwest of the city of El Dorado, Arkansas. The consent decree requires the defendant to perform injunctive relief and pay a \$300,000 penalty.

The publication of the notice opens a period for public comment on the consent decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States v. Great Lakes Chemical Company*, D.J. Ref. No. 90–5–1–1–10527. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

<i>To submit comments:</i>	<i>Send them to:</i>
By email .....	<a href="mailto:pubcomment-ees.enrd@usdoj.gov">pubcomment-ees.enrd@usdoj.gov</a>
By mail .....	Assistant Attorney General U.S. DOJ—ENRD P.O. Box 7611 Washington, DC 20044–7611.

During the public comment period, the consent decree may be examined and downloaded at this Justice Department Web site: [http://www.usdoj.gov/enrd/Consent\\_Decrees.html](http://www.usdoj.gov/enrd/Consent_Decrees.html). We will provide a paper copy of the consent decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for \$12.50 (25 cents per page

reproduction cost) payable to the United States Treasury.

**Maureen Katz,**

*Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.*

[FR Doc. 2013-16564 Filed 7-9-13; 8:45 am]

**BILLING CODE 4410-15-P**

**DEPARTMENT OF JUSTICE**

**Notice of Lodging of Proposed Consent Decree Under the Oil Pollution Act**

On July 2, 2013, the Department of Justice lodged a proposed Consent Decree with the United States District Court for the District of Alaska in the lawsuit entitled *United States and State of Alaska v. Adak Petroleum, LLC*, Civil Action No. 3:13-cv-00121-HRH.

In this action, the United States of America, acting at the request of National Oceanic and Atmospheric Administration and the Department of the Interior, and the State of Alaska, acting at the request of the Alaska Department of Fish and Game, the Alaska Department of Natural Resources, the Alaska Department of Law, and the Alaska Department of Environmental Conservation, sought recovery of natural resource damages from Adak Petroleum, LLC (Adak) pursuant to Section 1002 of the Oil Pollution Act, 33 U.S.C. 2702 and similar Alaska state provisions. The natural resource damages occurred when Adak accidentally released up to 142,000 gallons of diesel fuel when it was trying to refill a tank in its tank farm located in the Aleutian Islands. Under the Consent Decree, Adak will perform a restoration project to compensate for the injured natural resources, as well as pay all past and future assessment and oversight costs to state and federal agencies. In return, Adak will receive a covenant-not-to-sue for natural resource damages arising from the release.

The publication of this notice opens a period for public comment on the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States and State of Alaska v. Adak Petroleum, LLC*, D.J. Ref. No. 90-5-1-1-10506. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

<i>To submit comments:</i>	<i>Send them to:</i>
By email .....	<i>pubcomment-ees.enrd@usdoj.gov.</i>
By mail .....	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044-7611.

During the public comment period, the Consent Decree may be examined and downloaded at this Justice Department Web site: [http://www.usdoj.gov/enrd/Consent\\_Decrees.html](http://www.usdoj.gov/enrd/Consent_Decrees.html). We will provide a paper copy of the Consent Decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044-7611.

Please enclose a check or money order for \$13 (25 cents per page reproduction cost) payable to the United States Treasury.

**Robert E. Maher, Jr.,**

*Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.*

[FR Doc. 2013-16514 Filed 7-9-13; 8:45 am]

**BILLING CODE 4410-15-P**

**DEPARTMENT OF LABOR**

**Office of the Secretary**

**Agency Information Collection Activities; Submission for OMB Review; Comment Request; Plan Asset Transactions Determined by Independent Qualified Professional Asset Managers Under Prohibited Transaction Class Exemption 84-14**

**ACTION:** Notice.

**SUMMARY:** The Department of Labor (DOL) is submitting the Employee Benefits Security Administration (EBSA) sponsored information collection request (ICR) titled, "Plan Asset Transactions Determined by Independent Qualified Professional Asset Managers under Prohibited Transaction Class Exemption 84-14," to the Office of Management and Budget (OMB) for review and approval for continued use, without change, in accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 et seq.).

**DATES:** Submit comments on or before August 9, 2013.

**ADDRESSES:** A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of

response, and estimated total burden may be obtained free of charge from the RegInfo.gov Web site at [http://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=1210-0128](http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=1210-0128) (this link will only become active on the day following publication of this notice) or by contacting Michel Smyth by telephone at 202-693-4129 (this is not a toll-free number) or sending an email to [DOL\\_PRA\\_PUBLIC@dol.gov](mailto:DOL_PRA_PUBLIC@dol.gov).

Submit comments about this request to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL—EBSA, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503, Fax: 202-395-6881 (this is not a toll-free number), email: [OIRA\\_submission@omb.eop.gov](mailto:OIRA_submission@omb.eop.gov).

**FOR FURTHER INFORMATION CONTACT:** Michel Smyth by telephone at 202-693-4129 (this is not a toll-free number) or by email at [DOL\\_PRA\\_PUBLIC@dol.gov](mailto:DOL_PRA_PUBLIC@dol.gov).

**Authority:** 44 U.S.C. 3507(a)(1)(D).

**SUPPLEMENTARY INFORMATION:** Prohibited Transaction Class Exemption 84-14 permits a party that is related to an employee benefit plan to engage in transactions involving plan assets if, among other conditions, the assets are managed by a qualified professional asset manager (QPAM) that is independent of the parties in interest. Additional relief is also available under specific circumstances that are fully addressed within the exemption. The information collection requirements that are conditions of the exemption include written policies and procedures by a QPAM and audit requirements. An independent auditor uses the written policies and procedures to determine whether the QPAM is in compliance with the written policies and procedures and whether the exemption conditions have been met. These information collections are designed to safeguard participants and beneficiaries in plans that are involved in transactions covered by the exemption. The exemption does not require any reporting or filing with the Federal government. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on November 27, 2012 (77 FR 70828).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of

law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. See 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1210-0128.

OMB authorization for an ICR cannot be for more than three (3) years without renewal, and the current approval for this collection is scheduled to expire on July 31, 2013. The DOL seeks to extend PRA authorization for this information collection for three (3) more years, without any change to existing requirements. It should also be noted that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review.

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within 30 days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1210-0128. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
  - Enhance the quality, utility, and clarity of the information to be collected; and
  - Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

*Agency:* DOL—EBSA.

*Title of Collection:* Plan Asset Transactions Determined by Independent Qualified Professional Asset Managers under Prohibited Transaction Class Exemption 84-14.

*OMB Control Number:* 1210-0128.

*Affected Public:* Private Sector—businesses or other for-profits.

*Total Estimated Number of Respondents:* 5,100.

*Total Estimated Number of Responses:* 5,151.

*Total Estimated Annual Burden Hours:* 122,438.

*Total Estimated Annual Other Costs Burden:* \$51,000,000.

Dated: July 2, 2013.

**Michel Smyth,**

*Departmental Clearance Officer.*

[FR Doc. 2013-16552 Filed 7-9-13; 8:45 am]

**BILLING CODE 4510-29-P**

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## OFFICE OF MANAGEMENT AND BUDGET

### Audits of States, Local Governments, and Non-Profit Organizations; OMB Circular A-133 Compliance Supplement

**AGENCY:** Executive Office of the President, Office of Management and Budget.

**ACTION:** Notice of availability of the 2013 OMB Circular A-133 Compliance Supplement.

**SUMMARY:** This notice announces the availability of the 2013 OMB Circular A-133 Compliance Supplement (Supplement). The notice also offers interested parties an opportunity to comment on the 2013 Supplement. The 2013 Supplement adds four new programs, which are added to existing clusters. It deletes 23 programs and has also been updated for program changes and technical corrections.

The four added programs are:

- Catalog of Federal Assistance (CFDA) 10.565—Commodity Supplemental Food Program (as part of the newly titled Food Distribution Cluster)
- CFDA 14.889—Choice Neighborhoods Implementation Grants (as part of a new HOPE VI Cluster)
- CFDA 20.525—State of Good Repair Grants (as part of the Federal Transit Cluster)
- CFDA 20.526—Bus and Bus Facilities Formula Grants (as part of the Federal Transit Cluster)

The deleted programs are:

- CFDA 14.258—Tax Credit Assistance Program (TCAP) (Recovery Act Funded)
- CFDA 14.907—Lead-Based Paint Hazard Control in Privately-Owned Housing (Recovery Act Funded)
- CFDA 14.908—Healthy Homes Demonstration Grants (Recovery Act Funded)
- CFDA 14.909—Lead Hazard Reduction Demonstration Grant Program (Recovery Act Funded)
- CFDA 14.910—Healthy Homes Technical Studies Grants (Recovery Act Funded)
- CFDA 84.032—Federal Family Education Loans (FFEL)

- CFDA 84.375—Academic Competitiveness Grants (ACG)
- CFDA 84.376—National Science and Mathematics Access to Retain Talent (SMART) Grants (SMART Grants)
- CFDA 84.390—Rehabilitation Services—Vocational Rehabilitation Grants to States, Recovery Act
- CFDA 84.391—Special Education—Grants to States (IDEA, Part B), Recovery Act
- CFDA 84.392—Special Education—Preschool Grants (IDEA Preschool), Recovery Act
- CFDA 84.393—Special Education—Grants for Infants and Families, Recovery Act
- CFDA 84.394—State Fiscal Stabilization Fund (SFSF)—Education State Grants, Recovery Act (Education Stabilization Fund)
- CFDA 84.397—State Fiscal Stabilization Fund (SFSF)—Government Services, Recovery Act
- CFDA 93.407—ARRA—Scholarships for Disadvantaged Students (ARRA-SDS)
- CFDA 93.705—Aging Home-Delivered Nutrition Services for States (Recovery Act)
- CFDA 93.707—Aging Congregate Nutrition Services for States (Recovery Act)
- CFDA 93.708—ARRA—Head Start
- CFDA 93.709—ARRA—Early Head Start
- CFDA 93.710—ARRA—Community Services Block Grant
- CFDA 93.712—ARRA—Immunization
- CFDA 97.114—Emergency Food and Shelter National Board Program (ARRA)
- CFDA 97.109—Disaster Housing Assistance Grant

A list of changes to the 2013 Supplement can be found at Appendix V. Appendix VII provides an audit alert concerning deletion of American Recovery and Reinvestment Act programs from clusters (which accounts for many of the deleted programs). Due to its length, the 2013 Supplement is not included in this Notice. See **ADDRESSES** for information about how to obtain a copy either on line or through the Government Printing Office.

**DATES:** The 2013 Supplement supersedes the 2012 Supplement and will apply to audits of fiscal years beginning after June 30, 2012. All comments on the 2013 Supplement must be in writing and received by October 31, 2013. Late comments will be considered to the extent practicable. We received no comments on the 2012 Supplement.

Due to potential delays in OMB's receipt and processing of mail sent through the U.S. Postal Service, we encourage respondents to submit

comments electronically to ensure timely receipt. We cannot guarantee that comments mailed will be received before the comment closing date.

Electronic mail comments may be submitted to:

*Hai M. Tran@omb.eop.gov*. Please include "A-133 Compliance Supplement—2013" in the subject line and the full body of your comments in the text of the electronic message and as an attachment. Please include your name, title, organization, postal address, telephone number, and email address in the text of the message. Comments may also be submitted via facsimile at 202-395-3952.

Comments may be mailed to Gilbert Tran, Office of Federal Financial Management, Office of Management and Budget, 725 17th Street NW., Room 6025, New Executive Office Building, Washington, DC 20503.

Comments may also be sent through <http://www.regulations.gov>—a Federal E-Government Web site that allows the public to find, review, and submit comments on documents that agencies have published in the **Federal Register** and that are open for comment. Simply type "A-133 Compliance Supplement—2013" (in quotes) in the Comment or Submission search box, click Go, and follow the instructions for submitting comments. Comments received through the Web site by the date specified above will be included as part of the official record.

**ADDRESSES:** The 2013 Supplement is available online on the OMB home page at [http://www.whitehouse.gov/omb/financial\\_fin\\_single\\_audit](http://www.whitehouse.gov/omb/financial_fin_single_audit).

**FOR FURTHER INFORMATION CONTACT:** Recipients and auditors should contact their cognizant or oversight agency for audit, or Federal awarding agency, as appropriate under the circumstances. The Federal agency contacts are listed in Appendix III of the Supplement. Subrecipients should contact their pass-through entity. Federal agencies should contact Gilbert Tran, Office of Management and Budget, Office of Federal Financial Management, at (202) 395-3052.

**Norman S. Dong,**  
*Deputy Controller.*

[FR Doc. 2013-16509 Filed 7-9-13; 8:45 am]

**BILLING CODE P**

## NUCLEAR REGULATORY COMMISSION

[NRC-2013-0151; Docket Nos. 50-269, 50-270, and 50-287; License Nos. DPR-38, DPR-47, and DPR-55; EA-13-010]

### In the Matter of Duke Energy Carolinas, LLC; (Oconee Nuclear Station, Units 1, 2, and 3); Confirmatory Order Modifying License

#### I

Duke Energy Carolinas, LLC (Duke, Licensee) is the holder of Renewed Facility Operating License Nos. DPR-38, DPR-47, and DPR-55 issued by the U.S. Nuclear Regulatory Commission (NRC) pursuant to Part 50 of Title 10 of the *Code of Federal Regulations* (10 CFR), "Domestic Licensing of Production and Utilization Facilities," on May 23, 2000. The licenses authorize the operation of Oconee Nuclear Station, Units 1, 2, and 3, in accordance with the conditions specified therein. The facilities are located on the Licensee's site in Seneca, South Carolina.

#### II

On December 29, 2010, the NRC issued Amendment Nos. 371, 373, and 372 to Renewed Facility Operating Licenses DPR-38, DPR-47, and DPR-55, for the Oconee Nuclear Station, Units 1, 2, and 3, respectively (Agencywide Documents Access and Management System (ADAMS) Accession No. ML103630612). The amendments consisted of changes to the licenses and Technical Specifications to allow Duke to maintain a fire protection program (FPP) in accordance with 10 CFR 50.48(c). Condition 3.D, Fire Protection, Transition License Condition 1 required Duke to complete the items described in Section 2.9, Table 2.9-1, "Implementation Items," in the NRC safety evaluation dated December 29, 2010, prior to January 1, 2013. Table 2.9-1, item 23 required completion of the analysis of non-power operation (NPO) fire impacts for fire zones following installation of the NFPA-805 committed modifications, including the Protected Service Water (PSW) modifications. Item 32 required incorporation of the PSW modification into the FPP site documents after the modification was implemented. Item 43 required confirmation that the risk decrease from the as-built PSW system continued to bound the cumulative variances from deterministic requirements (VFDR) transition risk once the PSW modifications were installed. Transition License Condition 2 required Duke to complete the items described in Section 2.8, Table 2.8.1-1,

"Committed Plant Modifications," in the NRC safety evaluation dated December 29, 2010. Item 1 of the table included implementation of the PSW modifications.

On July 31, 2012, Duke submitted a license amendment request (LAR) to extend full PSW implementation by two years, but stated that the modification to supply power from the PSW building to the Standby Shutdown Facility (SSF) would be operational by December 31, 2012. In a clarification call on November 27, 2012, Duke discussed draft milestones which would extend some items, such as installation of the PSW pumps, by at least 3 years. As of January 1, 2013, the full PSW modification had not been completed, which put Duke in violation of License Condition 3.D in all three licenses. After considering the information provided by Duke, the NRC staff denied the July 31, 2012, LAR application in a letter dated January 15, 2013. Subsequently, the NRC staff described an apparent violation to Duke by letter dated January 31, 2013. This apparent violation has been considered for escalated enforcement action in accordance with the NRC Enforcement Policy.

#### III

On March 5, 2013, a predecisional enforcement conference (ADAMS Accession No. ML13072A426) was conducted at the NRC headquarters in Rockville, Maryland with members of Duke's staff to discuss the apparent violation, its significance, root causes, and Duke's corrective actions. By letter dated March 11, 2013 (ADAMS Accession No. ML13079A321), and in a public meeting on April 10, 2013, Duke provided additional information on milestones Duke plans to meet while completing the installation of the PSW system. The NRC staff is issuing this Confirmatory Order to provide regulatory oversight of these milestones. The requirements needed to effectuate the foregoing are set forth in Section IV below. On June 18, 2013, the Licensee consented to the license modifications set forth in Section IV below. The Licensee further agreed that it has waived its right to a hearing on this order, and, therefore, that the terms of the Order are effective upon issuance.

I find that the license modifications set forth in Section IV are acceptable and necessary because they reduce the risk of significant damage from fire, as determined by the NRC staff in the safety evaluation for Amendment Nos. 371, 373, and 372 to Renewed Facility Operating Licenses DPR-38, DPR-47, and DPR-55. Thus, I find this order acceptable in order to ensure public

health and safety. Based on the above and the Licensee's consent, this Order is effective upon issuance.

#### IV

In view of the foregoing and pursuant to Sections 104b, 161b, 161i, 161o, 182, and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202 and 10 CFR part 50, *it is hereby ordered, that license nos. DPR-38, DPR-47, and DPR-55 are modified as follows:*

1. The licensee shall provide the capability to supply off-site electrical power to the PSW building switchgear and from there to the SSF switchgear, with sufficient capacity to operate all credited SSF equipment in the event of a failure of the SSF diesel generator during a fire for which the SSF is credited. This modification along with approved plant procedures and the completion of operator training necessary to accomplish this lineup, and a combination of testing and engineering evaluation in accordance with station procedures which verifies this capability, will be completed and operational no later than October 1, 2013.

2. The licensee shall provide the capability to supply electrical power from each of the Keowee Hydro Units to the PSW building switchgear and from there to the SSF switchgear, with sufficient capacity to operate all credited SSF equipment in the event of a failure of the SSF diesel generator during a fire for which the SSF is credited. This modification along with approved plant procedures and the completion of operator training necessary to accomplish this lineup, and a combination of testing and engineering evaluation in accordance with station procedures which verifies this capability, will be completed and operational no later than July 18, 2014.

3. The licensee shall provide the capability to supply electrical power from the PSW building switchgear to simultaneously operate at least one high-pressure injection pump per unit, and to operate the associated valves needed to align water flow to the reactor coolant pump seals and to inject water into the reactor coolant system, as an alternate path within the emergency operating procedures. This modification along with approved plant procedures and the completion of operator training necessary to accomplish this lineup, and a combination of testing and engineering evaluation in accordance with station procedures which verifies this capability, will be completed and operational no later than October 1, 2014.

4. The licensee shall have the PSW pump installed and provide the capability to supply electrical power from the PSW building switchgear to operate the PSW pump and the associated valves to provide water to the steam generators of all three units sufficient to remove decay heat following simultaneous reactor trips from 100% power, with the steam generators at the pressure corresponding to the lowest safety valve setting, as an alternate path within the emergency operating procedures. This modification along with approved plant procedures and the completion of operator training necessary to accomplish this lineup, and a combination of testing and engineering evaluation in accordance with station procedures which verifies this capability, will be completed and operational no later than June 3, 2015.

5. The licensee shall provide the capability to supply electrical power from the PSW building switchgear to those DC battery chargers that provide power to controls and instrumentation that allow PSW system control and monitoring from the control room for an extended period of time as prescribed by the NFPA-805 fire protection program approved for Oconee. The licensee shall provide electrical power from the PSW building switchgear to at least 400 kW (nameplate rating) of pressurizer heaters for each unit, and provide the ability to select the PSW power source to those pressurizer heaters from the Auxiliary Building. The licensee shall provide Auxiliary Building and Reactor Building environments suitable for equipment operation. The licensee shall provide the ability to control and monitor the high-pressure injection equipment, the PSW equipment, and the steam generator heat removal equipment from the associated Oconee control rooms. This modification along with approved plant procedures and the completion of operator training necessary to accomplish this lineup, and a combination of testing and engineering evaluation in accordance with station procedures which verifies this capability, will be completed and operational no later than February 4, 2016.

6. The licensee shall complete all items in Table 2.9-1, "Implementation Items," of the December 29, 2010, Oconee NFPA 805 safety evaluation report no later than November 15, 2016.

7. The licensee shall provide a letter to the NRC under oath or affirmation, and in accordance with 10 CFR 50.4, "Written communications," reporting the completion of each milestone described above, and a final letter

reporting when it has achieved full compliance with the requirements contained in this Order, within 30 days of completion.

The Director, Office of Enforcement, may, in writing, relax or rescind any of the above conditions upon demonstration by the Licensee of good cause.

#### V

In accordance with 10 CFR 2.202, "Orders," the licensee, under oath or affirmation, may submit a written answer to this Order within 30 days from the date of this Order. Additionally, any person adversely affected by this Order, other than Duke, may submit a written answer and/or request a hearing on this Order within 30 days from the date of this Order. Where good cause is shown, consideration will be given to extending the time to answer or request a hearing. A request for extension of time must be directed to the U.S. Nuclear Regulatory Commission, ATTN: Document Control Desk, Washington, DC 20555-0001, with a copy to Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, and include a statement of good cause for the extension.

If a hearing is requested by a person whose interest is adversely affected, the Commission will issue an Order designating the time and place of any hearings. If a hearing is held, the issue to be considered at such hearing shall be whether this Order should be sustained.

All documents filed in the NRC adjudicatory proceedings, including a request for a 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's 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 optical 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 associated with 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 certificate). Based on 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 NRC'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 a 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 document 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 may obtain access to the document via the E-Filing system.

A person filing electronically using the NRC'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 to [MSHD.Resource@nrc.gov](mailto:MSHD.Resource@nrc.gov), or by a toll-free call to 1-866-672-7640. The NRC Meta System Help Desk is available between 9 a.m. and 7 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have good cause for not submitting documents electronically must file an extension 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. Copies shall be sent to the Director, Office of Enforcement and the Assistant General Counsel for Materials Litigation and Enforcement at the same address, the Regional Administrator, NRC Region II, Marquis One Tower, Suite 1200, 245 Peachtree Center Avenue NE., Atlanta, GA 30303, and to the Licensee, Duke Energy Carolinas, LLC, Oconee Nuclear Station, 7800 Rochester Highway, Seneca, SC 29672. 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 use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket, which is available to the public at <http://ehd1.nrc.gov/ehd>, unless excluded pursuant to an Order of the Commission, an Atomic Safety and Licensing Board, 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 submissions.

If a person other than the licensee requests a hearing, that person shall set forth with particularity the manner in which his or her interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.309(d) and (f).

In the absence of any request for hearing or written approval of an extension of time in which to request a hearing, the provisions specified in Section IV above shall be final 30 days from the date of this Order without further order or proceedings. If an extension of time for requesting a hearing has been approved, the provisions specified in Section IV shall be final when the extension expires if a hearing request has not been received.

Dated this 1st day of July 2013.

For the Nuclear Regulatory Commission.

**Roy Zimmerman,**

*Director, Office of Enforcement.*

[FR Doc. 2013-16588 Filed 7-9-13; 8:45 am]

**BILLING CODE 7590-01-P**

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## **NUCLEAR REGULATORY COMMISSION**

### **Advisory Committee on the Medical Uses of Isotopes: Meeting Notice**

**AGENCY:** U.S. Nuclear Regulatory Commission.

**ACTION:** Notice of meeting.

**SUMMARY:** NRC will convene a meeting of the Advisory Committee on the Medical Uses of Isotopes (ACMUI) on

September 9–10, 2013. A sample of agenda items to be discussed during the public session includes: (1) An update on the 10 CFR Part 35 Rulemaking; (2) a discussion on the development of 10 CFR 35.1000 Guidance; (3) a discussion on the ACMUI reporting structure; (4) permanent implant brachytherapy guidance; (5) the Medical Events Subcommittee Report. The agenda is subject to change. The current agenda and any updates will be available at <http://www.nrc.gov/reading-rm/doc-collections/acmui/meetings/2013.html> or by emailing Ms. Sophie Holiday at the **CONTACT INFORMATION** below.

*Purpose:* Discuss issues related to 10 CFR part 35 Medical Use of Byproduct Material.

*Date and Time for Closed Sessions:* September 09, 2013, from 8:30 a.m. to 10:30 a.m. and September 10, 2013 from 8:30 a.m. to 10:30 a.m. The first session will be closed for ACMUI training. The second session will be closed so that ACMUI members can prepare for a Commission Briefing in October 2013.

*Date and Time for Open Sessions:* September 09, 2013, from 10:30 a.m. to 5:00 p.m. and September 10, 2013, from 10:30 a.m. to 5:00 p.m.

*Address for Public Meeting:* U.S. Nuclear Regulatory Commission, Two White Flint North Building, Room T2–B3, 11545 Rockville Pike, Rockville, MD 20852.

*Public participation:* Any member of the public who wishes to participate in the meeting in person or via phone should contact Ms. Holiday using the information below. The meeting will also be webcast live: [video.nrc.gov](http://video.nrc.gov).

**CONTACT INFORMATION:** Sophie J. Holiday, email: [sophie.holiday@nrc.gov](mailto:sophie.holiday@nrc.gov), telephone: (301) 415–7865.

### Conduct of the Meeting

Bruce R. Thomadsen, Ph.D., will chair the meeting. Dr. Thomadsen will conduct the meeting in a manner that will facilitate the orderly conduct of business. The following procedures apply to public participation in the meeting:

1. Persons who wish to provide a written statement should submit an electronic copy to Ms. Holiday at the contact information listed above. All submittals must be received by September 2, 2013, and must pertain to the topic on the agenda for the meeting.

2. Questions and comments from members of the public will be permitted during the meeting, at the discretion of the Chairman.

3. The draft transcript and meeting summary will be available on ACMUI's Web site <http://www.nrc.gov/reading->

[rm/doc-collections/acmui/meetings/2013.html](http://www.nrc.gov/reading-rm/doc-collections/acmui/meetings/2013.html) on or about October 22, 2013.

4. Persons who require special services, such as those for the hearing impaired, should notify Ms. Holiday of their planned attendance.

This meeting will be held in accordance with the Atomic Energy Act of 1954, as amended (primarily Section 161a); the Federal Advisory Committee Act (5 U.S.C. App); and the Commission's regulations in Title 10, U.S. Code of Federal Regulations, Part 7.

Dated: July 1, 2013.

**Andrew L. Bates,**

*Advisory Committee Management Officer.*

[FR Doc. 2013–16433 Filed 7–9–13; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

[EA–12–193; NRC–2013–0142]

### In the Matter of Licensee Identified in Attachment 1 and All Other Persons Who Obtain Safeguards Information Described Herein; Order Imposing Requirements for the Protection of Certain Safeguards Information (Effective Immediately)

#### I

The Licensee, identified in Attachment 1<sup>1</sup> to this Order, holds a license issued in accordance with the Atomic Energy Act of 1954, as amended, (AEA) by the U.S. Nuclear Regulatory Commission (NRC or the Commission) or an Agreement State, authorizing it to possess, use, and transfer items containing radioactive material quantities of concern. The NRC intends to issue security Orders to this licensee in the near future. The Order will require compliance with specific Additional Security Measures to enhance the security for certain radioactive material quantities of concern. The Commission has determined that these documents will contain Safeguards Information, will not be released to the public, and must be protected from unauthorized disclosure. Therefore, the Commission is imposing the requirements, as set forth in Attachments 2 and 3 to this Order and in Order EA–12–194, so that the Licensee can receive these documents. This Order also imposes requirements for the protection of Safeguards Information in the hands of any person,<sup>2</sup>

<sup>1</sup> Attachment 1 contains sensitive information and will not be released to the public.

<sup>2</sup> Person means (1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, government agency other than the Commission or the U.S. Department

of Energy, except that the DOE shall be considered a person with respect to those facilities of the DOE specified in section 202 of the Energy Reorganization Act of 1974 (88 Stat. 1244), any State or any political subdivision of, or any political entity within a State, any foreign government or nation or any political subdivision of any such government or nation, or other entity; and (2) any legal successor, representative, agent, or agency of the foregoing.

#### II

The Commission has broad statutory authority to protect and prohibit the unauthorized disclosure of Safeguards Information. Section 147 of the AEA grants the Commission explicit authority to “. . . issue such orders, as necessary to prohibit the unauthorized disclosure of safeguards information . . .” This authority extends to information concerning the security measures for the physical protection of special nuclear material, source material, and byproduct material. Licensees and all persons who produce, receive, or acquire Safeguards Information must ensure proper handling and protection of Safeguards Information to avoid unauthorized disclosure in accordance with the specific requirements for the protection of Safeguards Information contained in Attachments 2 and 3 to this Order. The Commission hereby provides notice that it intends to treat violations of the requirements contained in Attachments 2 and 3 to this Order applicable to the handling and unauthorized disclosure of Safeguards Information as serious breaches of adequate protection of the public health and safety and the common defense and security of the United States.

Access to Safeguards Information is limited to those persons who have established the need-to-know the information, are considered to be trustworthy and reliable, and meet the requirements of Order EA–12–194. A need-to-know means a determination by a person having responsibility for protecting Safeguard Information that a proposed recipient's access to Safeguards Information is necessary in the performance of official, contractual, or licensee duties of employment.

The Licensee and all other persons who obtain Safeguards Information must ensure that they develop, maintain and implement strict policies and procedures for the proper handling of Safeguards Information to prevent unauthorized disclosure, in accordance with the requirements in Attachments 2 and 3 to this Order. The Licensee must ensure that all contractors whose

employees may have access to Safeguards Information either adhere to the licensee's policies and procedures on Safeguards Information or develop, or maintain and implement their own acceptable policies and procedures. The Licensee remains responsible for the conduct of their contractors. The policies and procedures necessary to ensure compliance with applicable requirements contained in Attachments 2 and 3 to this Order must address, at a minimum, the following: the general performance requirement that each person who produces, receives, or acquires Safeguards Information shall ensure that Safeguards Information is protected against unauthorized disclosure; protection of Safeguards Information at fixed sites, in use and in storage, and while in transit; correspondence containing Safeguards Information; access to Safeguards Information; preparation, marking, reproduction and destruction of documents; external transmission of documents; use of automatic data processing systems; removal of the Safeguards Information category; the need-to-know the information; and background checks to determine access to the information.

In order to provide assurance that the Licensee is implementing prudent measures to achieve a consistent level of protection to prohibit the unauthorized disclosure of Safeguards Information, the Licensee shall implement the requirements identified in Attachments 2 and 3 to this Order. In addition, pursuant to 10 CFR 2.202, I find that in light of the common defense and security matters identified above, which warrant the issuance of this Order, the public health, safety and interest require that this Order be effective immediately.

### III

Accordingly, pursuant to Sections 81, 147, 161b, 161i, 161o, 182 and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202, 10 CFR Part 30, 10 CFR Part 32, 10 CFR Part 35, 10 CFR Part 70, and 10 CFR Part 73, *it is hereby ordered*, effective immediately, that all licensees identified in attachment 1 to this order and all other persons who produce, receive, or acquire the additional security measures identified above (whether draft or final) or any related safeguards information shall comply with the requirements of attachments 2 and 3 to this order.

The Director, Office of Federal and State Materials and Environmental Management Programs, may, in writing, relax or rescind any of the above

conditions upon demonstration of good cause by the licensee.

### IV

In accordance with 10 CFR 2.202, the Licensee must, and any other person adversely affected by this Order may, submit an answer to this Order within twenty (20) days of the date of this Order. In addition, the Licensee and any other person adversely affected by this Order may request a hearing of this Order within twenty (20) days of the date of the Order. Where good cause is shown, consideration will be given to extending the time to request a hearing.

A request for extension of time must be made, in writing, to the Director, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, and include a statement of good cause for the extension.

The answer may consent to this Order. If the answer includes a request for a hearing, it shall, under oath or affirmation, specifically set forth the matters of fact and law on which the Licensee relies and the reasons as to why the Order should not have been issued. If a person other than the Licensee requests a hearing, that person shall set forth with particularity the manner in which his interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.309(d).

All documents filed in the NRC adjudicatory proceedings, including a request for a hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139 August, 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the participant should contact the Office of the Secretary by email at [hearing.docket@nrc.gov](mailto: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 NRC's public Web site at <http://www.nrc.gov/site-help/e-submittals/apply-certificates.html>. System requirements for accessing the E-Submittal server are detailed in NRC's "Guidance for Electronic Submission," which is available on the agency's public Web site at <http://www.nrc.gov/site-help/e-submittals.html>. Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through EIE, users will be required to install a Web browser plugin from the NRC Web site. Further information on the Web-based submission form, including the installation of the Web browser plugin, 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 a 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 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 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 document 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](mailto:MSHD.Resource@nrc.gov), or by a toll-free call at 866-672-7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m. Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have 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.

If a hearing is requested by the Licensee or a person whose interest is adversely affected, the Commission will issue an Order designating the time and place of any hearing. If a hearing is held the issue to be considered at such hearing shall be whether this Order should be sustained.

Pursuant to 10 CFR 2.202(c)(2)(i), the Licensee may, in addition to requesting a hearing at the time the answer is filed or sooner, move the presiding officer to set aside the immediate effectiveness of the Order on the ground that the Order, including the need for immediate effectiveness, is not based on adequate evidence but on mere suspicion, unfounded allegations, or error.

In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions specified in Section III above shall be final twenty (20) days from the date of this Order without further order or proceedings.

If an extension of time for requesting a hearing has been approved, the provisions specified in Section III shall be final when the extension expires if a hearing request has not been received. An answer or a request for hearing shall not stay the immediate effectiveness of this order.

Dated at Rockville, Maryland this 27th day of June, 2013.

For the Nuclear Regulatory Commission.

**Brian J. McDermott,**

*Director, Division of Materials Safety and State Agreements, Office of Federal and State Materials and Environmental Management Programs.*

**Attachment 1: List of Applicable Materials**

Licenses

Redacted

**Attachment 2: Modified Handling Requirements for the Protection of Certain Safeguards Information (SGI-M) General Requirement**

Redacted

**Attachment 3: Trustworthiness and Reliability Requirements for Individuals Handling Safeguards Information**

In order to ensure the safe handling, use, and control of information designated as Safeguards Information, each licensee shall control and limit access to the information to only those individuals who have established the need-to-know the information, and are considered to be trustworthy and reliable. Licensees shall document the basis for concluding that there is reasonable assurance that individuals granted access to Safeguards Information are trustworthy and reliable, and do not constitute an unreasonable risk for malevolent use of the information.

The Licensee shall comply with the requirements of this attachment:

1. The trustworthiness and reliability of an individual shall be determined based on a background investigation:

(a) The background investigation shall address at least the past three years and, at a minimum, include verification of employment, education, and personal references. The licensee shall also, to the extent possible, obtain independent information to corroborate that provided by the employee (i.e., seeking references not supplied by the individual).

(b) If an individual's employment has been less than the required three-year period, educational references may be used in lieu of employment history.

The licensee's background investigation requirements may be satisfied for an individual that has an active Federal security clearance.

2. The licensee shall retain documentation regarding the trustworthiness and reliability of individual employees for three years after the individual's employment ends.

In order for an individual to be granted access to Safeguards Information, the individual must be determined to be trustworthy and

reliable, as described in requirement 1 above, and meet the requirements of NRC Order EA-12-194 (NRC-2013-0143).

[FR Doc. 2013-16592 Filed 7-9-13; 8:45 am]

BILLING CODE 7590-01-P

## NUCLEAR REGULATORY COMMISSION

[EA-12-194; (NRC-2013-0143)]

### Licensee Identified in Attachment 1 and All Other Persons Who Seek or Obtain Access to Safeguards Information Described Herein; Order Imposing Fingerprinting and Criminal History Records Check Requirements for Access To Safeguards Information (Effective Immediately)

#### I

The Licensee identified in Attachment 1<sup>1</sup> to this Order, holds a license issued in accordance with the Atomic Energy Act (AEA) of 1954, as amended, by the U.S. Nuclear Regulatory Commission (NRC) or an Agreement State, authorizing them to engage in an activity subject to regulation by the Commission or Agreement States. In accordance with Section 149 of the AEA, fingerprinting and a Federal Bureau of Investigation (FBI) identification and criminal history records check are required of any person who is to be permitted to have access to Safeguards Information (SGI).<sup>2</sup> The NRC's implementation of this requirement cannot await the completion of the SGI rulemaking, which is underway. Although the AEA permits the Commission by rule to except certain categories of individuals from the fingerprinting requirement, which the Commission has done (*see* 10 CFR 73.59, 77 FR 24206 (June 11, 2012)), it is unlikely that licensee employees or others are excepted from the fingerprinting requirement by the "fingerprinting relief" rule. Individuals relieved from fingerprinting and criminal history records checks under the relief rule include Federal, State, and local officials and law enforcement personnel; Agreement State inspectors who conduct security inspections on behalf of the NRC; members of Congress and certain employees of members of Congress or Congressional Committees, and representatives of the International Atomic Energy Agency (IAEA) or certain

foreign government organizations. In addition, individuals who have a favorably-decided U.S. Government criminal history records check within the last five (5) years, or individuals who have active Federal security clearances (provided in either case that they make available the appropriate documentation), have satisfied the AEA fingerprinting requirement and need not be fingerprinted again. Therefore, in accordance with Section 149 of the AEA the Commission is imposing additional requirements for access to SGI, as set forth by this Order, so that affected licensees can obtain and grant access to SGI. This Order also imposes requirements for access to SGI by any person, from any person<sup>3</sup>, whether or not a Licensee, Applicant, or Certificate Holder of the Commission or Agreement States.

#### II

The Commission has broad statutory authority to protect and prohibit the unauthorized disclosure of SGI. Section 147 of the AEA grants the Commission explicit authority to issue such Orders as necessary to prohibit the unauthorized disclosure of SGI. Furthermore, Section 149 of the AEA requires fingerprinting and an FBI identification and a criminal history records check of each individual who seeks access to SGI. In addition, no person may have access to SGI unless the person has an established need-to-know the information and satisfies the trustworthy and reliability requirements described in Attachment 3 to Order EA-12-193 (NRC-2013-0142).

In order to provide assurance that the Licensees identified in Attachment 1 to this Order are implementing appropriate measures to comply with the fingerprinting and criminal history records check requirements for access to SGI, all Licensees identified in Attachment 1 to this Order shall implement the requirements of this Order. In addition, pursuant to 10 CFR 2.202, I find that in light of the common defense and security matters identified above, which warrant the issuance of this Order, the public health, safety and

<sup>3</sup> Person means (1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, government agency other than the Commission or the U.S. Department of Energy (DOE), except that the DOE shall be considered a person with respect to those facilities of the DOE specified in section 202 of the Energy Reorganization Act of 1974 (88 Stat. 1244), any State or any political subdivision of, or any political entity within a State, any foreign government or nation or any political subdivision of any such government or nation, or other entity; and (2) any legal successor, representative, agent, or agency of the foregoing.

interest require that this Order be effective immediately.

#### III

Accordingly, pursuant to Sections 81, 147, 149, 161b, 161i, 161o, 182 and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202, 10 CFR Parts 30 and 73, *it is hereby ordered, effective immediately, that all licensees identified in attachment 1 to this order and all other persons who seek or obtain access to safeguards information, as described above, shall comply with the requirements set forth in this order.*

A. 1. No person may have access to SGI unless that person has a need-to-know the SGI, has been fingerprinted or who has a favorably-decided FBI identification and criminal history records check, and satisfies all other applicable requirements for access to SGI. Fingerprinting and the FBI identification and criminal history records check are not required, however, for any person who is relieved from that requirement by 10 CFR 73.59 (77 FR 34206 (June 11, 2012)), or who has a favorably-decided U.S. Government criminal history records check within the last five (5) years, or who has an active Federal security clearance, provided in the latter two cases that the appropriate documentation is made available to the Licensee's NRC-approved reviewing official described in paragraph III.C.2 of this Order.

2. No person may have access to any SGI if the NRC has determined, based on fingerprinting and an FBI identification and criminal history records check, that the person may not have access to SGI.

B. No person may provide SGI to any other person except in accordance with Condition III.A. above. Prior to providing SGI to any person, a copy of this Order shall be provided to that person.

C. All Licensees identified in Attachment 1 to this Order shall comply with the following requirements:

1. The Licensee shall, within twenty (20) days of the date of this Order, establish and maintain a fingerprinting program that meets the requirements of Attachment 2 to this Order.

2. The Licensee shall, within twenty (20) days of the date of this Order, submit the fingerprints of one (1) individual who (a) the Licensee nominates as the "reviewing official" for determining access to SGI by other individuals, and (b) has an established need-to-know the information and has been determined to be trustworthy and

<sup>1</sup> Attachment 1 contains sensitive information and will not be released to the public.

<sup>2</sup> Safeguards Information is a form of sensitive, unclassified, security-related information that the Commission has the authority to designate and protect under section 147 of the AEA.

reliable in accordance with the requirements described in Attachment 3 to Order EA-12-193. The NRC will determine whether this individual (or any subsequent reviewing official) may have access to SGI and, therefore, will be permitted to serve as the Licensee's reviewing official.<sup>4</sup> The Licensee may, at the same time or later, submit the fingerprints of other individuals to whom the Licensee seeks to grant access to SGI or designate an additional reviewing official(s). Fingerprints shall be submitted and reviewed in accordance with the procedures described in Attachment 2 of this Order.

3. The Licensee shall, in writing, within twenty (20) days of the date of this Order, notify the Commission, (1) if it is unable to comply with any of the requirements described in this Order, including Attachment 2 to this Order, or (2) if compliance with any of the requirements is unnecessary in its specific circumstances. The notification shall provide the Licensee's justification for seeking relief from or variation of any specific requirement.

Licensee responses to C.1., C.2., and C.3. above shall be submitted to the Director, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555. In addition, Licensee responses shall be marked as "Security-Related Information—Withhold Under 10 CFR 2.390."

The Director, Office of Federal and State Materials and Environmental Management Programs, may, in writing, relax or rescind any of the above conditions upon demonstration of good cause by the Licensee.

#### IV

In accordance with 10 CFR 2.202, the Licensee must, and any other person adversely affected by this Order may, submit an answer to this Order within twenty (20) days of the date of this Order. In addition, the Licensee and any other person adversely affected by this Order may request a hearing of this Order within twenty (20) days of the date of the Order. Where good cause is shown, consideration will be given to extending the time to request a hearing. A request for extension of time must be made, in writing, to the Director, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and include a

statement of good cause for the extension.

The answer may consent to this Order. If the answer includes a request for a hearing, it shall, under oath or affirmation, specifically set forth the matters of fact and law on which the Licensee relies and the reasons as to why the Order should not have been issued. If a person other than the Licensee requests a hearing, that person shall set forth with particularity the manner in which his interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.309(d).

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139, August, 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the Internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline the participant should contact the Office of the Secretary by email at [hearing.docket@nrc.gov](mailto:hearing.docket@nrc.gov), or by telephone at 301-415-1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on NRC's public Web site at <http://www.nrc.gov/site-help/e-submittals/apply-certificates.html>. System requirements for accessing the E-Submittal server are detailed in NRC's "Guidance for Electronic Submission,"

which is available on the agency's public Web site at <http://www.nrc.gov/site-help/e-submittals.html>. Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through the Electronic Information Exchange System, users will be required to install a Web browser plug-in from the NRC Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at <http://www.nrc.gov/site-help/e-submittals.html>.

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for a hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at <http://www.nrc.gov/site-help/e-submittals.html>. A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an 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 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 document 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->

<sup>4</sup> The NRC's determination of this individual's access to SGI in accordance with the process described in Enclosure 5 to the transmittal letter of this Order is an administrative determination that is outside the scope of this Order.

*submittals.html*, by email at [MSHD.Resource@nrc.gov](mailto:MSHD.Resource@nrc.gov), or by a toll-free call at 866-672-7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by (1) first class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at <http://ehd1.nrc.gov/ehd>, unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

If a hearing is requested by the Licensee or a person whose interest is adversely affected, the Commission will issue an Order designating the time and place of any hearing. If a hearing is held

the issue to be considered at such hearing shall be whether this Order should be sustained.

Pursuant to 10 CFR 2.202(c)(2)(i), the Licensee may, in addition to requesting a hearing, at the time the answer is filed or sooner, move the presiding officer to set aside the immediate effectiveness of the Order on the ground that the Order, including the need for immediate effectiveness, is not based on adequate evidence but on mere suspicion, unfounded allegations, or error.

In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions specified in Section III above shall be final twenty (20) days from the date of this Order without further order or proceedings.

If an extension of time for requesting a hearing has been approved, the provisions specified in Section III shall be final when the extension expires if a hearing request has not been received. An answer or a request for hearing shall not stay the immediate effectiveness of this order.

Dated this 27th day of June, 2013.

For the Nuclear Regulatory Commission.

**Brian J. McDermott,**

*Director, Division of Materials Safety and State Agreements, Office of Federal and State Materials, and Environmental Management Programs.*

#### **Attachment 1: List of Applicable Materials Licensees Redacted**

#### **Attachment 2: Requirements for Fingerprinting and Criminal History Records Checks of Individuals When Licensee's Reviewing Official is Determining Access to Safeguards Information**

##### **General Requirements**

Licensees shall comply with the requirements of this attachment.

A. 1. Each Licensee subject to the provisions of this attachment shall fingerprint each individual who is seeking or permitted access to Safeguards Information (SGI). The Licensee shall review and use the information received from the Federal Bureau of Investigation (FBI) and ensure that the provisions contained in the subject Order and this attachment are satisfied.

2. The Licensee shall notify each affected individual that the fingerprints will be used to secure a review of his/her criminal history record and inform the individual of the procedures for revising the record or including an explanation in the record, as specified in the "Right to Correct and Complete Information" section of this attachment.

3. Fingerprints need not be taken if an employed individual (e.g., a Licensee employee, contractor, manufacturer, or supplier) is relieved from the fingerprinting requirement by 10 CFR 73.59, has a favorably-decided U.S. Government criminal history records check within the last five (5) years, or has an active Federal security clearance. Written confirmation from the agency/ employer which granted the Federal security clearance or reviewed the criminal history records check must be provided. The Licensee must retain this documentation for a period of three (3) years from the date the individual no longer requires access to SGI associated with the Licensee's activities.

4. All fingerprints obtained by the Licensee pursuant to this Order must be submitted to the Commission for transmission to the FBI.

5. The Licensee shall review the information received from the FBI and consider it, in conjunction with the trustworthy and reliability requirements included in Attachment 3 to NRC Order EA-12-193, in making a determination whether to grant access to SGI to individuals who have a need-to-know the SGI.

6. The Licensee shall use any information obtained as part of a criminal history records check solely for the purpose of determining an individual's suitability for access to SGI.

7. The Licensee shall document the basis for its determination whether to grant access to SGI.

B. The Licensee shall notify the NRC of any desired change in reviewing officials. The NRC will determine whether the individual nominated as the new reviewing official may have access to SGI based on a previously-obtained or new criminal history check and, therefore, will be permitted to serve as the Licensee's reviewing official.

##### **Prohibitions**

A Licensee shall not base a final determination to deny an individual access to SGI solely on the basis of information received from the FBI involving: an arrest more than one (1) year old for which there is no information of the disposition of the case, or an arrest that resulted in dismissal of the charge or an acquittal.

A Licensee shall not use information received from a criminal history check obtained pursuant to this Order in a manner that would infringe upon the rights of any individual under the First Amendment to the Constitution of the United States, nor shall the Licensee use the information in any way which would discriminate among individuals

on the basis of race, religion, national origin, sex, or age.

#### Procedures for Processing Fingerprint Checks

For the purpose of complying with this Order, Licensees shall, using an appropriate method listed in 10 CFR 73.4, submit to the NRC's Division of Facilities and Security, Mail Stop TWB-05B32M, one completed, legible standard fingerprint card (Form FD-258, ORIMDNRC000Z), or where practicable, other fingerprint records for each individual seeking access to Safeguards Information, to the Director of the Division of Facilities and Security, marked for the attention of the Division's Criminal History Program. Copies of these forms may be obtained by writing the Office of Information Services, U.S. Nuclear Regulatory Commission, Washington, DC 20555, by calling 630-829-9565, or by email to [forms.resource@nrc.gov](mailto:forms.resource@nrc.gov). Practicable alternative formats are set forth in 10 CFR 73.4. The Licensee shall establish procedures to ensure that the quality of the fingerprints taken results in minimizing the rejection rate of fingerprint cards due to illegible or incomplete cards.

The NRC will review submitted fingerprint cards for completeness. Any Form FD-258 fingerprint record containing omissions or evident errors will be returned to the Licensee for corrections. The fee for processing fingerprint checks includes one re-submission if the initial submission is returned by the FBI because the fingerprint impressions cannot be classified. The one free re-submission must have the FBI Transaction Control Number reflected on the re-submission. If additional submissions are necessary, they will be treated as initial submittals and will require a second payment of the processing fee.

Fees for processing fingerprint checks are due upon application. Licensees shall submit payment with the application for processing fingerprints by corporate check, certified check, cashier's check, or money order, made payable to "U.S. NRC." [For guidance on making electronic payments, contact the Facilities Security Branch, Division of Facilities and Security, at 301-492-3531]. Combined payment for multiple applications is acceptable. The application fee (currently \$26) is the sum of the user fee charged by the FBI for each fingerprint card or other fingerprint record submitted by the NRC on behalf of a Licensee, and an NRC processing fee, which covers administrative costs associated with the NRC handling of Licensee fingerprint

submissions. The Commission will directly notify Licensees who are subject to this regulation of any fee changes.

The Commission will forward to the submitting Licensee all data received from the FBI as a result of the Licensee's application(s) for criminal history records checks, including the FBI fingerprint record.

#### Right To Correct and Complete Information

Prior to any final adverse determination, the Licensee shall make available to the individual the contents of any criminal records obtained from the FBI for the purpose of assuring correct and complete information. Written confirmation by the individual of receipt of this notification must be maintained by the Licensee for a period of one (1) year from the date of the notification.

If, after reviewing the record, an individual believes that it is incorrect or incomplete in any respect and wishes to change, correct, or update the alleged deficiency, or to explain any matter in the record, the individual may initiate challenge procedures. These procedures include either direct application by the individual challenging the record to the agency (i.e., law enforcement agency) that contributed the questioned information, or direct challenge as to the accuracy or completeness of any entry on the criminal history record to the Assistant Director, Federal Bureau of Investigation Identification Division, Washington, DC 20537-9700 (as set forth in 28 CFR 16.30 through 16.34). In the latter case, the FBI forwards the challenge to the agency that submitted the data and requests that agency to verify or correct the challenged entry. Upon receipt of an official communication directly from the agency that contributed the original information, the FBI Identification Division makes any changes necessary in accordance with the information supplied by that agency. The Licensee must provide at least ten (10) days for an individual to initiate an action challenging the results of an FBI criminal history records check after the record is made available for his/her review. The Licensee may make a final SGI access determination based upon the criminal history record only upon receipt of the FBI's ultimate confirmation or correction of the record. Upon a final adverse determination on access to SGI, the Licensee shall provide the individual its documented basis for denial. Access to SGI shall not be granted to an individual during the review process.

#### Protection of Information

1. Each Licensee who obtains a criminal history record on an individual pursuant to this Order shall establish and maintain a system of files and procedures for protecting the record and the personal information from unauthorized disclosure.

2. The Licensee may not disclose the record or personal information collected and maintained to persons other than the subject individual, his/her representative, or to those who have a need to access the information in performing assigned duties in the process of determining access to Safeguards Information. No individual authorized to have access to the information may re-disseminate the information to any other individual who does not have a need-to-know.

3. The personal information obtained on an individual from a criminal history record check may be transferred to another Licensee if the Licensee holding the criminal history record check receives the individual's written request to re-disseminate the information contained in his/her file, and the gaining Licensee verifies information such as the individual's name, date of birth, social security number, sex, and other applicable physical characteristics for identification purposes.

4. The Licensee shall make criminal history records, obtained under this section, available for examination by an authorized representative of the NRC to determine compliance with the regulations and laws.

5. The Licensee shall retain all fingerprint and criminal history records received from the FBI, or a copy if the individual's file has been transferred, for three (3) years after termination of employment or determination of access to SGI (whether access was approved or denied). After the required three (3) year period, these documents shall be destroyed by a method that will prevent reconstruction of the information in whole or in part.

[FR Doc. 2013-16591 Filed 7-9-13; 8:45 am]

BILLING CODE 7590-01-P

#### NUCLEAR REGULATORY COMMISSION

[NRC-2013-0147]

#### Proposed Revisions to Design of Structures, Components, Equipment and Systems

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Standard review plan-draft section revision; request for comment.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) is revising and soliciting public comment on Section 3.12, "ASME Code Class 1, 2 and 3 Piping Systems, Piping Components and their Associated Supports," of NUREG-0800, "Standard Review Plan for the Review of Safety Analysis Reports for Nuclear Power Plants: LWR Edition."

**DATES:** Submit comments by August 9, 2013. Comments received after this date will be considered, if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

**ADDRESSES:** You may submit comments by any of the following methods (unless this document describes a different method for submitting comments on a specific subject):

- *Federal Rulemaking Web Site:* Go to <http://www.regulations.gov> and search for Docket ID NRC-2013-0147. Address questions about NRC dockets to Carol Gallagher; telephone: 301-492-3668; email: [Carol.Gallagher@nrc.gov](mailto:Carol.Gallagher@nrc.gov). For technical questions, contact the individual(s) listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

- *Mail comments to:* Cindy Bladey, Chief, Rules, Announcements, and Directives Branch (RADB), Office of Administration, Mail Stop: 3WFN 6-A56, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.

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:** Mr. Jonathan DeGange, Office of New Reactors, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; telephone at 301-415-6992 or email at [Jonathan.DeGange@nrc.gov](mailto:Jonathan.DeGange@nrc.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Accessing Information and Submitting Comments**

*A. Accessing Information*

Please refer to Docket ID NRC-2013-0147 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 is publicly available, by any of the following methods:

- *Federal Rulemaking Web Site:* Go to <http://www.regulations.gov> and search for Docket ID NRC-2013-0147.

- *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](mailto:pdr.resource@nrc.gov). The ADAMS Accession numbers for the redline document comparing the current revision and the proposed revision are available in ADAMS under Accession Nos.: Section 3.12, Proposed Revision 1 (ML12334A376), Current Revision 0 (ML070040002), Redline (ML12341A132).

- *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-2013-0147 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.

**II. Further Information**

The Office of New Reactors is revising Section 3.12 from the current version (ADAMS Accession No. ML070040002). In respect of this proposed revision 1 (ADAMS Accession No. ML12334A376), details of specific changes are included at the end of the proposed section, and are shown in the description of changes.

The changes to Chapter 3 of this Standard Review Plan (SRP) reflect the

current staff's review methods and practices based on lessons learned from NRC reviews of design certification and combined license applications completed since the last revision of this chapter.

These sections have been updated to reflect the requirements of "Resolution of Generic Safety Issues: Issue 89, Stiff Pipe Clamps," (ADAMS Accession No. ML101720320), and Regulatory Guide 1.207, "Guidelines for Evaluating Fatigue Analyses Incorporating the Life Reduction of Metal Components due to the Effects of the Light-water Reactor Environment for New Reactors," (ADAMS Accession No. ML070380586). The ADAMS accession number for the redline document comparing the current revision with the proposed revision is included in Section I.A of this document.

The NRC staff is issuing this notice to solicit public comments on the proposed SRP Section 3.12 in Chapter 3. After the NRC staff considers any public comments, it will make a determination regarding the revised SRP Section 3.12 in Chapter 3.

**III. Backfitting and Issue Finality**

This draft SRP, if finalized, would provide guidance to the staff for reviewing applications for a construction permit and an operating license under Part 50 of Title 10 of the *Code of Federal Regulations* (10 CFR) with respect to the structural integrity of pressure-retaining components, their supports, and core support structures which are considered to be ASME Code Class 1, 2 and 3. The draft SRP would also provide guidance for reviewing an application for a standard design approval, a standard design certification, a combined license, and a manufacturing license under 10 CFR part 52 with respect to those same subject matters.

Issuance of this draft SRP, if finalized, would not constitute backfitting as defined in 10 CFR 50.109, or otherwise be inconsistent with the issue finality provisions in 10 CFR part 52. The staff's position is based upon the following considerations.

1. *The draft SRP positions, if finalized, do not constitute backfitting, inasmuch as the SRP is internal guidance to NRC staff.*

The SRP provides interim guidance to the staff on how to review an application for NRC regulatory approval in the form of licensing. Changes in internal staff guidance are not matters for which applicants or licensees are protected under 10 CFR 50.109 or issue finality provisions in 10 CFR Part 52.

2. *Backfitting and issue finality—with certain exceptions discussed below—do not protect current or future applicants.*

Applicants and potential applicants are not, with certain exceptions, protected by either the Backfit Rule or any issue finality provisions under 10 CFR part 52. This is because neither the Backfit Rule nor the issue finality provisions under 10 CFR part 52—with certain exclusions discussed below—were intended to apply to every NRC action which substantially changes the expectations of current and future applicants.

The exceptions to the general principle are applicable whenever an applicant references a 10 CFR part 52 license (e.g., an early site permit) and/or NRC regulatory approval (e.g., a design certification rule) with specified issue finality provisions. The staff does not, at this time, intend to impose the positions represented in the draft SRP section (if finalized) in a manner that is inconsistent with any issue finality provisions. If, in the future, the staff seeks to impose a position in the draft SRP section (if finalized) in a manner which does not provide issue finality as described in the applicable issue finality provision, then the staff must address the criteria for avoiding issue finality as described in the applicable issue finality provision.

3. *The staff has no intention to impose the draft SRP positions on existing nuclear power plant licenses or regulatory approvals either now or in the future (absent a voluntary request for change from the licensee, holder of a regulatory approval, or a design certification applicant).*

The staff does not intend to impose or apply the positions described in the draft SRP section to existing (already issued) licenses (e.g., operating licenses and combined licenses) and regulatory approvals—in this case, design certifications. Hence, the draft SRP—even if considered guidance which is within the purview of the issue finality provisions in 10 CFR part 52—need not be evaluated as if it were a backfit or as being inconsistent with issue finality provisions. If, in the future, the staff seeks to impose a position in the draft SRP (if finalized) on holders of already issued licenses in a manner which does not provide issue finality as described in the applicable issue finality provision, then the staff must make the showing as set forth in the Backfit Rule, or address the criteria for avoiding issue finality as described applicable issue finality provision, as applicable.

Dated at Rockville, Maryland, this 27th day of June 2013.

For the Nuclear Regulatory Commission.

**Joseph Colaccino,**

Chief, Policy Branch, Division of Advanced Reactors and Rulemaking, Office of New Reactors.

[FR Doc. 2013-16585 Filed 7-9-13; 8:45 am]

**BILLING CODE 7590-01-P**

## **NUCLEAR REGULATORY COMMISSION**

**[NRC-2013-0150]**

### **Proposed Revision to Treatment of Non-Safety Systems for Passive Advanced Light Water Reactors**

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Standard review plan-draft section revision; request for comment and use; re-notice.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) is re-noticing the solicitation for public comment published in the **Federal Register** on October 12, 2012 (77 FR 62270), on the NUREG-0800, “Standard Review Plan for the Review of Safety Analysis Reports for Nuclear Power Plants: LWR Edition,” on a proposed new section to its Standard Review Plan (SRP), Section 19.3, “Regulatory Treatment of Non-Safety Systems (RTNSS) for Passive Advanced Light Water Reactors.” The NRC seeks public comment on a narrow area of focus related to a revised position on the treatment of the high winds external hazard for certain RTNSS structures, systems, and components.

**DATES:** Submit comments by August 9, 2013. Comments received after this date will be considered, if it is practical to do so, but the Commission is able to ensure consideration only 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 publicly available, by searching on <http://www.regulations.gov> under Docket ID NRC-2013-0150. 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-2013-0150. Address questions about NRC dockets to Carol Gallagher; telephone: 301-492-3668; email: [Carol.Gallagher@nrc.gov](mailto:Carol.Gallagher@nrc.gov).

- *Mail comments to:* Cindy Bladey, Chief, Rules, Announcements, and Directives Branch (RADB), Office of Administration, Mail Stop: 3WFN 6-A56 U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.

- 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:** Mr. Jonathan DeGange, Office of New Reactors, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; telephone: 301-415-6992, email: <mailto:jonathan.DeGange@nrc.gov>.

#### **SUPPLEMENTARY INFORMATION:**

#### **I. Accessing Information and Submitting Comments**

##### *A. Accessing Information*

Please refer to Docket ID NRC-2013-0150 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-2013-XXX.

- *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](mailto: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 SRP Section 19.3 is re-noticed in its entirety under ADAMS Accession ML13081A756.

- *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, MD 20852.

##### *B. Submitting Comments*

Please include Docket ID NRC-2013-0150 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 will NRC posts all comment submissions at <http://www.regulations.gov>.

[www.regulations.gov](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

This re-notice includes a revised position on treatment of the high winds external hazard for certain RTNSS structures, systems and components (SSCs). This position differs from the one described in the previously issued draft Section 19.3 of NUREG-0800 (ADAMS Accession No: ML12128A405) and from the alternative proposed from public comments (ML12319A465) on the previously issued draft Section 19.3 of NUREG-0800, which, during a public meeting held on January 22, 2013, the staff agreed to consider. Consequently, public stakeholders have not had an opportunity to comment on this approach to treatment of the high winds hazard for certain RTNSS SSCs.

The staff's original position on treatment of the high winds external hazard is documented in a memorandum from L. Joseph Callan, US NRC Executive Director for Operations to Chairman Jackson, US NRC dated June 23, 1997 (ML003708229) and entitled: "Implementation of Staff Position in SECY-96-128, 'Policy and Key Technical Issues Pertaining to the Westinghouse AP600 Standard Pressurized Reactor Design', Related to Post-72 Hour Actions". At that time, the NRC was concerned with the ability of a severe hurricane to cause an extended loss of reliable offsite AC power for a period longer than 72 hours. Consequently, the NRC took the position that it was reasonable and practical to design post-72 hour SSCs (most notably non-safety related diesel generators and their enclosure) to withstand a Category 5 hurricane and associated wind-borne missiles; but, these SSCs should not be required to withstand tornado loads and tornado missiles. Also at the time, tornado loads and missiles were considered generally to lead to more restrictive design requirements.

Since this position was established in the mid-1990s, Regulatory Guide 1.76 has been revised using the Enhanced Fujita Scale, resulting in a significant decrease to the maximum design basis tornado wind speeds, and new guidance (Regulatory Guide 1.221) has been issued for addressing hurricanes and associated hurricane missiles. In addition, recent operating experience shows that tornado wind events can also cause an extended loss of reliable offsite AC power for more than 72 hours. Lastly, application of the guidance described in the memorandum referenced above could, in some cases, result in a level of treatment for non-safety related SSCs which meet Criterion B for RTNSS that is higher than the level for safety-related SSCs. Therefore, the RTNSS missile protection guidance described in the memorandum is no longer appropriate. The NRC's position now is that RTNSS "B" SSCs should be protected from both tornadoes and hurricanes and the missiles they might create, and that applicants should choose the design basis wind speeds for RTNSS "B" SSCs using the guidance in Regulatory Guides 1.76 and 1.221. Standard Review Plan 19.3 has been revised to reflect this position.

The NRC seeks public comment on a narrow area of focus in the reissuance of the SRP Section 19.3, "Regulatory Treatment of Non-Safety Systems (RTNSS) for Passive Advanced Light Water Reactors." This area includes a revised position on treatment of the high winds external hazard for certain RTNSS SSCs that is described above and elsewhere (ML13081A756) under section "SRP Acceptance Criteria" and in "Area of Review—Augmented Design Standards" shown as item 4 in the guidance document page 19.3-8.

Following NRC staff evaluation of public comments, the NRC intends to incorporate the final approved guidance into the next revision of NUREG-0800.

### *Backfitting and Issue Finality*

This draft SRP, if finalized, would provide guidance to the staff for reviewing applications for a construction permit and an operating license under part 50 of Title 10 of the *Code of Federal Regulations* (10 CFR) with respect to the regulatory treatment of non-safety systems. The draft SRP would also provide guidance for reviewing an application for a standard design approval, a standard design certification, a combined license, and a manufacturing license under part 52 of Title 10 of the *Code of Federal Regulations* (10 CFR) with respect to these same subject matters.

Issuance of this draft SRP, if finalized, would not constitute backfitting as defined in 10 CFR 50.109, or otherwise be inconsistent with the issue finality provisions in 10 CFR part 52. The staff's position is based upon the following considerations.

1. *The draft SRP positions, if finalized, do not constitute backfitting, inasmuch as the SRP is internal guidance to NRC staff.*

The SRP provides interim guidance to the staff on how to review an application for NRC regulatory approval in the form of licensing. Changes in internal staff guidance are not matters for which applicants or licensees are protected under 10 CFR 50.109 or issue finality provisions in 10 CFR Part 52.

2. *Backfitting and issue finality—with certain exceptions discussed below—do not protect current or future applicants.*

Applicants and potential applicants are not, with certain exceptions, protected by either the Backfit Rule or any issue finality provisions under 10 CFR part 52. This is because neither the Backfit Rule nor the issue finality provisions under 10 CFR part 52—with certain exclusions discussed below—were intended to apply to every NRC action which substantially changes the expectations of current and future applicants.

The exceptions to this general principle are applicable whenever an applicant references a 10 CFR Part 52 license (e.g., an early site permit) and/or NRC regulatory approval (e.g., a design certification rule) with specified issue finality provisions. The staff does not, at this time, intend to impose the positions represented in the draft SRP section (if finalized) in a manner that is inconsistent with any issue finality provisions. If, in the future, the staff seeks to impose a position in the draft SRP section (if finalized) in a manner which does not provide issue finality as described in the applicable issue finality provision, then the staff must address the criteria for avoiding issue finality as described in the applicable issue finality provision.

3. *The staff has no intention to impose the draft SRP positions on existing nuclear power plant licenses or regulatory approvals either now or in the future (absent a voluntary request for change from the licensee, holder of a regulatory approval, or a design certification applicant).*

The staff does not intend to impose or apply the positions described in the draft SRP section to existing (already issued) licenses (e.g., operating licenses and combined licenses) and regulatory approvals—in this case, design certifications. Hence, the draft SRP—

even if considered guidance which is within the purview of the issue finality provisions in 10 CFR part 52—need not be evaluated as if it were a backfit or as being inconsistent with issue finality provisions. If, in the future, the staff seeks to impose a position in the draft SRP (if finalized) on holders of already issued licenses in a manner which does not provide issue finality as described in the applicable issue finality provision, then the staff must make the showing as set forth in the Backfit Rule, or address the criteria for avoiding issue finality as described applicable issue finality provision, as applicable.

Dated at Rockville, Maryland, this 28th day of June 2013.

For the Nuclear Regulatory Commission.

**Joseph Colaccino,**

*Chief, Policy Branch, Division of Advanced Reactors and Rulemaking, Office of New Reactors.*

[FR Doc. 2013-16586 Filed 7-9-13; 8:45 am]

BILLING CODE 7590-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 30589; File No. 813-00383]

### Citadel LLC (Formerly Citadel Investment Group, L.L.C.) and CEIF LLC; Notice of Application

July 3, 2013.

**AGENCY:** Securities and Exchange Commission (“Commission”).

**ACTION:** Notice of application for an order under sections 6(b) and 6(e) of the Investment Company Act of 1940 (the “Act”) granting an exemption from all provisions of the Act, except section 9 and sections 36 through 53 and the rules and regulations under those sections. With respect to sections 17 and 30 of the Act, and the rules and regulations thereunder, and rule 38a-1 under the Act, the exemption is limited as set forth in the application.

**SUMMARY OF APPLICATION:** Applicants request an order to amend and supersede a prior order (“Prior Order”)<sup>1</sup> to exempt certain limited liability companies, limited partnerships, companies and other investment vehicles formed for the benefit of eligible employees of Citadel LLC and its affiliates (“ESC Funds”) from certain provisions of the Act. Each ESC Fund will be an “employees’ securities company” within the meaning of

section 2(a)(13) of the Act. The requested order would reflect the amendment of certain mandatory redemption terms of the ESC Funds to allow voluntary deferral of redemption of Vested Membership Interests beyond the relevant Determination Date (as these terms are defined below). The terms and conditions of the application are otherwise identical to the terms and conditions of the Prior Order.

**APPLICANTS:** Citadel LLC and CEIF LLC (“CEIF”).

**DATES: Filing Dates:** The application was filed on January 31, 2013, and amended on April 30, 2013.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the application 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 July 29, 2013, and should be accompanied by proof of service on 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:** Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090; Applicants, Citadel LLC and CEIF, 131 South Dearborn Street, Chicago, Illinois 60603.

**FOR FURTHER INFORMATION CONTACT:** Emerson S. Davis, Senior Counsel, at (202) 551-6868, or Daniele Marchesani, Branch Chief, at (202) 551-6821 (Division of Investment Management, Exemptive Applications Office).

**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’s name box, at <http://www.sec.gov/search/search.htm> or by calling (202) 551-8090.

### Applicants’ Representations

1. Citadel is a global financial institution with a diverse business platform which includes alternative asset management, strategic advisory services and capital markets businesses and services. Citadel LLC, a Delaware limited liability company, and its “Affiliates,” as defined in rule 12b-2 under the Securities Exchange Act of

1934 (“Exchange Act”) other than an ESC Fund are referred to collectively as “Citadel” or “Citadel Entities.”

2. Citadel has established CEIF, a Delaware limited liability company and will in the future establish any other ESC Funds (collectively with CEIF, the “ESC Funds” and each, an “ESC Fund”) for the benefit of Eligible Employees (defined below) as part of a program to create capital building opportunities that are competitive with those at other financial services firms and to facilitate the recruitment and retention of high caliber professionals. Each of the ESC Funds will be structured as a limited liability company, limited partnership, corporation, business trust or other entity organized under the laws of the state of Delaware or another U.S. jurisdiction. Each ESC Fund will be identical in all material respects (other than investment objectives and strategies, vesting terms, form of organization and related structural and operative provisions contained in the constitutive documents of such funds). Each ESC Fund will be an “employees’ security company” within the meaning of section 2(a)(13) of the Act and will operate as a diversified or non-diversified management investment company. Citadel will control the ESC Funds within the meaning of section 2(a)(9) of the Act.

3. Each managing member of an ESC Fund or person acting in a similar capacity will be an Affiliate of Citadel LLC (a “Managing Member”). Any member or partner of, or otherwise investor in, an ESC Fund is a “Member.” The Managing Member of each ESC Fund will manage, operate and control such ESC Fund and will have the authority to delegate investment management responsibility with respect to the acquisition, management and disposition of Portfolio Investments, as defined below, to a Citadel Entity. Any Citadel Entity that is delegated the responsibility of making investment decisions for an ESC Fund will be registered as an investment adviser under the Investment Advisers Act of 1940 (the “Advisers Act”), if required under applicable law.

4. The Managing Member, a Member, Citadel, Citadel Entity or any employees of the Managing Member or Citadel may be entitled to receive a performance-based fee or profits allocation (a “carried interest”).<sup>2</sup> All ESC Fund

<sup>2</sup> A “carried interest” is a fee paid or an allocation made to the Managing Member, a Member or the Citadel Entity acting as the investment adviser to an ESC Fund based on net gains in addition to the amount allocable to such entity in proportion to its invested capital. A Managing Member, Member or Citadel Entity that is registered as an investment

<sup>1</sup> *Citadel LLC and CEIF LLC*, Investment Company Release Nos. IC-29851 (Oct. 27, 2011) (notice) and IC-29869 (Nov. 22, 2011) (order).

investments are referred to as “Portfolio Investments.”

5. Interests in an ESC Fund will be issued without registration in reliance on section 4(2) of the Securities Act of 1933 (the “Securities Act”), Regulation D and/or Regulation S under the Securities Act and may be acquired only by “Eligible Employees” and “Qualified Participants” in each case defined below. Prior to issuing Interests to an Eligible Employee either directly or through a related Qualified Participant, a Managing Member must reasonably believe that the Eligible Employee will be a sophisticated investor capable of understanding and evaluating the risks of participation in an ESC Fund without the benefit of regulatory safeguards.

6. An “Eligible Employee” is an individual who is a current or former employee, officer or partner of Citadel or a director of Citadel that is an “interested person” as defined under the Act, and that is an “accredited investor” under rule 501(a)(5) or rule 501(a)(6) of Regulation D (“Accredited Investor”). A “Qualified Participant” is an entity that is a Qualified Investment Vehicle (as defined below) and, if purchasing an Interest (as defined below) directly from an ESC, comes within one of the categories of an “accredited investor” under 501(a) of Regulation D. A “Qualified Investment Vehicle” is (a) a trust of which the trustee, grantor and/or beneficiary is an Eligible Employee or (b) a partnership, corporation or other entity controlled by an Eligible Employee. A Qualified Investment Vehicle that is not an Accredited Investor will not be permitted to invest in an ESC Fund.

7. The terms of an ESC Fund will be fully disclosed to each Eligible Employee and, if applicable, to a Qualified Participant, prior to admission to the ESC Fund. Each Eligible Employee and Qualified Participant will be furnished with access to the offering documents, including a copy of the operating agreement or other organizational documents of the relevant ESC Fund (“Operating Agreement”). The Managing Member will send each person who was a Member at any time during the fiscal year then ended (except for the first year of operations of an ESC Fund if no investment activities took place in such fiscal year), audited financial statements within 180 days after the end of the fiscal year. For purposes of this requirement “audit” shall have the meaning defined in rule 1–02(d) of

adviser under the Advisers Act may be paid or allocated carried interest only if permitted by rule 205–3 under the Advisers Act.

Regulation S–X. In addition, as soon as practicable after the end of the ESC Fund’s tax year, a report will be transmitted to each Member showing such Member’s share of income, gains, losses, credits, deductions, and other tax items for U.S. federal income tax purposes, resulting from such ESC Fund’s operations during that year.

8. Interests in the ESC Funds will be non-transferable except (i) to the extent cancelled or (ii) with the prior written consent of the Managing Member and, in any event, no person or entity will be admitted into an ESC Fund as a Member unless such person or entity is an Eligible Employee, a Qualified Participant of an Eligible Employee, or a Citadel Entity. Interests in the ESC Funds will be issued without a sales load or similar fee.

9. Ownership interests (“Interests”) in an ESC Fund may be acquired on a voluntary basis or be offered through a long-term incentive program to qualified Eligible Employees (the “Long-Term Points Program”). Interests in a “Participation Points ESC Fund” may only be acquired through the Long-Term Points Program. Pursuant to the Long-Term Points Program, Eligible Employees may be issued Participation Points on the basis of, among other things, personal performance and/or firm-wide or relevant team performance results. An Eligible Employee may also voluntarily acquire an Interest in a “non-Participation Points ESC Fund.” An Eligible Employee and/or its Qualified Participant may not make additional capital contributions to the ESC Fund in which it is invested after such Eligible Employee’s employment with Citadel has terminated.

10. Both Participation Points ESC Funds and non-Participation Points ESC Funds may be offered as part of an investment program that includes vesting and cancellation provisions. In such circumstances, some or all of an Eligible Employee’s Interest at the commencement of the program will be treated as being “unvested,” and “vesting” will occur only as certain conditions are satisfied under the terms of the investment program. The portion of an Eligible Employee’s Interest that is “unvested” at the time of termination of such Eligible Employee’s employment by Citadel may be subject to (a) cancellation and/or (b) the imposition of different terms and conditions, which would be described in the Operating Agreement and/or offering documents of the relevant ESC Fund and/or in other written correspondence issued to such Eligible Employee.

11. With respect to Participation Points ESC Funds, a Member will

become vested in his/her Interest (“Vested Membership Interests”) if (a) he/she remains employed by Citadel through a specified date (the “Determination Date”) and he/she has satisfied, among other things, all of the certain applicable employment and post-employment obligations (including non-competition, non-solicitation, non-disclosure and notice obligations). Non-Participation Points ESC Funds may or may not provide for vesting provisions. An Eligible Employee that purchases an Interest in a non-Participation Points ESC Fund will be immediately vested in such Interest to the extent of such purchase.

12. With respect to a non-Participation Points ESC Fund that does not provide for vesting provisions, an Eligible Employee’s entire Interest may be subject to repurchase by the Managing Member and/or the imposition of different terms and conditions upon termination of such Eligible Employee’s employment by Citadel, as described in the Operating Agreement and/or offering documents of the relevant ESC Fund and/or in other written correspondence issued to such Eligible Employee. Upon any repurchase of an Eligible Employee’s Vested Membership Interests, the Managing Member will at a minimum pay to the Eligible Employee the lesser of (a) the amount actually paid by the Eligible Employee to acquire the Interest plus interest, less prior distributions and (b) the fair market value of the Interests determined at the time of repurchase by the Managing Member. The terms of any repurchase or cancellation of Interests will apply equally to an Eligible Employee and any Qualified Participant of such Eligible Employee.

13. The requested order would supersede the Prior Order to reflect the amendment of certain mandatory redemption terms of the Participation Points ESC Funds. A Member who remains employed by Citadel may make a request to defer redemption from the relevant Participation Points ESC Fund beyond the relevant Determination Date, subject to approval by Citadel. If a Member does not make such a request, or Citadel does not approve such request, that Member’s Interest will be mandatorily redeemed as soon as reasonably practicable following the relevant Determination Date.<sup>3</sup> Citadel

<sup>3</sup> In the event of such a mandatory redemption, subject to the availability of liquidity (including suspensions on withdrawals) in respect of the Citadel Third Party Funds in which the relevant Participation Points ESC Fund is invested, the balance of such Member’s capital account in such

will endeavor to treat Members consistently in making the determination to approve such requests. Such Vested Membership Interest may be redeemed as of any calendar quarter-end upon not less than seventy days' prior written notice or according to such other terms as may be described in such Participation Points ESC Fund's Operating Agreement and/or Offering Documents or election form, subject to the availability of liquidity (including suspensions on withdrawals) in respect of the Citadel Third Party Funds in which the relevant Participation Points ESC Fund is invested.

14. Subject to the terms of the applicable Fund Operating Agreement and/or offering documents, an ESC Fund will be permitted to enter into transactions involving (i) a Citadel Entity, (ii) any Member or person or entity affiliated with a Member or (iii) an investment fund or separate account, organized in part for the benefit of investors who are not Affiliates of Citadel and over which a Citadel Affiliate exercises investment discretion (a "Citadel Third Party Fund"). Prior to entering into any of these transactions, the Managing Member will make the findings required in Condition 1 below. A Citadel Entity (including the Managing Member) also may be compensated for providing services or financing from entities in which an ESC Fund (directly or indirectly) makes an investment, from competitors of such entities or from other unaffiliated persons or entities.

15. The investment objective of each ESC Fund will be set forth in the ESC Fund's offering documents. Each ESC Fund (directly or indirectly through its investments in Citadel Third Party Funds) may engage in various investment strategies implemented by Citadel in markets around the world.<sup>4</sup> An ESC Fund may invest directly in securities and similar investments (including, without limitation, exchange-traded funds, mutual funds and index funds) and/or may invest all or substantially all of its assets in Citadel Third Party Funds. An ESC Fund will not acquire any security issued by a registered investment company if, immediately after the acquisition, such ESC Fund will own

more than 3% of the outstanding voting stock of the registered investment company.

16. If the Managing Manager or a Citadel Entity makes a loan to an ESC Fund, the loan would bear interest at a rate no less favorable to the ESC Fund than the rate that could be obtainable in an arm's-length transaction. An Eligible Employee will not borrow from any person if the borrowing would cause any person not named in section 2(a)(13) of the Act to own outstanding securities of the ESC Fund (other than short-term paper). Any borrowing by an ESC Fund will be non-recourse to the Members.

#### Applicants' Legal Analysis

1. Section 6(b) of the Act provides, in part, that the Commission will exempt employees' securities companies from the provisions of the Act to the extent that the exemption is consistent with the protection of investors. Section 6(b) provides that the Commission will consider, in determining the provisions of the Act from which the employees' securities companies should be exempt, the company's form of organization and capital structure, the persons owning and controlling its securities, the price of the company's securities and the amount of any sales load, how the company's funds are invested, and the relationship between the company and the issuers of the securities in which it invests. Section 2(a)(13) defines an employees' securities company, in relevant part, as any investment company all of whose securities (other than short-term paper) are beneficially owned (a) By current or former employees, or persons on retainer, of one or more affiliated employers, (b) by immediate family members of such persons, or (c) by such employer or employers together with any of the persons in (a) or (b).

2. Section 7 of the Act generally prohibits investment companies that are not registered under section 8 of the Act from selling or redeeming their securities. Section 6(e) of the Act provides that, in connection with any order exempting an investment company from any provision of section 7, certain provisions of the Act, as specified by the Commission, will be applicable to the investment company and other persons dealing with the investment company as though the investment company were registered under the Act. Applicants request an order under sections 6(b) and 6(e) of the Act exempting the Applicants and any ESC Funds from all provisions of the Act, except section 9 and sections 36 through 53 and the rules and regulations

under those sections. With respect to sections 17 and 30 of the Act, and the rules and regulations thereunder, and rule 38a-1 under the Act, the exemption is limited as set forth in the application.

3. Section 17(a) generally prohibits any affiliated person of a registered investment company, or any affiliated person of an affiliated person, acting as principal, from knowingly selling or purchasing any security or other property to or from the investment company. Applicants request an exemption from section 17(a) to permit: (a) A Citadel Entity or a Citadel Third Party Fund (or any affiliated person of such Third Party Fund), acting as principal, to engage in any transaction directly or indirectly with any ESC Fund or any company controlled by such ESC Fund; (b) any ESC Fund to invest in or engage in any transaction with any Citadel Entity, or Citadel Third Party Fund, acting as principal, (i) in which such ESC Fund, any company controlled by such ESC Fund or any Citadel Entity or Citadel Third Party Fund has invested or will invest; or (ii) with which such ESC Fund, any company controlled by such ESC Fund or any Citadel Entity or Citadel Third Party Fund is or will otherwise become affiliated.

4. Applicants submit that an exemption from section 17(a) is consistent with the purposes of each ESC Fund and the protection of investors and is necessary to promote the basic purpose of such ESC Fund. Applicants state that the Members of each ESC Fund will be fully informed of the possible extent of such ESC Fund's dealings with Citadel and, as professionals with experience in financial services businesses, Members will be able to understand and evaluate the attendant risks. Applicants assert that the community of interest among the Members in each ESC Fund and Citadel is the best insurance against any risk of abuse.

5. Section 17(d) of the Act and rule 17d-1 under the Act prohibit any affiliated person of a registered investment company, or any affiliated person of such person, acting as principal, from participating in any joint enterprise or joint arrangement with the company unless authorized by the Commission. Applicants request relief to permit affiliated persons of each ESC Fund or affiliated persons of such persons to participate in, or effect any transaction in connection with, any joint enterprise or joint arrangement or profit-sharing plan in which an ESC Fund or a company controlled by such ESC Fund is a participant.

Participation Points ESC Fund relating to such redeemed Interest, as adjusted through the date of such redemption, will be distributed to such Member.

<sup>4</sup> Applicants are not requesting any exemption from any provision of the Act or any rule thereunder that may govern the eligibility of an ESC Fund to invest in an entity relying on section 3(c)(1) or 3(c)(7) of the Act or any such entity's status under the Act.

6. Applicants assert that compliance with section 17(d) would cause an ESC Fund to forego investment opportunities simply because a Member or any other affiliated person of the ESC Fund (or any affiliate of such a person) also had, or contemplated making, a similar investment. Applicants also submit that co-investment opportunities with Citadel are advantageous to Eligible Employees because (a) the resources of Citadel enable it to analyze investment opportunities to an extent that Eligible Employees would have neither the time nor resources to duplicate, (b) investments made by Citadel will not be generally available to investors even if the financial status of the Eligible Employees would enable them to otherwise participate in such opportunities and (c) Eligible Employees will be able to pool their resources in co-investments, thus achieving greater diversification of their individual portfolios. Applicants note that each ESC Fund will be primarily organized for the benefit of Eligible Employees as an incentive for them to remain with Citadel and for the generation and maintenance of goodwill through an investment in Citadel Third Party Funds. Applicants assert that the flexibility to structure co-investments and joint investments will not involve abuses of the type section 17(d) and rule 17d-1 were designed to prevent.

7. Side-by-side investments held by a Citadel Third Party Fund, or by a Citadel Entity in a transaction in which the Citadel investment was made pursuant to a contractual obligation to a Citadel Third Party Fund will not be subject to condition 3 below. Applicants note that Citadel is likely to invest its own capital in Citadel Third Party Fund investments and that such investments will be subject to substantially the same terms as those applicable to such Citadel Third Party Fund, except as otherwise disclosed in the offering documents and/or Operating Agreement of the relevant ESC Fund. In addition, applicants assert that the relationship of an ESC Fund to a Citadel Third Party Fund is fundamentally different from such ESC Fund's relationship to Citadel. Applicants contend that the focus of, and the rationale for, the protections contained in the requested relief are to protect the ESC Funds from any overreaching by Citadel in the employer/employee context, whereas the same concerns are not present with respect to the ESC Funds vis-à-vis the investors in a Citadel Third Party Fund.

8. Section 17(f) of the Act designates the entities that may act as investment company custodians, and rule 17f-1 under the Act imposes certain

requirements when the custodian is a member of a national securities exchange. Applicants request an exemption from section 17(f) and rule 17f-1 to permit a Citadel Entity to act as custodian without a written contract. Applicants also request an exemption from the rule 17f-1(b)(4) requirement that an independent accountant periodically verify the assets held by the custodian. Applicants state that, given the community of interest of all the parties involved and the existing requirement for an independent audit, compliance with the rule's requirement would be unnecessary. Each ESC Fund will otherwise comply with all the provisions of rule 17f-1.

9. Applicants also request an exemption from rule 17f-2 to permit the following exceptions from the requirements of rule 17f-2: (a) An ESC Fund's investments may be kept in the locked files of the Managing Member (or a Citadel Entity) for purposes of paragraph (b) of the rule; (b) for purposes of paragraph (d) of the rule, (i) employees of the Managing Member (or a Citadel Entity) will be deemed to be employees of the ESC Funds, (ii) officers or managers of the Managing Member of an ESC Fund (or a Citadel Entity) will be deemed to be officers of the ESC Fund, and (iii) the Managing Member will be deemed to be the board of directors of the ESC Fund; and (c) in place of the verification procedure under paragraph (f) of the rule, verification will be effected quarterly by two high level employees of the Managing Member (or another Citadel Entity). Applicants expect that most of their investments may be evidenced only by partnership agreements, participation agreements or similar documents, rather than by negotiable certificates that could be misappropriated. Applicants believe that these instruments are most suitably kept in the files of the Managing Member (or a Citadel Entity), where they can be referred to as necessary.

10. Section 17(g) of the Act and rule 17g-1 under the Act generally require the bonding of officers and employees of a registered investment company who have access to its securities or funds. Rule 17g-1 requires that a majority of directors who are not interested persons take certain actions and give certain approvals relating to fidelity bonding. Applicants request exemptive relief to permit the Managing Member, regardless of whether it is deemed an interested person of the ESC Funds, to take actions and make determinations set forth in the rule. Applicants state that the ESC Funds are unable to comply with Rule 17g-1 because the

ESC Funds will not have a board of directors and the Managing Member of the ESC Fund will be an interested person of the ESC Funds. Applicants also state that the ESC Funds will comply with all other requirements of rule 17g-1, except that the Applicants request an exemption from the requirements of paragraphs (g) and (h) of rule 17g-1 (relating to the filing of copies of fidelity bonds and related information with the Commission and relating to the provision of notices to the board of directors), and an exemption from the requirements of paragraph (j)(3) of rule 17g-1 that the ESCs comply with the fund governance standards defined in rule 0-1(a)(7).

11. Section 17(j) of the Act and paragraph (b) of rule 17j-1 under the Act make it unlawful for certain enumerated persons to engage in fraudulent or deceptive practices in connection with the purchase or sale of a security held or to be acquired by a registered investment company. Rule 17j-1 also requires that every registered investment company adopt a written code of ethics and that every access person of a registered investment company report personal securities transactions. Applicants request an exemption from the provisions of rule 17j-1, except for the anti-fraud provisions of paragraph (b), because they are unnecessary and burdensome as applied to the ESC Funds.

12. Applicants request an exemption from the requirements in sections 30(a), 30(b), and 30(e) of the Act, and the rules under those sections, that registered investment companies prepare and file with the Commission and mail to their shareholders certain periodic reports and financial statements. Applicants contend that the forms prescribed by the Commission for periodic reports have little relevance to an ESC Fund and would entail administrative and legal costs that outweigh any benefit to the Members of such ESC Fund. Applicants request exemptive relief to the extent necessary to permit each ESC Fund to report annually to its Members. Applicants also request an exemption from section 30(h) of the Act to the extent necessary to exempt the Managing Member of each ESC Fund, directors and officers of the Managing Member and any other persons who may be deemed to be members of an advisory board or an investment adviser (and affiliated persons thereof) of such ESC Fund from filing Forms 3, 4, and 5 under section 16 of the Exchange Act with respect to such ESC Fund. Applicants assert that, because there will be no trading market and the transfers of Interests will be severely

restricted, these filings are unnecessary for the protection of investors and burdensome to those required to make them.

13. Rule 38a-1 requires investment companies to adopt, implement and periodically review written policies and procedures reasonably designed to prevent violation of the federal securities laws and to appoint a chief compliance officer. Each ESC Fund will comply with rule 38a-1(a), (c) and (d), except that (a) because the ESC Funds do not have a board of directors, the Managing Member will fulfill the responsibilities assigned to a board of directors under the rule, (b) because the Managing Member does not have any disinterested members, approval by a majority of the disinterested board members required by rule 38a-1 will not be obtained, and (c) because the ESC Funds do not have any independent directors, the ESC Funds will comply with the requirement in rule 38a-1(a)(4)(iv) that the chief compliance officer meet with the independent directors by having the chief compliance officer meet with the Managing Member.

#### Applicants' Conditions

Applicants agree that any order granting the requested relief will be subject to the following conditions:

1. Each proposed transaction to which an ESC Fund is a party otherwise prohibited by section 17(a) or section 17(d) of the Act and rule 17d-1 under the Act (the "Section 17 Transactions") will be effected only if the Managing Member determines that: (a) The terms of the Section 17 Transaction, including the consideration to be paid or received, are fair and reasonable to the Members of the ESC Fund and do not involve overreaching of the ESC Fund or its Members on the part of any person concerned and (b) the Section 17 Transaction is consistent with the interests of the Members of the ESC Fund, the ESC Fund's organizational documents and the ESC Fund's reports to its Members.

In addition, the Managing Member will record and will preserve a description of all Section 17 Transactions, the Managing Member's findings, the information or materials upon which the findings are based and the basis for the findings. All such records will be maintained for the life of the ESC Fund and at least six years thereafter, and will be subject to examination by the Commission and its staff. Each ESC Fund will preserve the accounts, books and other documents required to be maintained in an easily

accessible place for at least the first two years.

2. The Managing Member will adopt, and periodically review and update, procedures designed to ensure that reasonable inquiry is made, prior to the consummation of any Section 17 Transaction, with respect to the possible involvement in the transaction of any affiliated person or promoter of or principal underwriter for any ESC Fund, or any affiliated person of such affiliated person, promoter or principal underwriter.

3. The Managing Member of each ESC Fund will not invest the funds of the ESC Fund in any investment in which a "Co-Investor" (as defined below) has acquired or proposes to acquire the same class of securities of the same issuer and where the investment involves a joint enterprise or other joint arrangement within the meaning of rule 17d-1 in which the ESC Fund and the Co-Investor are participants, unless any such Co-Investor, prior to disposing of all or part of its investment: Agrees to (a) give the Managing Member sufficient, but not less than one day's notice of its intent to dispose of its investment; and (b) refrain from disposing of its investment unless the ESC Fund has the opportunity to dispose of its investment prior to or concurrently with, and on the same terms as, and *pro rata* with, the Co-Investor. The term "Co-Investor" with respect to any ESC Fund means any person who is: (a) An "affiliated person" (as defined in section 2(a)(3) of the Act) of the ESC Fund (other than a Citadel Third Party Fund); (b) a Citadel Entity; (c) an officer, director or employee of a Citadel Entity; or (d) an entity (other than a Citadel Third Party Fund) in which a Managing Member or an Affiliate of Citadel acts as a managing member or in a similar capacity so as to control the sale or other disposition of the entity's investments. The restrictions contained in this condition, however, shall not be deemed to limit or prevent the disposition of an investment by a Co-Investor: (a) To its direct or indirect wholly-owned subsidiary, to any company (a "Parent") of which the Co-Investor is a direct or indirect wholly-owned subsidiary or to a direct or indirect wholly-owned subsidiary of such Parent; (b) to immediate family members of the Co-Investor or a trust or other investment vehicle established for any such family member; or (c) when the investment is comprised of securities that are (i) listed on any exchange registered as a national exchange under section 6 of the Exchange Act; (ii) NMS stocks, pursuant to section 11A(a)(2) of the Exchange Act

and rule 600(a) of Regulation NMS thereunder; (iii) government securities as defined in section 2(a)(16) of the Act, or (iv) listed or traded on any foreign securities exchange or board of trade that satisfies regulatory requirements under the law of the jurisdiction in which such foreign securities exchange or board of trade is organized similar to those that apply to a national securities exchange or a national market system for securities.

4. Each ESC Fund and its Managing Member will maintain and preserve, for the life of such ESC Fund and at least six years thereafter, such accounts, books, and other documents constituting the record forming the basis for the audited financial statements that are to be provided to the Members of such ESC Fund, and each annual report of such ESC Fund required to be sent to such Members, and agree that all such records will be subject to examination by the Commission and its staff. Each ESC Fund will preserve the accounts, books and other documents required to be maintained in an easily accessible place for the first two years after the life of such ESC Fund.

5. The Managing Member of each ESC Fund will send to each person who was a Member having an Interest in the ESC Fund at any time during the fiscal year then ended (except for the first fiscal year of operations of an ESC Fund if no investment activities took place in such fiscal year), audited financial statements with respect to those ESC Funds in which the Member held Interests. At the end of each fiscal year, the Managing Member will make a valuation or have a valuation made of all of the assets of the ESC Fund as of such fiscal year end in a manner consistent with customary practice with respect to the valuation of assets of the kind held by the ESC Fund. In addition, within 180 days after the end of each fiscal year of each ESC Fund or as soon as practicable thereafter, the Managing Member will send a report to each person who was a Member at any time during the fiscal year then ended, setting forth such tax information as shall be necessary for the preparation by the Member of his, her or its U.S. federal and state income tax returns and a report of the investment activities of the ESC Fund during that fiscal year.

6. If an ESC Fund makes purchases from, or sales to, an entity affiliated with the ESC Fund by reason of an officer, director or employee of Citadel (a) serving as an officer, director, managing member, general partner or investment adviser of the entity, or (b) having a 5% or more investment in the entity, such individual will not participate in the ESC Fund's

determination of whether or not to effect the purchase or sale.

For the Commission, by the Division of Investment Management, under delegated authority.

**Elizabeth M. Murphy,**  
Secretary.

[FR Doc. 2013-16537 Filed 7-9-13; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 30590; 812-14096]

### BofA Funds Series Trust, et al., Notice of Application

July 3, 2013.

**AGENCY:** Securities and Exchange Commission (“Commission”).

**ACTION:** Notice of application for an order under sections 6(c) and 17(b) of the Investment Company Act of 1940 (the “Act”) for an exemption from section 17(a) of the Act.

**APPLICANTS:** BofA Advisors, LLC (together with any successor,<sup>1</sup> the “Advisor”),<sup>2</sup> BofA Funds Series Trust (“Trust” and each series of the Trust, a “Current Fund,” and collectively, the “Current Funds”),<sup>3</sup> any existing or future registered management investment companies and their series that are advised or subadvised by the Advisor (“Future Funds,” Future Funds and Current Funds are collectively the “Funds”),<sup>4</sup> and Merrill Lynch, Pierce,

<sup>1</sup> The term “successor” is limited to an entity that results from a reorganization into another jurisdiction, a change in the type of business organization or a combination, consolidation or reorganization of any of the entities referred to above, including any such combination, consolidation or reorganization effected through the use of a “shell” entity controlled by any of the foregoing entities, provided that such combination, consolidation or reorganization does not result in a change of direct or indirect control of such entity.

<sup>2</sup> For purposes of the relief sought by the Applicants, the term “Advisor” also includes any other existing or future investment adviser registered under the Investment Advisers Act of 1940 (“Advisers Act”) which controls, is controlled by, or is under common control with (as defined in Section 2(a)(9) of the Act) the Advisor. Any Advisor that currently intends to rely on the requested order is named as an Applicant in this Application. Any other Advisor that relies on the order in the future will comply with the terms and conditions of the application.

<sup>3</sup> The Trust offers eleven series: BofA Cash Reserves, BofA Money Market Reserves, BofA Treasury Reserves, BofA Government Reserves, BofA Government Plus Reserves, BofA Tax-Exempt Reserves, BofA Municipal Reserves, BofA California Tax-Exempt Reserves, BofA New York Tax-Exempt Reserves, BofA Connecticut Municipal Reserves and BofA Massachusetts Municipal Reserves.

<sup>4</sup> Any Fund that currently intends to rely on the requested order is named as an applicant in the

Fenner & Smith Incorporated (together with any successor, “MLPF&S”). All the Funds are money market funds subject to rule 2a-7 under the Act.

**SUMMARY OF APPLICATION:** Applicants request an order to permit the Funds to engage in principal transactions in certain tax-exempt money market instruments with MLPF&S.

**FILING DATES:** The application was filed on November 19, 2012, and amended on May 14, 2013.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the application 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 July 29, 2013, 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 may request notification of a hearing by writing to the Commission’s Secretary.

**ADDRESSES:** Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090. Applicants: c/o Robert M. Kurucz, Esq., Goodwin Procter LLP, 901 New York Avenue NW., Washington, DC 20001.

**FOR FURTHER INFORMATION CONTACT:** Emerson S. Davis, Senior Counsel, (202) 551-6868 or Daniele Marchesani, Branch Chief, (202) 551-6821 (Division of Investment Management, Exemptive Applications Office).

**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 Trust, an open-end management company registered under the Act, is organized as a Delaware statutory trust and is comprised of eleven series that are Funds. The Advisor, an investment adviser registered under the Advisers Act, is a direct wholly-owned subsidiary of BofA Global Capital Management Group, LLC,

application. Any Future Fund that relies on the order in the future will comply with the terms and conditions of the application.

which is a direct wholly-owned subsidiary of Bank of America, which in turn is an indirect, wholly-owned banking subsidiary of Bank of America Corporation (“BAC”). Each Fund has an investment advisory agreement with the Advisor pursuant to which the Advisor provides investment advisory and management services. MLPF&S, a broker-dealer registered under the Securities Exchange Act of 1934, provides retail brokerage customer services and operates as a full service investment banking firm with a broad range of investment banking services, among which are the public underwriting and private placement of equity and debt securities, including a wide variety of Tax-Exempt Money Market Instruments (as defined below). MLPF&S is a wholly-owned subsidiary of Merrill Lynch & Co. (“ML&Co”), which is a wholly-owned subsidiary of BAC.

2. Applicants state that the Advisor and MLPF&S are functionally independent of each other and operate as completely separate entities. While MLPF&S and the Advisor could be deemed second-tier affiliates through their relationship with BAC, each entity has its own separate directors, officers and employees, is separately capitalized, maintains its own books and records and operates on different sides of walls of separation with respect to the Funds and Tax-Exempt Money Market Instruments. The Advisor also maintains offices physically separate from MLPF&S.

3. Investment decisions for the Funds are determined solely by the Advisor. The portfolio managers and other employees that are responsible for the investment of the Funds are employed solely by the Advisor, and not MLPF&S, and have lines of reporting responsibility solely within the Advisor. The compensation of persons employed by the Advisor will not depend on the volume or nature of trades with MLPF&S, except to the extent that such trades may affect the profits and losses of BAC and its affiliates as a whole and such trades affect the investment performance of a Fund.

4. As used in the application, the term “Tax-Exempt Money Market Instruments” refers to tax-exempt securities which are eligible for purchase by money market funds under rule 2a-7, including conventional municipal notes, tax-exempt commercial paper, and variable rate demand bonds. The term “Tax-Exempt Money Market Instruments” does not include “Government Securities” as defined under Section 2(a)(16) of the Investment Company Act. Each Fund is

able to invest in Tax-Exempt Money Market Instruments under its investment objectives and policies.

5. Trading in Tax-Exempt Money Market Instruments generally takes place in over-the-counter markets consisting of groups of dealers who are primarily major securities firms or large banks. The tax-exempt money market consists of an extensive telephonic and electronic communications network among buyers and sellers, which generally precludes being able to obtain a single market price for a given instrument at any given time.

Applicants state that the money market for Tax-Exempt Money Market Instruments tends to be somewhat segmented. The markets for the different types of instruments will vary in terms of price, volatility, liquidity and availability. With respect to any given type of security or instrument, there may be only a few dealers who can be expected to have the security in inventory and be in a position to quote a purchase and sale price that is the best price. Applicants also state that different dealers may quote different prices with respect to the same type of instrument because of differing outlooks on future yields, to adjust their inventory or because of competitive pressure to meet other dealers' quotes.

6. MLPF&S is one of the world's largest dealers in Tax-Exempt Money Market Instruments, being a major participant in both the primary new issue, and in the secondary dealer, tax-exempt money markets. During the period January 1, 2013, to April 6, 2013, MLPF&S underwrote approximately \$547 million in new issues of municipal notes, acting as senior manager, and its market share in the municipal 2013 new issue note market as of April 6, 2013, was estimated to be approximately 11.4%, acting as lead manager. At April 10, 2013, MLPF&S acted as dealer for tax-exempt commercial papers programs in an authorized amount of approximately \$20.5 billion. MLPF&S's market share in the tax-exempt commercial paper market was estimated by the Advisor to be 18.4% as of December 31, 2012. MLPF&S estimates that its market share in the new issue market for variable rate demand bonds was 16.5% for the period January 1, 2013, through April 6, 2013. During the period January 1, 2013, to April 11, 2013, MLPF&S underwrote approximately \$265.1 million in new issues of variable rate demand bonds as senior manager. MLPF&S acted as remarketing agent for approximately \$43.4 billion of variable rate demand bonds as of March 31, 2013, with a market share of approximately 18.8%.

MLPF&S is the remarketing agent for approximately \$3.5 billion of put bonds outstanding as of April 11, 2013.

7. Subject to the general supervision of the board of trustees of the Funds ("Board"), the Advisor is responsible for portfolio investment decisions and for the placement of portfolio transactions. The Funds have no obligation to deal with any dealer or group of dealers in the execution of their portfolio transactions. When placing orders, the Advisor must attempt to obtain the best net price and the most favorable execution of its orders. In doing so, it takes into account such factors as price, the size, type and difficulty of the transaction involved and the dealer's general execution and operational facilities. The transaction costs of the Funds with respect to Tax-Exempt Money Market Instruments consist primarily of dealer or underwriter spreads. Spreads for Tax-Exempt Money Market Instruments typically are not greater than 5 basis points (0.05%), but are subject to variations based on the type of instruments or the occurrence of turbulent market conditions.

#### Applicants' Legal Analysis

1. Applicants request an order pursuant to sections 6(c) and 17(b) of the Act exempting certain transactions from the provisions of section 17(a) of the Act to permit MLPF&S, acting as principal, to sell or purchase Tax-Exempt Money Market Instruments to or from the Funds, subject to the conditions set forth below.

2. Section 17(a) of the Act generally prohibits an affiliated person or principal underwriter of a registered investment company, or any affiliated person of that person ("second-tier affiliate"), acting as principal, from selling to or purchasing from the registered company, or any company controlled by the registered company, any security or other property. Because BAC owns ML&Co, which in turn, owns MLPF&S, ML&Co and MLPF&S could both be deemed to be "affiliated persons" of the Advisor, in which case the Funds and MLPF&S could be deemed second-tier affiliates, and the Funds could be prohibited from conducting portfolio transactions with MLPF&S in transactions in which MLPF&S acts as principal.

3. Section 17(b) of the Act provides that the Commission, upon application, may exempt a transaction from the provisions of section 17(a) if evidence establishes that the terms of the proposed transaction, including the consideration to be paid, are reasonable and fair, and do not involve overreaching on the part of any person

concerned, and that the proposed transaction is consistent with the policy of the registered investment company concerned and with the general purposes of the Act. Section 6(c) provides that the Commission may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of the Act or of any rule or regulation thereunder, if and to the extent that 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.

4. Applicants note the following in support of the requested relief:

(a) With over \$10.4 billion invested in Tax-Exempt Money Market Instruments, the Funds have an ongoing need for access to significant quantities of high quality Tax-Exempt Money Market Instruments. The Funds and the Advisor believe that access to a major dealer as MLPF&S in this market increases the Funds' ability to obtain suitable portfolio securities.

(b) The policy of the Funds, which is to invest in securities with short maturities, combined with the active portfolio management techniques employed by the Advisor, results in a high level of portfolio activity and the need to make numerous purchases and sales of Tax-Exempt Money Market Instruments. This high level of portfolio activity emphasizes the importance of increasing opportunities to obtain suitable portfolio securities and best price and execution.

(c) The tax-exempt money market is highly competitive and maintaining a dealer as prominent as MLPF&S in the pool of dealers with which the Funds could conduct principal transactions may provide the Funds with improved opportunities to purchase and sell Tax-Exempt Money Market Instruments, including those not available from any other source.

(d) MLPF&S is such a major participant in the tax-exempt money market that removing constraints on the ability of the Funds to conduct principal transactions with MLPF&S would enhance the Funds' ability to obtain best price and execution even when the Funds trade with unaffiliated dealers.

5. Applicants believe that the requested order will provide the Funds with fuller access to the primary and secondary market for Tax-Exempt Money Market Instruments to better ensure the availability of suitable portfolio securities and best price and execution of portfolio trades. The Funds

submit that such transactions are consistent with the policies of the Funds as recited in their registration statements and reports filed under the Investment Company Act. The Applicants also submit that the procedures to be followed with respect to principal transactions with MLPF&S are structured in such a way as to ensure that the terms of such transactions will be in all instances reasonable and fair and will not involve overreaching on the part of any person concerned and that such exemption is 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' Conditions

Applicants agree that any order granting the requested relief will be subject to the following conditions:<sup>5</sup>

1. The exemption shall be applicable to principal transactions in the secondary market and primary or secondary fixed and variable rate dealer offerings not made pursuant to underwriting syndicates. Principal purchase or sale transactions pursuant to the requested order will be conducted only in Tax-Exempt Money Market Instruments that are *First Tier Securities*. Notwithstanding the foregoing, if a Fund purchases a Tax-Exempt Money Market Instrument meeting the above requirements from MLPF&S and, subsequent to such purchase, the security becomes no longer a *First Tier Security*, the Fund may sell the security to MLPF&S in a manner consistent with the requirements of Rule 2a-7(c)(7)(i)(B). Additionally:

(a) The exemption shall not apply to an *Unrated Security*.

(b) The exemption shall not apply to any purchase or sale of any security issued by ML&Co., BAC or any affiliated person of ML&Co. or BAC or to any security subject to a *Demand Feature* or *Guarantee* issued by ML&Co., BAC or any affiliated person of ML&Co. or BAC. For purposes of this requirement, ML&Co., BAC or any affiliated person of ML&Co. or BAC will not be considered to be the issuer of a *Demand Feature* or *Guarantee* solely by reason of the fact that MLPF&S or an affiliate thereof serves as a remarketing agent for a Tax-Exempt Money Market Instrument.

2. The Advisor (unless the Board decides that the Fund should make these determinations) will determine with respect to each principal

transaction conducted by a Fund pursuant to the order, based upon the information reasonably available to the Funds and the Advisor, that the price available from MLPF&S for each Tax-Exempt Money Market Instrument other than a variable rate demand bond is at least as favorable to the Fund as the prices obtained from two other dealers in connection with securities falling within the same category of instrument, quality and maturity (but not necessarily the identical security or issuer) ("price test"). In the case of variable rate demand bonds, for which dealer prices are not ordinarily available, the Funds will only undertake purchases and sales where the rate of interest to be earned from the variable rate demand bond in a purchase, or price to be received in a sale, is at least equal to that of variable rate demand bonds of comparable quality from other dealers. Neither ML&Co., BAC nor any other affiliate thereof (other than the Advisor) will have any involvement with respect to proposed transactions between the Funds and MLPF&S and, except to the extent set forth in Condition 6(e) below, will not attempt to influence or control in any way the placing by the Funds or the Advisor of orders with MLPF&S.

3. Before any principal transaction may be conducted pursuant to the order, the Advisor or a Fund must obtain such information as it deems reasonably necessary to determine that the price test (as defined in Condition (2) above) has been satisfied. In the case of each purchase or sale of a Tax-Exempt Money Market Instrument other than a variable rate demand bond, the Advisor or a Fund must make and document a good faith determination with respect to compliance with the price test based on current price information obtained through the contemporaneous solicitation of bona fide prices in connection with securities falling within the same category of instrument, quality and maturity (but not necessarily the identical security or issuer). With respect to variable rate demand bonds, information on the rate of interest or price of bonds of comparable quality shall be solicited during the same trading day. With respect to prospective purchases of securities by a Fund, the dealer firms from which prices or interest rates are solicited must be those who have securities of the categories and the types desired in their inventories, or who otherwise have access to Tax-Exempt Money Market Instruments of the categories and types desired, and who are in a position to quote favorable

prices or interest rates with respect thereto. With respect to the prospective sale of securities by a Fund, these dealer firms must be those who, in the experience of the Funds and the Advisor, are in a position to quote favorable prices.

4. Principal transactions in Tax-Exempt Money Market Instruments conducted by a Fund pursuant to the order, and principal transactions in taxable money market instruments other than repurchase agreements conducted by a Fund pursuant to the Taxable Order, shall be limited to no more than (a) 25% of the direct or indirect purchases or 25% of the direct or indirect sales, as the case may be, conducted by that Fund of *Eligible Securities* other than repurchase agreements and (b) 25% of the purchases or sales, as the case may be, by MLPF&S of *Eligible Securities* other than repurchase agreements. Principal transactions in Tax-Exempt Money Market Instruments conducted by each Fund pursuant to the order, shall be limited to no more than an aggregate of 20% of the direct or indirect purchases and 20% of the direct or indirect sales of Tax-Exempt Money Market Instruments by that Fund. These limits shall be measured on an annual basis (the fiscal year of each Fund) and shall be computed using the dollar volume of transactions.

5. MLPF&S's dealer spread regarding any transaction with the Funds pursuant to the order will be no greater than its customary dealer spread on similar transactions (with unaffiliated parties) of a similar size during a comparable time period. Its customary dealer spread also will be consistent with the average or standard spread charged by dealers in Tax-Exempt Money Market Instruments of a similar type and transaction size.

6. The Advisor, on the one hand, and MLPF&S, on the other, will operate on different sides of appropriate walls of separation with respect to the Funds and the Tax-Exempt Money Market Instruments. The walls of separation will include all of the following characteristics, and such others that MLPF&S and the Advisor consider reasonable to facilitate the factual independence of the Advisor from MLPF&S:

(a) The Advisor will maintain offices physically separate from those of MLPF&S.

(b) The compensation of persons assigned to the Advisor (*i.e.*, executive, administrative or investment personnel) will not depend on the volume or nature of trades effected by the Advisor for the Funds with MLPF&S under the

<sup>5</sup> Italicized terms are defined as set forth in paragraph (a) of rule 2a-7 under the Act.

exemption, except to the extent that such trades may affect the profits and losses of BAC and its affiliates as a whole or to the extent that such trades affect the investment performance of a Fund.

(c) MLPF&S will not compensate the Advisor based upon its profits or losses on transactions conducted pursuant to the exemption, provided that the allocation of the profits by BAC to its shareholders and the determination of general firm-wide compensation of officers and employees, will be unaffected by this undertaking.

(d) Personnel employed by the Advisor's investment advisory operations on behalf of the Funds will be exclusively devoted to the investment advisory businesses and affairs of the Advisor and the businesses of its affiliates (other than MLPF&S), and have lines of reporting solely within the Advisor or its affiliates (other than MLPF&S). The personnel assigned to the Advisor's investment advisory operations that are also involved with the business of other affiliates have absolutely no function or responsibility with respect to MLPF&S.

(e) Personnel assigned to MLPF&S will not participate in the decision-making process for or otherwise seek to influence the Advisor other than in the normal course of sales and dealer activities of the same nature as are simultaneously being carried out with respect to nonaffiliated institutional clients. The Advisor, on the one hand, and MLPF&S, on the other, may nonetheless maintain affiliations other than with respect to the Funds, and in addition with respect to the Funds as follows:

(i) The Advisor's personnel may rely on research, including credit analysis and reports prepared internally by various subsidiaries and divisions of MLPF&S.

(ii) Certain senior executives of BAC with responsibility for overseeing operations of various divisions, subsidiaries and affiliates of BAC are not precluded from exercising those functions over the Advisor because they oversee MLPF&S, as well; provided that such persons shall not have any involvement with respect to proposed transactions pursuant to the exemption and will not in any way attempt to influence or control the placing by the Funds or the Advisor of orders in respect of *Eligible Securities* with MLPF&S.

7. The Funds and the Advisor will maintain such records with respect to those transactions conducted pursuant to the exemption as may be necessary to confirm compliance with the conditions

to the requested relief. To this end, each Fund shall maintain the following:

(a) An itemized daily record of all purchases and sales of securities pursuant to the exemption, showing for each transaction the following: (i) the name and quantity of securities; (ii) the unit purchase or sale price; (iii) the time and date of the transaction; and (iv) whether the security was a *First Tier Security*. For each transaction (other than variable rate demand bonds), these records shall document two quotations received from other dealers for securities falling within the same category of instrument, quality and maturity; including the following: (i) the names of the dealers; (ii) the names of the securities; (iii) the prices quoted; (iv) the times and dates the quotations were received; and (v) whether such securities were *First Tier Securities*. In the case of variable rate demand bonds, the Fund shall maintain the same records except that the rates of return quoted will be substituted for the prices quoted.

(b) Records sufficient to verify compliance with the volume limitations contained in Condition (4) above. MLPF&S will provide the Funds with all records and information necessary to implement this requirement.

The records required by this Condition (7) will be maintained and preserved in the same manner as records required under Rule 31a-1(b)(1) under the Investment Company Act.

8. The compliance departments of MLPF&S and the Advisor will prepare and administer guidelines, which will be reviewed by the legal departments of MLPF&S and the Advisor, for personnel of MLPF&S and the Advisor, respectively, to make certain that transactions conducted pursuant to the order comply with the conditions set forth in the order and that the parties generally maintain arm's-length relationships. In the training of MLPF&S's personnel, particular emphasis will be placed upon the fact that the Funds are to receive rates as favorable as other institutional purchasers buying the same quantities. The compliance departments will periodically monitor the activities of MLPF&S and the Advisor to make certain that the conditions set forth in the order are adhered to.

9. The audit committee of the Funds or another committee, which is comprised of Independent Trustees (as defined below) (the "Audit Committee"), will approve, periodically review, and update as necessary, guidelines for the Funds and the Advisor that are reasonably designed to

make certain that the transactions conducted pursuant to the exemption comply with the conditions set forth herein and that the above procedures are followed in all respects. The Audit Committee will periodically monitor the activities of the Funds and the Advisor in this regard to ensure that these goals are being accomplished.

10. The Board, including a majority of the members of the Board that are not "interested persons" as defined in section 2(a)(9) of the Act ("Independent Trustees"), will have approved each Fund's participation in transactions conducted pursuant to the exemption and determined that such participation by the Fund is in the best interests of the Fund and its shareholders. The minutes of the meeting of the Board at which this approval was given must reflect in detail the reasons for the Board's determination. The Board will review no less frequently than annually each Fund's participation in transactions conducted pursuant to the exemption during the prior year and determine whether the Fund's participation in such transactions continues to be in the best interests of the Fund and its shareholders. Such review will include (but not be limited to) (a) a comparison of the volume of transactions in each type of security conducted pursuant to the exemption to the market presence of MLPF&S in the market for that type of security, which market data may be based on good faith estimates to the extent that current formal data is not reasonably available, and (b) a determination that the Funds are maintaining appropriate trading relationships with other sources for each type of security to ensure that there are appropriate sources for the quotations required by Condition 3. The minutes of the meetings of the Board at which these determinations are made will reflect in detail the reasons for the Board's determinations.

For the Commission, by the Division of Investment Management, under delegated authority.

**Elizabeth M. Murphy,**  
Secretary.

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**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-69935; File No. SR-BYX-2013-23]

### Self-Regulatory Organizations; BATS Y-Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Impose Fees for Market Data

July 3, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on June 26, 2013, BATS Y-Exchange, Inc. (“BYX” or the “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 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 filed with the Commission a proposed rule change to amend its fee schedule applicable to Exchange Members<sup>3</sup> and other market data recipients to assess market data fees for internal and external distribution of the BYX PITCH (including both TCP PITCH and Multicast PITCH), BYX TOP, and BYX Last Sale Feed data feed products (PITCH, TOP and Last Sale Feed collectively referred to in this proposal as the “Data Feeds”). Although changes to the fee schedule pursuant to this proposal are effective upon filing, the Exchange will implement the proposed revised fees on July 1, 2013.

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 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 the proposed rule change is to amend the BYX fee schedule with respect to the fees for the BYX PITCH (including both TCP PITCH and Multicast PITCH), BYX TOP and BYX Last Sale Feed data products. For BYX PITCH, data recipients would pay a single fee, regardless if the data recipient receives BYX TCP PITCH, BYX Multicast PITCH, or both. The Exchange’s other data products will continue to be offered free of charge. Below is a description of each of the Data Feeds, as well as a brief description of the other data products offered by the Exchange that are impacted by this proposal.

###### (i) TCP PITCH

The BYX TCP PITCH data feed provides Exchange data recipients with depth of book quotations and execution information. The PITCH feeds offered by BYX (including Multicast PITCH) are the data feeds through which Exchange data recipients can receive full, real-time quotation and execution information. Each PITCH message reflects the addition, deletion or execution of an order in the System.<sup>4</sup> TCP PITCH is the data feed used by Exchange data recipients to receive BYX PITCH information via a TCP/IP connection.

###### (ii) Multicast PITCH

The BYX Multicast PITCH data feed, like TCP PITCH, offers depth of book quotations and execution information, however, unlike TCP PITCH, this data feed is transmitted in a manner that can be processed more efficiently by recipients. This is achieved by using binary messages. BYX offers both WAN-shaped and Gig-shaped versions of the Multicast feed. Exchange data recipients may choose one or more Multicast

PITCH feed options depending on their location and connectivity to BYX.

###### (iii) TOP

The BYX TOP data feed offers top of book quotations and last sale execution information. By only providing top of book quotations and last sale information, TOP offers data recipients a significant reduction in required bandwidth and processing when compared to BYX’s standard TCP PITCH data feed. The quotations made available via TOP provide an aggregated size and do not indicate the size or number of individual orders at the best bid or ask.

###### (iv) Last Sale Feed

The BYX Last Sale Feed offers real-time, intraday trade information, including price, volume and time of executions. Because quotes are not shown, the BYX Last Sale Feed results in much less data than other BYX data feeds and requires less technology development for data recipients.

###### (v) Other BYX Data Feeds

The Exchange will continue to offer certain other market data products to Members and other market data recipients free of charge. These data products include (i) Multicast Latency Feed, which offers real-time latency information; (ii) DROP, which contains order execution and other information (e.g., modifications and cancellations) specific to the Exchange activity of one or more Users; and (iii) BYX Historical Data (PITCH, TOP and Last Sale Feed), which offers up to three months of data on a T+1 basis available via download from the BYX Web site or additional data beyond three months available via an external hard drive.

Upon the Exchange’s initial offering of the BYX PITCH (including both TCP PITCH and Multicast PITCH) and BYX TOP data products, such services were provided at no cost. In SR-BYX-2011-012, the Exchange stated that “should the Exchange determine to charge fees associated with [BYX PITCH (including both TCP PITCH and Multicast PITCH) and BYX TOP], the Exchange will submit a proposed rule change to the Commission in order to implement those fees.”<sup>5</sup> Although the Exchange has not previously made a BYX Last Sale Feed available to market data recipients, the Exchange recently filed a rule change with the Commission to add the BYX Last Sale Feed data product to the list of data products made available

<sup>4</sup> As defined in BYX Rule 1.5(aa), the term “System” means “the electronic communications and trading facility designated by the Board through which securities orders of Users are consolidated for ranking, execution and, when applicable, routing away.” As defined in BYX Rule 1.5(cc), the term “User” means “any Member or Sponsored Participant who is authorized to obtain access to the [Exchange’s] System pursuant to Rule 11.3.”

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> A Member is any registered broker or dealer that has been admitted to membership in the Exchange.

<sup>5</sup> Securities Exchange Act Release No. 34-64444 (May 9, 2011) 76 FR 28115 (May 13, 2011) (File No. SR-BYX-2011-012).

by BYX, as set forth in Rule 11.22,<sup>6</sup> and is proposing to charge a fee for such data feed through this proposal.

This proposal is designed to implement fees for the receipt of PITCH (including both TCP PITCH and Multicast PITCH), TOP and Last Sale Feed data products.

The proposed amendment to the BYX fee schedule codifies such fees associated with the receipt of PITCH (including both TCP PITCH and Multicast PITCH), TOP and Last Sale Feed. The Exchange, like other market centers and other data providers, intends to assess fees for individuals and entities that receive real-time market data directly or indirectly and act as either internal or external distributors of such market data.

A “Data Recipient” of Exchange data is any entity that receives a Data Feed directly from the Exchange or indirectly through another entity and then distributes such data internally (within that entity) to “Internal Subscribers” or externally (outside that entity) to “External Subscribers” or “Data Feed Subscribers.” An “Internal Subscriber” is any end-user of the Exchange data affiliated with the Data Recipient where the Data Recipient can substantially control the Exchange data for purpose of reporting usage or qualification of the end-user. An “External Subscriber” is any end-user of the Exchange data not affiliated with the Data Recipient where the Data Recipient can substantially control the Exchange data for purpose of reporting usage or qualification of the end-user. A “Data Feed Subscriber” is any end-user of the Exchange data outside of the Data Recipient that receives the Exchange data from a Data Recipient for which the Data Recipient cannot substantially control the Exchange data for the purpose of reporting usage or qualification of the end-user.

All Data Recipients and Data Feed Subscribers must execute a BATS Global Markets, Inc. Data Agreement with BATS Global Markets, Inc., acting on behalf of itself and the Exchange, and, as a result, would be charged the applicable monthly access fee described below. All External Subscribers must execute a BATS Global Markets, Inc. Subscriber Agreement or equivalent with the Data Recipient that is distributing the Exchange data to such External Subscriber; however, neither External Subscribers nor Internal Subscribers would be charged the

monthly access fee described below for the receipt of such data.

Data Recipients (including Data Feed Subscribers) would be charged a separate monthly access fee to access: (i) The BYX PITCH data product; (ii) the BYX TOP data product; and/or (iii) the BYX Last Sale Feed data product. The amount of the monthly access fees would depend on whether the Data Recipient is distributing the Exchange data internally or externally. Data Recipients distributing the Exchange data internally are proposed to be charged \$500 per month for access to the BYX PITCH data product, \$500 per month for access to the BYX TOP data product, and \$500 per month for access to the BYX Last Sale Feed data product. Data Recipients distributing the Exchange data externally are proposed to be charged \$2,500 per month for access to the BYX PITCH data product, \$2,500 per month for access to the BYX TOP data product, and \$2,500 for access to the BYX Last Sale Feed data product. The fee paid by a Data Recipient distributing the Exchange data externally includes the fee for distributing the Exchange data internally and thus permits a Data Recipient distributing the Exchange data externally to also provide the data internally (*i.e.*, to users within their own organization) for a single access fee. The Exchange does not propose to charge Data Recipients a per user fee for internal or external distribution of Exchange Data.

The Exchange will use commercially reasonable efforts to provide at least 60 days advance notice to Data Recipients (delivered via email and posted to BYX’ Web site) of any changes to fees for the Exchange data, provided, however, that such notice shall be not less than 30 days prior to the effectiveness of the change. Receipt or use of the Exchange data after the applicable notice period will constitute acceptance of such fees.

Data Recipients will only pay one access fee, regardless of the number of locations or users to which the Data Feeds are received or distributed. In addition, neither Data Recipients nor their end-users will be charged per-user device fees when used to receive the Data Feeds, nor will they be charged per-user display fees when used to present the Data Feeds.

If a Data Recipient desires to have one or more of its affiliates<sup>7</sup> be bound by the

terms and conditions of the BATS Global Markets, Inc. Data Agreement, the Data Recipient may submit a list of any such affiliate(s) to BATS Global Markets, Inc. Including affiliates under the same data agreement would entitle any such affiliate to access and use data from the Exchange for no additional fee (assuming either (i) the Data Recipient and the affiliate each are distributing the data internally, or (ii) the Data Recipient is distributing the data externally and the affiliate is distributing the data either internally or externally). One or more of the entities (each a “Connected Entity”) that is part of the group comprised of the Data Recipient and the affiliates included under the same agreement (collectively, the “Affiliate Group”) is permitted to own connectivity directly with BYX. Further, any member of the Affiliate Group that, in addition to receiving Exchange data directly from BYX, also receives uncontrolled Exchange data indirectly from another Data Recipient (in addition to the Connected Entity) is not required to execute a separate data agreement; rather, that entity is bound by the same data agreement executed by the applicable member of the Affiliate Group. Lastly, if a Data Recipient is receiving Exchange data from (i) multiple third-party distributors or (ii) from one or more third-party distributors and the Exchange, the Data Recipient would only be required to pay one access fee—either the internal distribution access fee or the external distribution access fee—depending on whether the Data Recipient is distributing the Exchange data internally or externally.

The Exchange intends to implement the proposed fees on July 1, 2013.

## 2. Statutory Basis

The Exchange believes that the rule change proposed in this submission 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(b) of the Act.<sup>8</sup> Specifically, the Exchange believes that the proposed change is consistent with Section 6(b)(4) and 6(b)(5) of the Act,<sup>9</sup> because it provides an equitable allocation of reasonable fees among its Members and other recipients of Exchange data and is not designed to permit unfair discrimination between them. The Exchange believes that its proposed fees

through the ownership of voting securities, by contract, or otherwise.

<sup>8</sup> 15 U.S.C. 78f(b).

<sup>9</sup> 15 U.S.C. 78f(b)(4) and (5).

<sup>6</sup> See SR-BYX-2013-022, filed June 24, 2013, available at: [http://cdn.batstrading.com/resources/regulation/rule\\_filings/approved/2013/SR-BYX-2013-022\\_approved.pdf](http://cdn.batstrading.com/resources/regulation/rule_filings/approved/2013/SR-BYX-2013-022_approved.pdf).

<sup>7</sup> An “affiliate” of a Data Recipient includes any entity that, from time to time, directly or indirectly Controls, is Controlled by, or is under common Control with the Data Recipient. “Control” means the power to direct or cause the direction of the management of policies of another entity, whether

for the data products described herein are reasonable in light of the benefits to data recipients and the fact that certain other Exchange data feeds will continue to be provided free of charge.

As described in more detail below, the proposed fees are based on pricing conventions and distinctions that exist in the fee schedules of other exchanges. These distinctions (depth-of-book versus top-of-book and internal distribution versus external distribution) are each based on principles of fairness and equity that have helped for many years to maintain fair, equitable, and not unreasonably discriminatory fees, and that apply with equal or greater force to the current proposal.

For example, NASDAQ Exchange (“NASDAQ”) charges data recipients of its NASDAQ TotalView data feed \$2,000 per month for NASDAQ-listed security depth entitlements and \$1,000 per month for non NASDAQ-listed security depth entitlements to receive the data feed directly from NASDAQ. If the data recipient then distributes the data, it pays an additional internal or external distribution fee depending on the method of distribution. NASDAQ charges \$1,000 per month for internal distribution of NASDAQ-listed security depth entitlements and \$500 per month for internal distribution of non NASDAQ-listed security depth entitlements, and \$2,500 per month for external distribution of NASDAQ-listed security depth entitlements and \$1,250 per month for external distribution of non NASDAQ-listed security depth entitlements. NASDAQ also charges end-user fees per professional and non-professional subscriber for NASDAQ TotalView.<sup>10</sup>

NASDAQ charges data recipients that distribute its NASDAQ Basic data feed \$1,500 per month for best bid and offer and last sale information for all U.S. exchange-listed securities. Data recipients that subscribe to the NASDAQ Basic web service must pay a fee of \$1,500 per month, plus the applicable distribution and subscriber fees. NASDAQ also charges end-user fees per professional and non-professional subscriber or, in the alternative, NASDAQ charges per query fees for NASDAQ Basic.<sup>11</sup>

NASDAQ OMX PSX (“PSX”) charges data recipients of its book feed, PSX TotalView, a \$1,000 monthly fee to receive its data feed directly from PSX. If the data recipient then distributes the data, it pays an additional internal or

external distribution fee depending on the method of distribution. These distribution fees are \$500 per month for internal distribution and \$1,250 per month for external distribution. PSX also charges end-user fees per professional and non-professional subscriber for PSX TotalView.<sup>12</sup> NASDAQ OMX BX (“BX”) charges data recipients of its book feed, BX TotalView, the same access fees and distribution fees as PSX, and also charges end-user fees per professional and non-professional subscriber for BX TotalView.<sup>13</sup>

NYSE charges data recipients of its book feed, NYSE OpenBook, a \$5,000 monthly fee to receive its data feed directly or indirectly from NYSE. NYSE also charges end-user fees per professional and non-professional subscriber for NYSE OpenBook. NYSE charges data recipients of its last sale feed, NYSE Real-Time Reference Prices, a \$60,000 monthly fee to receive this feed containing only NYSE data directly or indirectly from NYSE. If a data recipient wishes to receive NYSE, NYSE Arca and NYSE MKT data, NYSE charges the data recipient a \$100,000 monthly fee to receive this feed.<sup>14</sup>

Each of EDGX Exchange (“EDGX”) and EDGA Exchange (“EDGA”) charge \$500 per month for internal distribution and \$2,500 per month for external distribution of their EDGX and EDGA book feeds, respectively. In addition, each of EDGX and EDGA charge \$2,500 per month for internal distribution and \$5,000 per month for external distribution of their EdgeBook Attributed feeds.<sup>15</sup> Neither EDGX nor EDGA charge a per user fee for internal or external distribution of its data.

Revenue generated from Exchange data fees will help offset the costs that the Exchange incurs in operating and regulating a highly efficient and reliable platform for the trading of U.S. equities. This increased revenue stream will permit the Exchange to offer an innovative service at a reasonable rate, structured in a manner comparable to and consistent with other market centers that provide similar market data products.<sup>16</sup>

The Exchange will continue to make such data available until such time as it changes its rule.

The Exchange believes that the proposal is also consistent with Section

6(b)(8) of the Act<sup>17</sup> in that it does not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The fees charged would be the same for all similarly-situated market participants, and therefore do not unreasonably discriminate among market participants.

In adopting Regulation NMS, the Commission granted self-regulatory organizations (“SROs”) and broker-dealers (“BDs”) increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers and also spur innovation and competition for the provision of market data.

The Exchange believes that its Data Feeds are precisely the sort of market data products that the Commission envisioned when it adopted Regulation NMS. The Commission concluded that Regulation NMS—by deregulating the market in proprietary data—would itself further the Act’s goals of facilitating efficiency and competition:

[E]fficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information are not required to receive (and pay for) such data. The Commission also believes that efficiency is promoted when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data.<sup>18</sup>

By removing “unnecessary regulatory restrictions” on the ability of exchanges to sell their own data, Regulation NMS advanced the goals of the Act and the principles reflected in its legislative history. If the free market should determine whether proprietary data is sold to BDs at all, it follows that the price at which such data is sold should be set by the market as well.

On July 21, 2010, President Barak [sic] Obama signed into law H.R. 4173, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”), which amended Section 19 of the Act. Among other things, Section 916 of the Dodd-Frank Act amended paragraph (A) of Section 19(b)(3) of the Act by inserting the phrase “on any person, whether or not the person is a member of the self-regulatory organization” after “due, fee or other charge imposed by the self-regulatory organization.” As a result, all SRO rule proposals establishing or changing dues, fees, or other charges are

<sup>12</sup> See NASDAQ PSX Pricing Schedule.

<sup>13</sup> See NASDAQ OMX BX Rule 7019 and NASDAQ OMX BX Rule 7023.

<sup>14</sup> See NYSE Schedule of Fees.

<sup>15</sup> See EDGX Exchange Fee Schedule; See also EDGA Exchange Fee Schedule.

<sup>16</sup> See *infra* note 21 and accompanying text.

<sup>17</sup> 15 U.S.C. 78f(b)(8).

<sup>18</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

<sup>10</sup> See NASDAQ OMX Rule 7019 and NASDAQ OMX Rule 7023.

<sup>11</sup> *Id.*

immediately effective upon filing regardless of whether such dues, fees, or other charges are imposed on members of the SRO, non-members, or both. Section 916 further amended paragraph (C) of Section 19(b)(3) of the Act to read, in pertinent part, "At any time within the 60-day period beginning on the date of filing of such a proposed rule change in accordance with the provisions of paragraph (1) [of Section 19(b)], the Commission summarily may temporarily suspend the change in the rules of the self-regulatory organization made thereby, 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 this title. If the Commission takes such action, the Commission shall institute proceedings under paragraph (2)(B) [of Section 19(b)] to determine whether the proposed rule should be approved or disapproved."

The decision of the United States Court of Appeals for the District of Columbia Circuit in *NetCoalition v. SEC*, 615 F.3d 525 (D.C. Cir. 2010), although reviewing a Commission decision made prior to the effective date of the Dodd-Frank Act, upheld the Commission's reliance upon competitive markets to set reasonable and equitably allocated fees for 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.'" <sup>19</sup> 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.'" <sup>20</sup>

The Exchange believes that the proposed fees are fair and equitable, and not unreasonably discriminatory. Specifically, the Exchange believes that the fees proposed for the Data Feeds are fair and equitable in that they are optional and apply uniformly to all data recipients irrespective of each recipient's relationship to the Exchange (e.g., Member, non-Member data recipient, etc.) except with respect to reasonable distinctions as between

internal and external distribution.<sup>21</sup> The proposed fees are based on pricing conventions and distinctions (e.g., internal versus external distribution and controlled versus uncontrolled data feed) based on established principles of fairness and equity that have helped to maintain fair, equitable, and not unreasonably discriminatory fees, and that apply with equal or greater force to the current proposal.

Regardless of a Data Recipient's reasons for subscribing to the Data Feeds, the fees for such feeds apply equally to all Data Recipients that wish to use the feeds for internal use only and equally to all Data Recipients that wish to redistribute the feeds.

The Exchange proposes charging Data Recipients that distribute Exchange data externally more than Data Recipients that distribute Exchange data internally because of higher administrative costs associated with monitoring methods of distribution and ongoing reporting by those Data Recipients distributing the data externally, as required in the BATS Global Markets, Inc. Data Agreement and Exchange requirements referenced therein. The Exchange believes that the access fees for the Data Feeds are reasonable and fair in light of alternatives offered by other market centers, as described above.

Efficiency is promoted when Members who do not need the Data Feeds are not required to receive (and pay for) such data. The Exchange also believes that efficiency is promoted when Members may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data. Only those consumers that deem such products to be of sufficient overall value and usefulness will purchase them. The Exchange is not required to make the Data Feeds available or to offer specific pricing alternatives for potential purchases. The Exchange has chosen to make the Data Feeds available to improve market quality, attract order flow, and increase transparency. The Exchange can discontinue offering a pricing alternative and firms can discontinue their use at any time and for any reason, including due to their

assessment of the reasonableness of fees charged.

Lastly, competition is promoted as the Exchange cannot set unreasonable fees without losing business to its competitors.<sup>22</sup> The Exchange continues to establish and revise pricing policies aimed at increasing fairness and equitable allocation of fees among data recipients. If the market deems the proposed fees to be unfair or inequitable, firms can diminish or discontinue their use of the data.

#### *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. Notwithstanding its determination that the Commission may rely upon competition to establish fair and equitably allocated fees for market data, the *NetCoalition* court found that the Commission had not, in that case, compiled a record that adequately supported its conclusion that the market for the data at issue in the case was competitive. The Exchange believes that a record may readily be established to demonstrate the competitive nature of the market in question.

The proposal is, as described below, pro-competitive. There is intense competition between trading platforms that provide transaction execution and routing services and proprietary data products. 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 [sic] 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 the prospect of a taking order seeing and reacting to a posted order on a particular platform, the posting of the order would accomplish little. Without orders entered and trades executed, exchange data products cannot exist. 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.

<sup>22</sup> See *infra* discussion in Section 4 [sic], "Self-Regulatory Organization's Statement on Burden on Competition."

<sup>19</sup> *NetCoalition*, at 535 (quoting H.R. Rep. no. 94-229, at 92 (1975), as reprinted in 1975 U.S.C.A.N. 321, 323).

<sup>20</sup> *Id.*

<sup>21</sup> The Exchange notes that distinctions based on internal versus external distribution have been previously filed with the Commission by NASDAQ, BX, PSX, and EDGX. See Nasdaq Rule 7019(b). See also Securities Exchange Act Release Nos. 62876 (September 9, 2010), 75 FR 56624 (September 16, 2010) (File No. SR-PHLX-2010-120); 62907 (September 14, 2010), 75 FR 57314 (September 20, 2010) (File No. SR-NASDAQ-2010-110); 63442 (December 6, 2010), FR 77029 (December 10, 2010) (File No. SR-BX-2010-081); 66864 (April 26, 2012), 77 FR 26064 (May 2, 2012) (File No. SR-EDGX-2012-14).

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. 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 BD customers view the costs of transaction executions and of data as a unified cost of doing business with the exchange. A BD 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 BD 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 product exceeds its expected value, the BD will choose not to buy it.

Moreover, as a BD chooses to direct fewer orders to a particular exchange, the value of the product to that BD decreases, for two reasons. First, the product will contain less information, because executions of the BD's orders will not be reflected in it. Second, and perhaps more important, the product will be less valuable to that BD because it does not provide information about the venue to which it is directing its orders. Data from the competing venue to which the BD is directing orders will become correspondingly more valuable. Thus, a super-competitive increase in the fees charged for either transactions or data has the potential to impair revenues from both products.

"No one disputes that competition for order flow is 'fierce'."<sup>23</sup> However, the existence of fierce competition for order flow implies a high degree of price sensitivity on the part of BDs with order flow, since they may readily reduce costs by directing orders toward the lowest-cost trading venues. A BD 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. Similarly, if a platform increases its market data fees, the change will affect the overall cost of doing business with the platform, and affected BDs will assess whether they can lower their trading costs by directing orders elsewhere and thereby

lessening the need for the more expensive data.

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 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 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. Such regulation is unnecessary because an "excessive" price for one of the joint products will ultimately have to be reflected in lower prices for other products sold by the firm, or otherwise the firm will experience a loss in the volume of its sales that will be adverse to its overall profitability. In other words, an increase in the price of data will ultimately have to be accompanied by a decrease in the cost of executions, or the volume of both data and executions will fall.

The market for market data products is 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 exchanges compete with each other for listings, trades, and market data itself, 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, as well as other entities, in a vigorously competitive market.

BDs currently have numerous alternative venues for their order flow, including thirteen SRO markets, as well as internalizing BDs and various forms of alternative trading systems ("ATs"), including dark pools and electronic communication networks ("ECNs"). Each SRO market competes to produce transaction reports via trade executions, and two FINRA-regulated Trade Reporting Facilities ("TRFs") compete to attract internalized transaction reports. Competitive markets for order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary data products.

The large number of SROs, TRFs, BDs, and ATs that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO, TRF, AT, and BD is currently permitted to produce proprietary data products, and many currently do or have announced plans to do so, including, but not limited to, NASDAQ, NYSE, NYSE MKT, NYSE Arca, Direct Edge and International Securities Exchange.

Any AT or BD can combine with any other AT, BD, or multiple ATs or BDs to produce joint proprietary data products. Additionally, order routers and market data vendors can facilitate single or multiple BDs' production of proprietary data products. The potential sources of proprietary products are virtually limitless.

The fact that proprietary data from ATs, BDs, and vendors can by-pass SROs is significant in two respects. First, non-SROs can compete directly with SROs for the production and sale of proprietary data products, as the Exchange and Arca did before registering as exchanges by publishing proprietary book data on the Internet. Second, because a single order or transaction report can appear in an SRO proprietary product, a non-SRO proprietary product, or both, the data available in proprietary products is exponentially greater than the actual number of orders and transaction reports that exist in the marketplace. Indeed, in the case of the Data Feeds, the data provided through these products appears both in (i) real-time core data products offered by the SIPs for a fee, and (ii) free SIP data products

<sup>23</sup> *NetCoalition*, at 24 [sic].

with a 15-minute delay, and find close substitutes in products of competing venues.

Market data vendors provide another form of price discipline for proprietary data products because they control the primary means of access to end users. Vendors impose price restraints based upon their business models. For example, vendors such as Bloomberg and Reuters that assess a surcharge on data that 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. Retail BDs, such as Schwab and Fidelity, offer their customers proprietary data only if it promotes trading and generates sufficient commission revenue. 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 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 such as the Data Feeds 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 by investors with access to the Internet and television. Conversely, the value of such products to distributors and investors decreases if order flow falls, because the products contain less content.

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, including the Exchange, that swiftly grew into some of the largest electronic trading platforms and proprietary data producers: Archipelago, Bloomberg Tradebook, Island, RediBook, Attain, TracECN and Direct Edge. A proliferation of dark pools and other ATSs operate profitably with fragmentary shares of consolidated market volume.

Regulation NMS, by deregulating the market for proprietary data, has increased the contestability of that market. While BDs have previously published their proprietary data individually, Regulation NMS encourages market data vendors and

BDs to produce proprietary products cooperatively in a manner never before possible. Multiple market data vendors already have the capability to aggregate data and disseminate it on a profitable scale, including Bloomberg, and Thomson Reuters.

Competition among platforms has driven the Exchange continually to improve its market data offerings and to cater to customers’ data needs. For example, the Exchange has developed and maintained multiple delivery mechanisms that enable customers to receive data in the form and manner they prefer and at the lowest cost to them.

The Exchange offers data via multiple extranet providers, thereby helping to reduce network and total cost for its data products. Despite these enhancements and a dramatic increase in message traffic, to date the Exchange has been able to offer most of its market data without charge. Moreover, platform competition has intensified as new entrants have emerged, constraining prices for both executions and for data.

The Exchange has witnessed competitors creating new products and innovative pricing in this space over the last few years. In all cases, firms make decisions on how much and what types of data to consume on the basis of the total cost of interacting with the Exchange or other exchanges. Of course, the explicit data fees are but one factor in a total platform analysis. Some competitors have lower transactions fees and higher data fees, and others are vice versa. The market for the proposed data is highly competitive and continually evolves as products develop and change.

In establishing the fees for the Data Feeds, the Exchange considered the competitiveness of the market for the type of data being offered and all of the implications of that competition. The Exchange believes that it has considered all relevant 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 Data Feeds, 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, without losing business to these alternatives.

### *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 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<sup>24</sup> and Rule 19b-4(f)(2) thereunder,<sup>25</sup> because it establishes a due, fee, or other charge imposed by BYX.

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](mailto:rule-comments@sec.gov). Please include File Number SR-BYX-2013-23 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-BYX-2013-23. 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

<sup>24</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>25</sup> 17 CFR 240.19b-4(f)(2).

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 BYX. 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-2013-23 and should be submitted on or before July 31, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>26</sup>

**Elizabeth M. Murphy,**  
Secretary.

[FR Doc. 2013-16534 Filed 7-9-13; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-69933; File No. SR-BATS-2013-040]

### 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.

July 3, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on June 28, 2013, 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<sup>3</sup> and Rule 19b-4(f)(2) thereunder,<sup>4</sup> 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 filed a proposal to amend the fee schedule applicable to Members<sup>5</sup> 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 July 1, 2013.

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 purpose of the proposed rule change is to begin charging a monthly fee for the Multicast PITCH Spin Server Port and GRP Port, each of which are logical ports<sup>6</sup> used to receive data from

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>4</sup> 17 CFR 240.19b-4(f)(2).

<sup>5</sup> A Member is any registered broker or dealer that has been admitted to membership in the Exchange.

<sup>6</sup> A logical port is commonly referred to as a TCP/IP port, and represents a port established by the Exchange within the Exchange's system for trading and billing purposes. Each logical port established is specific to a Member or non-member and grants that Member or non-member the ability to operate a specific application, such as FIX order entry or Multicast PITCH data receipt. Logical port fees are limited to logical ports in the Exchange's primary

the Exchange.<sup>7</sup> Currently, the Exchange charges a monthly fee for all other port types used to enter orders in the Exchange's system and to receive data from the Exchange;<sup>8</sup> however, for both BATS Equities and BATS Options,<sup>9</sup> the Exchange provides 32 primary Multicast PITCH Spin Server Ports free of charge (32 ports currently makes a complete set of Spin Server Ports) and, if such ports are used, one free primary GRP Port. In addition, all redundant Multicast PITCH Spin Server Ports and GRP Ports are provided free of charge.<sup>10</sup> Currently, the Exchange charges \$400 per month per additional set of primary Multicast PITCH Spin Server Ports and \$400 per month per additional primary GRP Port.

Beginning July 1, 2013, the Exchange proposes to charge \$400 per month per set of primary Multicast PITCH Spin Server Ports and \$400 per month per primary GRP Port for BATS Equities and BATS Options. The Exchange is also proposing to eliminate the reference to the exact number of ports that makes a complete set of Multicast Spin Server Ports, as this number has changed in the past and could again change in the future. A complete set of Multicast Spin Server Ports is the number of ports necessary to get one full set of information from the Exchange based on load balancing by the Exchange.<sup>11</sup> The Exchange believes that this concept is clearly understood amongst recipients of Multicast data, and, therefore, does not believe that eliminating the fee schedule reference to the exact number of ports necessary to receive Exchange PITCH data via Multicast will cause

data center and no logical port fees are assessed for redundant secondary data center ports.

<sup>7</sup> BATS FIX ports are the only ports that may be used to send orders and related instructions to the Exchange. All other port types, including the Multicast PITCH Spin Server Port and GRP Port, permit Members and non-members to receive information from the Exchange.

<sup>8</sup> The Exchange currently charges a monthly fee for all other Exchange FIX, FIXDROP, BOE, DROP, TCP PITCH, and TOP ports.

<sup>9</sup> BATS Equities is the Exchange's platform for trading cash equity securities whereas BATS Options is the Exchange's platform for trading equity options.

<sup>10</sup> Exchange Multicast PITCH data feed for both BATS Equities and BATS Options is currently offered through two primary feeds, identified as the "A feed" and the "C feed", which contain the same information but differ only in the way such feeds are received. The Exchange offers for free the ports necessary to receive the Exchange's redundant Multicast "B feed" and "D feed", as well as all ports made available in the Exchange's secondary data center. Accordingly, this proposal only applies to ports used to receive an Exchange primary Multicast Feed at the Exchange's primary data center.

<sup>11</sup> The Exchange load balances information regarding securities traded on the Exchange across multiple channels (today 32) with each channel requiring a separate Multicast PITCH Spin Server Port.

<sup>26</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

confusion amongst recipients of Multicast data.

Based on the proposal, the change applies to Members that obtain ports for direct access to the Exchange, Sponsored Participants sponsored by Members to receive direct access to the Exchange, non-member service bureaus that act as a conduit for orders entered by Exchange Members that are their customers, and market data recipients.

## 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.<sup>12</sup> Specifically, the Exchange believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,<sup>13</sup> 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 operates in a highly competitive market in which exchanges offer connectivity services as a means to facilitate the trading activities of members and other participants. Accordingly, fees charged for connectivity are constrained by the active competition for the order flow of such participants as well as demand for market data from the Exchange. If a particular exchange charges excessive fees for connectivity, affected members will opt to terminate their connectivity arrangements with that exchange, and adopt a possible range of alternative strategies, including routing to the applicable exchange through another participant or market center or taking that exchange's data indirectly. Accordingly, the exchange charging excessive fees would stand to lose not only connectivity revenues but also revenues associated with the execution of orders routed to it by affected members, and, to the extent applicable, market data revenues. The Exchange believes that this competitive dynamic imposes powerful restraints on the ability of any exchange to charge unreasonable fees for connectivity.

The Exchange believes that its proposed changes to logical port fees are reasonable in light of the benefits to Exchange participants of direct market access and receipt of data.<sup>14</sup> In addition,

the Exchange believes that its fees are equitably allocated among Exchange constituents based upon the number of access ports that they require to receive data from the Exchange. Further, the Exchange believes that its fees are not unreasonably discriminatory because all market participants are charged standard fees for port usage. The Exchange notes that it believes its prior fee structure, under which ports necessary for receipt of Multicast data were provided free of charge, was reasonable, equitably allocated and not unreasonably discriminatory because it was available to all market participants and was intended to encourage the use of Multicast PITCH. However, by moving towards a more uniform approach to ports billing, the Exchange believes that its fees are even more equitably allocated and nondiscriminatory. The Exchange also believes that its fees for access services will enable it to better cover its infrastructure costs and to improve its market technology and services.

### *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. As discussed above, the Exchange believes that fees for connectivity are constrained by the robust competition for order flow among exchanges and non-exchange markets. Further, excessive fees for connectivity, including logical port fees, would serve to impair an exchange's ability to compete for order flow rather than burdening competition.

### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

The Exchange has neither solicited nor received written comments on the proposed rule change.

## 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) of the Act<sup>15</sup> and paragraph (f) of Rule 19b-4 thereunder.<sup>16</sup> At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if

for the BATS Equities PITCH (including both TCP PITCH and Multicast PITCH) and TOP data products, and to revise the fee for the Last Sale Feed data product.

<sup>15</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>16</sup> 17 CFR 240.19b-4(f).

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](mailto:rule-comments@sec.gov). Please include File Number SR-BATS-2013-040 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 20549-1090.

All submissions should refer to File Number SR-BATS-2013-040. 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-

<sup>12</sup> 15 U.S.C. 78f.

<sup>13</sup> 15 U.S.C. 78f(b)(4).

<sup>14</sup> Through a different filing, beginning July 1, 2013, the Exchange has proposed to implement fees

2013-040 and should be submitted on or before July 31, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>17</sup>

**Elizabeth M. Murphy,**  
Secretary.

[FR Doc. 2013-16532 Filed 7-9-13; 8:45 am]

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-69929; File No. SR-NASDAQ-2013-091]

**Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Penny Pilot Option Rebates To Add Liquidity**

July 3, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup>, and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on June 27, 2013, The NASDAQ Stock Market LLC (“NASDAQ” 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 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**

NASDAQ 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 certain Customer,<sup>3</sup> Professional<sup>4</sup> and NOM Market Maker<sup>5</sup> Rebates to Add Liquidity in Penny Pilot Options.<sup>6</sup>

While the changes proposed herein are effective upon filing, the Exchange has designated that the amendments be operative on July 1, 2013.

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 the 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 proposes to amend the Customer, Professional and NOM Market Maker Penny Pilot Options Rebates to Add Liquidity and make other technical amendments to the Section 2(1) as described more fully below.

Today, the Exchange offers an eight-tiered Rebate to Add Liquidity in Penny Pilot Options to Customers and Professionals as follows:

	Monthly volume	Rebate to add liquidity
Tier 1 .....	Participant adds Customer and Professional liquidity of up to 0.20% of total industry customer equity and ETF option average daily volume (“ADV”) contracts per day in a month.	\$0.25
Tier 2 .....	Participant adds Customer and Professional liquidity of 0.21% to 0.30% of total industry customer equity and ETF option ADV contracts per day in a month.	0.40
Tier 3 .....	Participant adds Customer and Professional liquidity of 0.31% to 0.49% of total industry customer equity and ETF option ADV contracts per day in a month.	0.43
Tier 4 .....	Participant adds Customer and Professional liquidity of 0.5% or more of total industry customer equity and ETF option ADV contracts per day in a month.	0.45
Tier 5 .....	Participant adds (1) Customer and Professional liquidity of 25,000 or more contracts per day in a month, (2) the Participant has certified for the Investor Support Program set forth in Rule 7014, and (3) the Participant executed at least one order on NASDAQ’s equity market.	0.42

<sup>17</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> The term “Customer” applies to any transaction that is identified by a Participant for clearing in the Customer range at The Options Clearing Corporation (“OCC”) which is not for the account of broker or dealer or for the account of a “Professional” (as that term is defined in Chapter I, Section 1(a)(48)).

<sup>4</sup> 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) pursuant to Chapter I, Section 1(a)(48). All Professional orders shall be appropriately marked by Participants.

<sup>5</sup> The term “NOM Market Maker” is a Participant that has registered as a Market Maker on NOM pursuant to Chapter VII, Section 2, and must also

remain in good standing pursuant to Chapter VII, Section 4. In order to receive NOM Market Maker pricing in all securities, the Participant must be registered as a NOM Market Maker in at least one security.

<sup>6</sup> The Penny Pilot was established in March 2008 and in October 2009 was expanded and extended through June 30, 2013. 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); 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); and 68519 (December 21, 2012), 78 FR 136 (January 2, 2013) (SR-NASDAQ-2012-143) (notice of filing and immediate effectiveness and extension and replacement of Penny Pilot through June 30, 2013). See also NOM Rules, Chapter VI, Section 5. The Exchange recently filed a proposed rule change to extend the pilot through December 31, 2013. See SR-Phlx-2013-64, which is not yet published.

	Monthly volume	Rebate to add liquidity
Tier 6 .....	Participant has Total Volume of 130,000 or more contracts per day in a month, of which 25,000 or more contracts per day in a month must be Customer or Professional liquidity.	0.45
Tier 7 .....	Participant has Total Volume of 175,000 or more contracts per day in a month, of which 50,000 or more contracts per day in a month must be Customer or Professional liquidity.	0.47
Tier 8 .....	Participant (1) has Total Volume of 325,000 or more contracts per day in a month, or (2) adds Customer or Professional liquidity of 1.00% or more of national customer volume in multiply-listed equity and ETF options classes in a month or (3) adds Customer or Professional liquidity of 60,000 or more contracts per day in a month and NOM Market Maker liquidity of 40,000 or more contracts per day per month.	0.48

The Exchange is proposing to amend Tier 8 which currently pays a rebate of \$0.48 per contract to a Participant that: (i) Has Total Volume<sup>7</sup> of 325,000 or more contracts per day in a month; (ii) adds Customer or Professional liquidity of 1.00% or more of national customer volume in multiply-listed equity and ETF options classes in a month; or (iii) adds Customer or Professional liquidity of 60,000 or more contracts per day in a month and NOM Market Maker liquidity of 40,000 or more contracts per day in a month. The Exchange is proposing to continue to pay a \$0.48 per contract rebate for Tier 8 and amend the criteria to qualify for this rebate tier. The Exchange proposes to pay the Tier 8 rebate to a Participant that: (i) has Total Volume of 325,000 or more contracts per day in a month (as is the case today); or (ii) has Total Volume of 200,000 or more contracts per day in a month of which 70,000 or more contracts per day in a month must be Customer and/or Professional liquidity; or (iii) adds Customer or Professional liquidity of 1.00% or more of national customer volume in multiply-listed equity and ETF options classes in a month (as is the case today). The Exchange would eliminate the criteria whereby a Participant can achieve the Tier 8 rebate by adding Customer or

Professional liquidity of 60,000 or more contracts per day in a month and NOM Market Maker liquidity of 40,000 or more contracts per day per month. The Exchange believes that Participants will be incentivized to achieve a Tier 8 rebate as they are today and additional Participants may be able to qualify with the new criteria, which focuses on Customer and/or Professional liquidity. The Exchange is also proposing to make a technical amendment to the Penny Pilot Options Customer and Professional Rebates to Add Liquidity to clarify the text of these rebates. The Exchange today permits Participants to add Customer or Professional liquidity for Tiers 1 through 7. Participants may add either Customer or Professional liquidity to qualify for these rebate tiers. The Exchange proposes to add the words “/or” to clarify that Customer and/or Professional liquidity may be added to Tiers 1 through 5. The Exchange also proposes to amend Tiers 6 and 7 in similar fashion to add “and/” to specify Customer or Professional liquidity may be added. Similarly the Exchange proposes to add the word “and/” in note 2 of Section (2)(1) of Chapter XV which provides that “[a] Participant that adds Firm, Non-NOM Market Maker or Broker-Dealer liquidity in Penny Pilot Options or Non-Penny Pilot Options of 15,000 contracts per

day or more in a given month will receive a Rebate to Add Liquidity in Penny Pilot Options of \$0.20 per contract and will pay a Fee for Adding Liquidity in Non-Penny Pilot Options of \$0.36 per contract.” This would make clear that a Participant may add Penny and/or Non-Penny Pilot Options to qualify for the rebate. Finally, the Exchange proposes a similar amendment to note b in Section 2(1) Chapter XV which provides that “[f]or purposes of Tiers 6, 7 and 8, “Total Volume” shall be defined as Customer, Professional, Firm, Broker-Dealer, Non-NOM Market Maker and NOM Market Maker volume in Penny Pilot Options and Non-Penny Pilot Options which either adds or removes liquidity on NOM.” The Exchange would add the words “/or” to make clear that Total Volume can consist of Penny Pilot Options or Non-Penny Pilot Options. The Exchange believes that these amendments will provide greater clarity to the pricing. The Exchange otherwise does not propose to amend Tiers 1 through 7 of the Customer and Professional Rebates to Add Liquidity in Penny Pilot Options. Today, the Exchange offers a four-tiered Rebate to Add Liquidity in Penny Pilot Options to NOM Market Makers as follows:

	Monthly volume	Rebate to add liquidity
Tier 1 .....	Participant adds NOM Market Maker liquidity in Penny Pilot Options of up to 39,999 contracts per day in a month.	\$0.25
Tier 2 .....	Participant adds NOM Market Maker liquidity in Penny Pilot Options of 40,000 to 109,999 contracts per day in a month.	0.30
Tier 3 .....	Participant and its affiliate under Common Ownership qualify for Tier 8 of the Customer and Professional Rebate to Add Liquidity in Penny Pilot Options.	0.37
Tier 4 .....	Participant adds NOM Market Maker liquidity in Penny Pilot Options of 110,000 or more contracts per day in a month.	0.28 or \$0.38 in the following symbols BAC, GLD, IWM, QQQ and VXX or \$0.40 in SPY.

<sup>7</sup> Total Volume is defined as Customer, Professional, Firm, Broker-Dealer, Non-NOM

Market Maker and NOM Market Maker volume in Penny Pilot Options or Non-Penny Pilot Options

which either adds or removes liquidity on NOM. See Chapter XV, Section 2(1) of the NOM Rules.

The Exchange proposes to amend the Tier 2 NOM Market Maker Rebate to Add Liquidity in Penny Pilot Options which currently pays a \$0.30 per contract rebate to a Participant that adds NOM Market Maker liquidity in Penny Pilot Options of 40,000 to 109,999 contracts per day in a month to 40,000 to 69,999 contracts per day in a month to achieve the same rebate.

The Exchange also proposes to amend the Tier 3 NOM Market Maker Rebate to Add Liquidity in Penny Pilot Options which currently pays a \$0.37 per contract rebate to reduce that rebate to \$0.32 per contract and amend the criteria to qualify for a Tier 3 rebate. Currently, a Participant and its affiliate under Common Ownership<sup>8</sup> that qualify for Tier 8 of the Customer and Professional Rebate to Add Liquidity in Penny Pilot Options qualify for a Tier 3 NOM Market Maker Rebate to Add Liquidity in Penny Pilot Options. The Exchange is proposing to eliminate the current Tier 3 criteria and instead pay the new \$0.32 per contract NOM Market Maker Rebate to Add Liquidity in Penny Pilot Options to Participants that add NOM Market Maker liquidity in Penny Pilot Options of 70,000 to 99,999 contracts per day in a month.

The Exchange also proposes to amend the Tier 4 NOM Market Maker Rebate to Add Liquidity in Penny Pilot Options which currently pays rebate of \$0.28<sup>9</sup> or \$0.38 per contract in the following symbols, Bank of America Corporation (“BAC”), SPDR Gold Shares (“GLD”), iShares Russell 2000 Index (“IWM”), PowerShares QQQ (“QQQ”), iPath S&P 500 VIX ST Futures ETN (“VXX”), or \$0.40 per contract in SPDR S&P 500 (“SPY”) if Participants add NOM Market Maker liquidity in Penny Pilot Options of 110,000 or more contracts per day in a month. The Exchange is proposing to increase the Tier 4 rebate of \$0.28 per contract, which is paid on all qualifying Penny Pilot Options, excluding BAC, GLD, IWM, QQQ, VXX and SPY, to \$0.32 per contract.<sup>10</sup> In addition, the Exchange proposes to decrease the requisite number of contracts that a Participant must add in NOM Market Maker liquidity in Penny Pilot Options to achieve a Tier 4 rebate

from 110,000 to 100,000 or more contracts per day in a month.

The Exchange is not proposing to amend the Tier 1 NOM Market Maker Rebate to Add Liquidity in Penny Pilot Options. The Exchange would also eliminate the text referencing Tiers 3 and 4 of the NOM Market Maker Rebate to Add Liquidity in Penny Pilot Options which provides that “[i]n the instance that a Participant qualifies for both a Tier 3 and a Tier 4 NOM Market Maker Penny Pilot Option rebate, the Exchange would pay the Participant the Tier 3 rebate unless the Participant is eligible for an increased rebate in one of the following symbols: BAC, GLD, IWM, QQQ, VXX and SPY, in which case the Tier 4 rebate would be applied.” This language is no longer necessary because a Participant would not be able to qualify for both a Tier 3 and a Tier 4 rebate with the proposed changes.

The Exchange believes that the amendment to the NOM Market Maker Rebate to Add Liquidity will continue to incentivize NOM Market Makers to post liquidity on the Exchange.

## 2. Statutory Basis

NASDAQ believes that the proposed rule changes are consistent with the provisions of Section 6 of the Act,<sup>11</sup> in general, and with Section 6(b)(4) of the Act,<sup>12</sup> in particular, in that they provide for the equitable allocation of reasonable dues, fees and other charges among Participants and issuers and other persons using any facility or system which NASDAQ operates or controls as described in detail below.

The Exchange’s proposal to amend the Customer, Professional and NOM Market Maker Penny Pilot Options Rebates to Add Liquidity are reasonable because the Exchange will continue to offer competitive Customer, Professional and NOM Market Maker rebates in order to attract liquidity to the market to the benefit of all market participants. The Exchange believes that offering Customers and Professionals and NOM Market Makers the opportunity to earn higher rebates is reasonable because by incentivizing Participants to select the Exchange as a venue to post Customer and Professional liquidity will attract additional order flow to the benefit of all market participants and incentivizing NOM Market Makers to post liquidity will also benefit participants through increased order interaction.

The Exchange believes that the amendments to the Penny Pilot Options Rebates to Add Liquidity are equitable

and not unfairly discriminatory for various reasons. The Exchange believes that continuing to pay Customers and Professionals tiered Rebates to Add Liquidity in Penny Pilot Options, as proposed herein, is equitable and not unfairly discriminatory as compared to other market participants. Pursuant to this proposal, the Exchange would pay the highest Tier 1 Rebates to Add Liquidity in Penny Pilot Options of \$0.25 per contract to Customers, Professionals and NOM Market Makers for transacting one qualifying contract as compared to other market participants.<sup>13</sup> The Exchange believes that Customers are entitled to higher rebates because Customer order flow brings unique benefits to the market through increased liquidity which benefits all market participants. The Exchange believes that continuing to offer Professionals the same Penny Pilot Options Rebates to Add Liquidity as Customers is equitable and not unfairly discriminatory for the reasons which follow. The Exchange believes that offering Professionals the opportunity to earn the same rebates as Customers, as is the case today, and higher rebates as compared to Firms, Broker-Dealers and Non-NOM Market Makers, and in some cases NOM Market Makers, is equitable and not unfairly discriminatory because the Exchange does not believe that the amount of the rebate offered by the Exchange has a material impact on a Participant’s ability to execute orders in Penny Pilot Options. By offering Professionals, as well as Customers, higher rebates, the Exchange hopes to simply remain competitive with other venues so that it remains a choice for market participants when posting orders and the result may be additional Professional order flow for the Exchange, in addition to increased Customer order flow. A Participant may not be able to gauge the exact rebate tier it would qualify for until the end of the month because Professional volume would be commingled with Customer volume in calculating tier volume.<sup>14</sup> A Professional could only otherwise presume the Tier 1 rebate would be achieved in a month when determining

<sup>13</sup> Firms, Non-NOM Market Makers and Broker-Dealers receive a \$0.10 per contract Penny Pilot Option Rebate to Add Liquidity. In addition, Participant that adds Firm, Non-NOM Market Maker or Broker-Dealer liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of 15,000 contracts per day or more in a given month will receive a Rebate to Add Liquidity in Penny Pilot Options of \$0.20 per contract.

<sup>14</sup> Customer and Professional volume is aggregated for purposes of determining which rebate tier a Participant qualifies for with respect to the Professional Rebate to Add Liquidity in Penny Pilot Options.

<sup>8</sup> The term “Common Ownership” is defined in Chapter XV of the NOM Rules as Participants under 75% common ownership or control.

<sup>9</sup> The \$0.28 per contract Tier 4 NOM Market Maker rebate would be paid on all qualifying Penny Pilot Options, excluding BAC, GLD, IWM, QQQ, VXX and SPY.

<sup>10</sup> The Exchange is not proposing to amend the \$0.38 per contract rebate in BAC, GLD, IWM, QQQ or VXX or the \$0.40 per contract rebate in SPY.

<sup>11</sup> 15 U.S.C. 78f.

<sup>12</sup> 15 U.S.C. 78f(b)(4).

price.<sup>15</sup> Further, the Exchange initially established Professional pricing in order to “. . . bring additional revenue to the Exchange.”<sup>16</sup> The Exchange noted in the Professional Filing that it believes “. . . that the increased revenue from the proposal would assist the Exchange to recoup fixed costs.”<sup>17</sup> The Exchange also noted in that filing that it believes that establishing separate pricing for a Professional, which ranges between that of a customer and market maker, accomplishes this objective.<sup>18</sup> The Exchange does not believe that providing Professionals with the opportunity to obtain higher rebates equivalent to that of a Customer creates a competitive environment where Professionals would be necessarily advantaged on NOM as compared to NOM Market Makers, Firms, Broker-Dealers or Non-NOM Market Makers. Also, a Professional is assessed the same fees as other market participants, except Customers and NOM Market Makers, as discussed herein.<sup>19</sup> For these reasons, the Exchange believes that continuing to offer Professionals the same rebates as Customers is equitable and not unfairly discriminatory. Finally, the Exchange believes that NOM Market Makers should be offered the opportunity to earn higher rebates as compared to Non-NOM Market Makers, Firms and Broker Dealers<sup>20</sup> because NOM Market Makers

<sup>15</sup> A Professional would be unable to determine the exact rebate that would be paid on a transaction by transaction basis with certainty until the end of a given month when all Customer and Professional volume is aggregated for purposes of determining which tier the Participant qualified for in a given month.

<sup>16</sup> See Securities Exchange Act Release No. 64494 (May 13, 2011), 76 FR 29014 (May 19, 2011) (SR-NASDAQ-2011-066) (“Professional Filing”). In this filing, the Exchange addressed the perceived favorable pricing of Professionals who were assessed fees and paid rebates like a Customer prior to the filing. The Exchange noted in that filing that a Professional, unlike a retail Customer, has access to sophisticated trading systems that contain functionality not available to retail Customers.

<sup>17</sup> See Securities Exchange Act Release No. 64494 (May 13, 2011), 76 FR 29014 (May 19, 2011) (SR-NASDAQ-2011-066).

<sup>18</sup> See Securities Exchange Act Release No. 64494 (May 13, 2011), 76 FR 29014 (May 19, 2011) (SR-NASDAQ-2011-066). The Exchange noted in this filing that it believes the role of the retail customer in the marketplace is distinct from that of the professional and the Exchange’s fee proposal at that time accounted for this distinction by pricing each market participant according to their roles and obligations.

<sup>19</sup> The Fee for Removing Liquidity in Penny Pilot Options is \$0.48 per contract for all market participants, except Customers and NOM Market Makers. Customers are assessed \$0.45 per contract and NOM Market Makers would continue to be assessed \$0.47 per contract.

<sup>20</sup> Firms, Non-NOM Market Makers and Broker-Dealers are paid a \$0.10 per contract Rebate to Add Liquidity in Penny Pilot Options and have the opportunity to earn a higher Penny Pilot Options Rebate to Add Liquidity of \$0.20 per contact if they

add value through continuous quoting<sup>21</sup> and the commitment of capital.

The Exchange’s proposal to amend the Customer and Professional Rebates to Add Liquidity in Penny Pilot Options is reasonable because the Exchange is offering Participants meaningful incentives to increase their participation on NOM in terms of higher Penny Pilot Options Rebates to Add Liquidity. The Exchange’s proposal to amend Tier 8 to eliminate the criteria which qualifies a Participant that adds Customer or Professional liquidity of 60,000 or more contracts per day in a month and NOM Marker Maker liquidity of 40,000 or more contracts per day in a month to a \$0.48 per contract rebate and replace that criteria with new criteria that pays the same rebate if the Participant has Total Volume of 200,000 or more contracts per day in a month, of which 70,000 or more contracts per day in a month must be Customer and/or Professional liquidity is reasonable because it should continue to incentivize Participants to add liquidity on NOM. The new criteria focuses on Total Volume which consists of Customer, Professional, Firm, Broker-Dealer, Non-NOM Market Maker and NOM Market Maker volume in Penny Pilot Options and/or Non-Penny Pilot Options which either adds or removes liquidity on NOM. The Exchange believes that offering Participants an option to transact a lower amount of Total Volume (200,000 contracts) as compared to the 325,000 contracts of Total Volume, which would also qualify a Participant for a Tier 8 rebate, and also requiring that 70,000 of that Total Volume be comprised of Customer and/or Professional liquidity further incentivizes Participants to add Customer and Professional liquidity to NOM. The criteria that is being eliminated required 60,000 or more contracts per day of Customer and/or Professional liquidity and 40,000 or more contracts of NOM Market Maker liquidity. The Exchange believes that it is reasonable to incentivize Participants to add a greater amount of Customer

transact 15,000 contracts per day or more in a given month of Penny Pilot Options or Non-Penny Pilot Options liquidity.

<sup>21</sup> 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.

and/or Professional liquidity combined with other volume as a means to qualify for the Tier 8 rebate. This proposal only impacts one of the ways in which a Participant may qualify for the Tier 8 rebate. Participants that today do not qualify for the Tier 8 rebate may be able to qualify with the new criteria. In addition, other exchanges employ similar incentive programs.<sup>22</sup>

The Exchange’s proposal to amend Tier 8 to eliminate the criteria which qualifies a Participant that adds Customer or Professional liquidity of 60,000 or more contracts per day in a month and NOM Marker Maker liquidity of 40,000 or more contracts per day in a month to a \$0.48 per contract rebate and replace that criteria with new criteria that pays the same rebate if the Participant has Total Volume of 200,000 or more contracts per day in a month, of which 70,000 or more contracts per day in a month must be Customer and/or Professional liquidity is equitable and not unfairly discriminatory because this amendment will be applied to all market participants in a uniform matter. Any market participant is eligible to receive the rebate provided they transact a qualifying amount of Customer and Professional volume in Penny Pilot Options.

The Exchange’s proposal to amend the NOM Market Maker Rebates to Add Liquidity in Penny Pilot Options is reasonable because it should incentivize NOM Market Makers to post liquidity on NOM. NOM Market Makers are valuable market participants that provide liquidity in the marketplace and incur costs unlike other market participants. The Exchange believes that encouraging NOM Market Makers to be more aggressive when posting liquidity benefits all market participants through increased liquidity. The Exchange believes that the NOM Market Maker rebate proposal is equitable and not unfairly discriminatory because it does not misalign the current rebate structure because NOM Market Makers will continue to earn higher rebates as compared to Firms, Non-NOM Market Makers and Broker-Dealers and will earn the same or lower rebates as

<sup>22</sup> See CBOE Fees Schedule. CBOE offers each Trading Permit Holder (“TPH”) a credit for each public customer order transmitted by the TPH which is executed electronically in all multiply-listed option classes, excluding QCC trades and executions related to contracts that are routed to one or more exchanges in connection with the Options Order Protection and Locked/Crossed Market Plan, provided the TPH meets certain percentage thresholds in a month as described in the Volume Incentive Program. See also Phlx’s Pricing Schedule at Section B which contains the Customer Rebate Program.

compared to Customers and Professionals.<sup>23</sup>

The Exchange's proposal to amend the number of qualifying contracts in Tier 2 of the NOM Market Maker Penny Pilot Options Rebate to Add Liquidity from 40,000 to 109,999 contracts to 40,000 to 69,999 contracts per day in a month is reasonable because today Participants that transact between 40,000 to 69,999 contracts of NOM Market Maker Penny Pilot Options would continue to qualify for Tier 2 and Participants that qualify from 70,000 to 109,999 contracts would qualify for the new proposed Tier 3 rebate of \$0.32 per contract.

The Exchange's proposal to amend the Tier 3 rebate, which currently requires a Participant and its affiliate under Common Ownership that qualify for Tier 8 of the Customer and Professional Rebate to Add Liquidity in Penny Pilot Options to receive a Tier 3 rebate of \$0.37 per contract, and replace it with new criteria which requires that a Participant add NOM Market Maker liquidity in Penny Pilot Options of 70,000 to 99,999 contracts per day in a month to qualify for a new Tier 3 rebate rate of \$0.32 per contract is reasonable because it would increase the rebate paid to certain Participants who currently qualifying for a Tier 2 rebate. Also, those Participants and its affiliate under Common Ownership that qualify for a Tier 8 rebate would continue to receive the Customer and Professional Rebates to Add Liquidity in Penny Pilot Options rebate and may separately qualify for another NOM Market Maker Rebate to Add Liquidity in Penny Pilot Options. The Exchange is offering a different rebate incentive to remain competitive while continuing to encourage NOM Market Makers to aggressively post liquidity on NOM.

The Exchange's proposal to amend Tier 4 to lower the number of NOM Market Maker Penny Pilot Options contract from 110,000 to 100,000 is reasonable because additional Participants may be able to qualify for a Tier 4 NOM Market Maker Rebate to Add Liquidity in Penny Pilot Options. The Exchange also believes that the proposal to pay an increased Tier 8 rebate of \$0.32 per contract as compared to \$0.28 per contract for all symbols excluding BAC, GLD, IWM, QQQ, VXX<sup>24</sup> and SPY<sup>25</sup> is reasonable because the increased rebate should encourage other market participants to add NOM

Marker Maker liquidity to obtain a higher rebate in certain symbols.

The Exchange believes offering NOM Market Makers the opportunity to receive higher rebates as compared to Firms, Non-NOM Market Makers and Broker-Dealers is equitable and not unfairly discriminatory because all NOM Market Makers may qualify for the NOM Market Maker rebate tiers and every NOM Market Maker is entitled to a rebate solely by adding one contract of NOM Market Maker liquidity on NOM. Also, as mentioned, the NOM Market Maker would receive the same rebate in Tier 1 as compared Customers and Professionals and a higher rebate in all other tiers as compared to a Firm, Non-NOM Market Maker or Broker-Dealer because of the obligations<sup>26</sup> borne by NOM Market Makers as compared to other market participants. Encouraging NOM Market Makers to add greater liquidity benefits all Participants in the quality of order interaction.

The Exchange believes that it is equitable and not unfairly discriminatory to amend the Tier 2, 3 and 4 rebate criteria to qualify for those rebates as well as the Tier 4 rebate rate for certain symbols because those amendments will apply uniformly to all participants. The Exchange believes that it is reasonable, equitable, and not unfairly discriminatory to adopt specific pricing for BAC, GLD, IWM, QQQ, VXX and SPY because pricing by symbol is a common practice on many U.S. options exchanges as a means to incentivize order flow to be sent to an exchange for execution in the most actively traded options classes, in this case actively traded Penny Pilot Options.<sup>27</sup> The Exchange notes that BAC, GLD, IWM, QQQ, VXX and SPY are some of the most actively traded options in the U.S.

The Exchange's proposal to add language throughout Section 2(1) of Chapter XV to clarify the rule text with respect to adding liquidity is reasonable, equitable and not unfairly discriminatory because the amendments provide clarity to the rule text. The Exchange's proposal to eliminate text related to qualifying for both Tier 3 and Tier 4 NOM Market Maker rebates is reasonable, equitable and not unfairly discriminatory because the text is no longer necessary because a Participant could no longer achieve both rebates in a given month.

### *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.

Customers have traditionally been paid the highest rebates offered by options exchanges. While the Exchange's proposal results in a Professional receiving the same or a higher rebate as compared to a NOM Market Maker, in certain circumstances, the Exchange does not believe the proposed rebate tiers would result in any burden on competition as between market participants. The Exchange believes that offering Customers and Professionals the proposed tiered rebates creates competition among options exchanges because the Exchange believes that the rebates may cause market participants to select NOM as a venue to send Customer and Professional order flow. The Exchange believes that incentivizing NOM Market Makers to post liquidity on NOM benefits market participants through increased order interaction. Also, NOM Market Makers have obligations<sup>28</sup> to the market which are not borne by other market participants and therefore the Exchange believes that NOM Market Makers are entitled to a lower fee.

The proposed amendments does not misalign the current rebate structure because NOM Market Makers will continue to earn higher rebates as compared to Firms, Non-NOM Market Makers and Broker-Dealers and will earn the same or lower rebates as compared to Customers and Professionals.

The Exchange believes the differing outcomes, rebates and fees created by the Exchange's proposed pricing incentives contribute to the overall health of the market place for the benefit of all Participants that willing choose to transact options on NOM. For the reasons specified herein, the Exchange does not believe this proposal creates an undue burden on competition. The Exchange operates in a highly competitive market comprised of eleven U.S. options exchanges in which many sophisticated and knowledgeable market participants can readily and do send order flow to competing exchanges if they deem fee levels or rebate incentives at a particular exchange to be excessive or inadequate. These market forces support the Exchange belief that the proposed rebate structure and tiers proposed herein are competitive with

<sup>23</sup> The Tier 1 NOM Market Maker Rebate to Add Liquidity in Penny Pilot Options is the same rebate as the proposed Tier 1 Customer and Professional rebate in Penny Pilot Options.

<sup>24</sup> These symbols pay a \$0.38 per contract rebate.

<sup>25</sup> SPY pays a \$0.40 per contract rebate.

<sup>26</sup> See note 21.

<sup>27</sup> See Phlx's Pricing Schedule. See also the International Securities Exchange LLC's Fee Schedule. Both of these markets segment pricing by symbol.

<sup>28</sup> See note 21.

rebates and tiers in place on other exchanges. The Exchange believes that this competitive marketplace continues to impact the rebates present on the Exchange today and substantially influences the proposals set forth above.

*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.<sup>29</sup> 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](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2013-091 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-2013-091. 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](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-2013-091, and should be submitted on or before July 31, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>30</sup>

Elizabeth M. Murphy,  
Secretary.

[FR Doc. 2013-16530 Filed 7-9-13; 8:45 am]

BILLING CODE 8011-01-P

**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-69932; File No. SR-BYX-2013-024]

**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.**

July 3, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on June 28, 2013, 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<sup>3</sup> and Rule 19b-4(f)(2) thereunder,<sup>4</sup> 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<sup>5</sup> 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 July 1, 2013.

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 purpose of the proposed rule change is to begin charging a monthly fee for the Multicast PITCH Spin Server Port and GRP Port, each of which are logical ports<sup>6</sup> used to receive data from

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>4</sup> 17 CFR 240.19b-4(f)(2).

<sup>5</sup> A Member is any registered broker or dealer that has been admitted to membership in the Exchange.

<sup>6</sup> A logical port is commonly referred to as a TCP/IP port, and represents a port established by the Exchange within the Exchange's system for trading and billing purposes. Each logical port established is specific to a Member or non-member and grants that Member or non-member the ability to operate a specific application, such as FIX order entry or Multicast PITCH data receipt. Logical port fees are limited to logical ports in the Exchange's primary data center and no logical port fees are assessed for redundant secondary data center ports.

<sup>30</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>29</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

the Exchange.<sup>7</sup> Currently, the Exchange charges a monthly fee for all other port types used to enter orders in the Exchange's system and to receive data from the Exchange;<sup>8</sup> however, the Exchange provides 32 primary Multicast PITCH Spin Server Ports free of charge (32 ports currently makes a complete set of Spin Server Ports) and, if such ports are used, one free primary GRP Port. In addition, all redundant Multicast PITCH Spin Server Ports and GRP Ports are provided free of charge.<sup>9</sup> Currently, the Exchange charges \$400 per month per additional set of primary Multicast PITCH Spin Server Ports and \$400 per month per additional primary GRP Port.

Beginning July 1, 2013, the Exchange proposes to charge \$400 per month per set of primary Multicast PITCH Spin Server Ports and \$400 per month per primary GRP Port. The Exchange is also proposing to eliminate the reference to the exact number of ports that makes a complete set of Multicast Spin Server Ports, as this number has changed in the past and could again change in the future. A complete set of Multicast Spin Server Ports is the number of ports necessary to get one full set of information from the Exchange based on load balancing by the Exchange.<sup>10</sup> The Exchange believes that this concept is clearly understood amongst recipients of Multicast data, and, therefore, does not believe that eliminating the fee schedule reference to the exact number of ports necessary to receive Exchange PITCH data via Multicast will cause confusion amongst recipients of Multicast data.

Based on the proposal, the change applies to Members that obtain ports for direct access to the Exchange, Sponsored Participants sponsored by Members to receive direct access to the

<sup>7</sup> BYX FIX ports are the only ports that may be used to send orders and related instructions to the Exchange. All other port types, including the Multicast PITCH Spin Server Port and GRP Port, permit Members and non-members to receive information from the Exchange.

<sup>8</sup> The Exchange currently charges a monthly fee for all other Exchange FIX, FIXDROP, BOE, DROP, TCP PITCH, and TOP ports.

<sup>9</sup> Exchange Multicast PITCH data feed is currently offered through two primary feeds, identified as the "A feed" and the "C feed", which contain the same information but differ only in the way such feeds are received. The Exchange offers for free the ports necessary to receive the Exchange's redundant Multicast "B feed" and "D feed", as well as all ports made available in the Exchange's secondary data center. Accordingly, this proposal only applies to ports used to receive an Exchange primary Multicast Feed at the Exchange's primary data center.

<sup>10</sup> The Exchange load balances information regarding securities traded on the Exchange across multiple channels (today 32) with each channel requiring a separate Multicast PITCH Spin Server Port.

Exchange, non-member service bureaus that act as a conduit for orders entered by Exchange Members that are their customers, and market data recipients.

## 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.<sup>11</sup> Specifically, the Exchange believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,<sup>12</sup> 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 operates in a highly competitive market in which exchanges offer connectivity services as a means to facilitate the trading activities of members and other participants. Accordingly, fees charged for connectivity are constrained by the active competition for the order flow of such participants as well as demand for market data from the Exchange. If a particular exchange charges excessive fees for connectivity, affected members will opt to terminate their connectivity arrangements with that exchange, and adopt a possible range of alternative strategies, including routing to the applicable exchange through another participant or market center or taking that exchange's data indirectly. Accordingly, the exchange charging excessive fees would stand to lose not only connectivity revenues but also revenues associated with the execution of orders routed to it by affected members, and, to the extent applicable, market data revenues. The Exchange believes that this competitive dynamic imposes powerful restraints on the ability of any exchange to charge unreasonable fees for connectivity.

The Exchange believes that its proposed changes to logical port fees are reasonable in light of the benefits to Exchange participants of direct market access and receipt of data.<sup>13</sup> In addition, the Exchange believes that its fees are equitably allocated among Exchange constituents based upon the number of access ports that they require to receive data from the Exchange. Further, the

Exchange believes that its fees are not unreasonably discriminatory because all market participants are charged standard fees for port usage. The Exchange notes that it believes its prior fee structure, under which ports necessary for receipt of Multicast data were provided free of charge, was reasonable, equitably allocated and not unreasonably discriminatory because it was available to all market participants and was intended to encourage the use of Multicast PITCH. However, by moving towards a more uniform approach to ports billing, the Exchange believes that its fees are even more equitably allocated and nondiscriminatory. The Exchange also believes that its fees for access services will enable it to better cover its infrastructure costs and to improve its market technology and services.

### 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. As discussed above, the Exchange believes that fees for connectivity are constrained by the robust competition for order flow among exchanges and non-exchange markets. Further, excessive fees for connectivity, including logical port fees, would serve to impair an exchange's ability to compete for order flow rather than burdening competition.

### 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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>14</sup> and paragraph (f) of Rule 19b-4 thereunder.<sup>15</sup> 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

<sup>11</sup> 15 U.S.C. 78f.

<sup>12</sup> 15 U.S.C. 78f(b)(4).

<sup>13</sup> Through a different filing, beginning July 1, 2013, the Exchange has proposed to implement fees for the BYX PITCH (including both TCP PITCH and Multicast PITCH) TOP, and Last Sale Feed data products.

<sup>14</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>15</sup> 17 CFR 240.19b-4(f).

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](mailto:rule-comments@sec.gov). Please include File Number SR-BYX-2013-024 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-BYX-2013-024. 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-2013-024 and should be submitted on or before July 31, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>16</sup>

**Elizabeth M. Murphy,**  
*Secretary.*

[FR Doc. 2013-16531 Filed 7-9-13; 8:45 am]

**BILLING CODE 8011-01-P**

## **SECURITIES AND EXCHANGE COMMISSION**

**[Release No. 34-69931; File No. SR-BATS-2013-038]**

### **Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing of a Proposed Rule Change, as Modified by Amendment No. 1, To Adopt Listing Standards for Certain Securities**

July 3, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on June 21, 2013, 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 filing was amended and replaced in its entirety by Amendment No. 1 thereto on July 2, 2013, and which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 1, from interested persons.

#### **I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange filed a proposal to adopt rules for the qualification, listing and delisting of companies on the Exchange. Specifically, the Exchange proposes to adopt rules applicable to the following securities (all of which are defined below): Equity Index-Linked Securities, Commodity-Linked Securities,<sup>3</sup> Fixed Income Index-Linked Securities, Futures-Linked Securities, Multifactor Index-Linked Securities, Index-Linked Exchangeable Notes; Equity Gold Shares; Trust Certificates; Commodity-Based Trust Shares; Currency Trust Shares; Commodity

<sup>16</sup> 17 CFR 200.30-3(a)(12).

<sup>15</sup> U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> Exchange Rules 14.11(d)(2)(G) and (H) currently include initial listing standards applicable to Equity Index-Linked Securities and Commodity-Linked Securities. The Exchange proposes to re-number the existing rule text in Rules 14.11(d)(2)(G) and (H), and to adopt continuing listing standards applicable to Equity Index-Linked Securities and Commodity-Linked Securities, in proposed Rules 14.11(d)(2)(K)(i) and (ii).

Index Trust Shares; Commodity Futures Trust Shares; Partnership Units; Trust Units; Managed Trust Securities; and Currency Warrants. Specifically, the proposal would adopt the relevant listing standards of the NASDAQ Stock Market LLC ("Nasdaq"), as set forth below. The Exchange also proposes changes to delete certain rule text from Rule 14.11(h), "Listing Requirements for Securities Not Specified Above (Other Securities)," to conform to the current listing standards of Nasdaq and to delete rule text that would become duplicative at the time the proposed rule becomes operative.

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 the Statutory Basis for, the Proposed Rule Change*

###### **1. Purpose**

This Amendment No. 1 to SR-BATS-2013-038 amends and replaces in its entirety the proposal as originally submitted on September 25, 2012. Amendment No. 1 corrects certain inconsistencies between the proposed rules and the descriptions of such proposed rules as well as various typographical and grammatical errors contained in the original filing.

The Exchange is proposing rules to adopt listing standards for each of the products enumerated above on the Exchange. Chapter XIV of the Exchange's Rules sets forth the rules applicable to securities listed on the Exchange (the "Listing Rules"). The Exchange is also proposing to make several non-substantive grammatical and technical changes to the Listing Rules. The Exchange's Listing Rules govern the qualification, listing and delisting of Securities on the Exchange.

The Listing Rules also set forth, among other things, definitions,<sup>4</sup> the Exchange's regulatory authority to list and maintain securities,<sup>5</sup> general procedures and prerequisites for initial and continued listing on the Exchange,<sup>6</sup> and, most significantly to the instant proposed rule change, "Other Securities,"<sup>7</sup> which govern, without limitation, listing and qualification rules applicable to Portfolio Depository Receipts, Index Fund Shares and other types of exchange traded products. The proposed amendment to Rule 14.11(d), Securities Linked to the Performance of Indexes and Commodities (Including Currencies), would add continuing listing standards for Equity Index-Linked Securities and Commodity-Linked Securities, and initial and continuing listing standards for fixed income index-linked securities ("Fixed Income Index-Linked Securities"), futures-linked securities ("Futures Linked Securities") and multifactor index-linked securities ("Multifactor Index-Linked Securities" and, together with Equity Index-Linked Securities and Commodity-Linked Securities, Fixed Income Index-Linked Securities and Futures-Linked Securities, "Linked Securities") to the rule.

Proposed new Rule 14.11(e), Trading of Certain Derivative Securities, would include listing standards for Index-Linked Exchangeable Notes, Equity Gold Shares, Trust Certificates, Commodity-Based Trust Shares, Currency Trust Shares, Commodity Index Trust Shares, Commodity Futures Trust Shares, Partnership Units, Trust Units, Managed Trust Securities, and Currency Warrants. Existing Rule 14.11(e), Selected Equity-linked Debt Securities ("SEEDS"), would be re-numbered as Rule 14.11(e)(12), and as a result, the Exchange proposes to re-number the sub-paragraphs and cross-references contained in such Rule.

The proposed rule change is intended to define the specific products (see above) that the Exchange intends to list and trade, and the listing and qualification requirements for each such product.

The Exchange also proposes changes to delete certain rule text from Rule 14.11(h), "Listing Requirements for Securities Not Specified Above (Other Securities)," to conform to the current listing standards of Nasdaq and to delete rule text that would become duplicative at the time the proposed rule becomes operative. Specifically, the Exchange

proposes to delete text to conform Rule 14.11(h) to conform such rule to Nasdaq Rule 5730.

#### Proposed Changes to Rule 14.11(d)—Linked Securities

##### Introductory Paragraphs to Rule 14.11(d)

The proposed amendments to Rule 14.11(d) would state that the Exchange will consider for listing and trading the Linked Securities set forth in the introductory paragraphs of the rule. These paragraphs describe the basis for the payment at maturity of the various securities, which is the performance of "Reference Assets," as defined below.

##### *Specifically:*

Equity Index-Linked Securities are securities that provide for the payment at maturity of a cash amount based on the performance of an underlying equity index or indexes (an "Equity Reference Asset").

The payment at maturity with respect to Commodity-Linked Securities is based on one or more physical Commodities or Commodity futures, options or other Commodity derivatives, Commodity-Related Securities, or a basket or index of any of the foregoing (a "Commodity Reference Asset"). The terms "Commodity" and "Commodity-Related Security" are defined in Rule 14.11.

The payment at maturity with respect to Fixed Income Index-Linked Securities is based on the performance of one or more indexes or portfolios of notes, bonds, debentures or evidence of indebtedness that include, but are not limited to, U.S. Department of Treasury securities ("Treasury Securities"), government-sponsored entity securities ("GSE Securities"), municipal securities, trust preferred securities, supranational debt and debt of a foreign country or a subdivision thereof or a basket or index of any of the foregoing (a "Fixed Income Reference Asset").

The payment at maturity with respect to Futures-Linked Securities is based on the performance of an index of (a) futures on Treasury Securities, GSE Securities, supranational debt and debt of a foreign country or a subdivision thereof, or options or other derivatives on any of the foregoing; or (b) interest rate futures or options or derivatives on the foregoing in this subparagraph (b); or (c) CBOE Volatility Index (VIX) Futures (a "Futures Reference Asset").

The payment at maturity with respect to Multifactor Index-Linked Securities is based on the performance of any combination of two or more Equity Reference Assets, Commodity Reference Assets, Fixed Income Reference Assets

or Futures Reference Assets (a "Multifactor Reference Asset," and together with Equity Reference Assets, Commodity Reference Assets, Fixed Income Reference Assets and Futures Reference Assets, "Reference Assets"). A Multifactor Reference Asset may include as a component a notional investment in cash or a cash equivalent based on a widely accepted overnight loan interest rate, LIBOR, Prime Rate, or an implied interest rate based on observed market spot and foreign currency forward rates.

Linked Securities may or may not provide for the repayment of the original principal investment amount. The Exchange may submit a rule filing pursuant to Section 19(b)(2) of the Act to permit the listing and trading of Linked Securities that do not otherwise meet the standards set forth in Rule 14.11(d).

##### Additional Changes to Rule 14.11(d)

The Exchange is not proposing any amendments to Rules 14.11(d)(2)(A)–(C) or (E)–(F) and such provisions would apply to all Linked Securities.<sup>8</sup>

The Exchange proposes to amend Rule 14.11(d)(2)(D) so that the Exchange may list Linked Securities that provide for three times accelerated payment at maturity.<sup>9</sup> In changing Rule 14.11(d)(2)(D), the Exchange is conforming its rule to the established listing rules of other exchanges. This proposed change to Rule 14.11(d)(2)(D) is based, word-for-word, on Nasdaq

<sup>8</sup> Current Rule 14.11(d)(2)(A)–(C) states:

(A) Both the issue and the issuer of such security meet the criteria for other securities set forth in Rule 14.11(h), except that if the security is traded in \$1,000 denominations or is redeemable at the option of holders thereof on at least a weekly basis, then no minimum number of holders and no minimum public distribution of trading units shall be required.

(B) The issue has a term of not less than one (1) year and not greater than thirty (30) years.

(C) The issue must be the non-convertible debt of the Company.

Current Rule 14.11(d)(2)(E) and (F) state:

(E) The Company will be expected to have a minimum tangible net worth in excess of \$250,000,000 and to exceed by at least 20% the earnings requirements set forth in paragraph (a)(1) of this Rule. In the alternative, the Company will be expected: (i) To have a minimum tangible net worth of \$150,000,000 and to exceed by at least 20% the earnings requirement set forth in paragraph (a)(1) of this Rule, and (ii) not to have issued securities where the original issue price of all the Company's other index-linked note offerings (combined with index-linked note offerings of the Company's affiliates) listed on a national securities exchange exceeds 25% of the Company's net worth.

(F) The Company is in compliance with Rule 10A–3 under the Act.

<sup>9</sup> The proposal is applicable only to non-option products.

<sup>4</sup> See Section 14.1 of the Exchange's Rules.

<sup>5</sup> See Section 14.2 of the Exchange's Rules.

<sup>6</sup> See Section 14.3 of the Exchange's Rules.

<sup>7</sup> See Section 14.11 of the Exchange's Rules.

Rule 5710(d).<sup>10</sup> Both the Exchanges Rule 14.11(d)(2)(D) and Nasdaq Rule 5710(d) state that pursuant to Rule 19b-4(e) under the Act<sup>11</sup> a loss or negative payment at maturity of a Linked Security may be accelerated by a multiple of the performance of an underlying asset (known as the “acceleration provision”). However, in Rule 14.11(d)(2)(D) the Exchange sets the multiple for the acceleration provision at “twice”; whereas Nasdaq sets the acceleration provision multiple at “three times”.<sup>12</sup> Other than changing one word—from “twice” to “three times”—in the Exchange’s acceleration provision in Rule 14.11(d)(2)(D), no other change is proposed or made to such sub-paragraph and such provision, as amended, would apply to all Linked Securities.

Additionally, the Exchange proposes to re-number the current text of Rule 14.11(d) by deleting current Rules 14.11(d)(2)(G) and (H) and moving the text of these two sections into proposed Rules 14.11(d)(2)(K)(i) and (ii).<sup>13</sup> Further, the Exchange is proposing to re-number the remaining existing sections of Rule 14.11(d), and to amend references and defined terms in such sections such that they would apply to all Linked Securities.

#### Listing Standards for Linked Securities

Proposed Rule 14.11(d)(2)(K) would adopt listing standards for the various Linked Securities, as described below.

#### Equity Index-Linked Securities

##### Initial Listing Criteria

Proposed Rule 14.11(d)(2)(K)(i)(a) would set forth the initial listing criteria for Equity Index-Linked Securities found in current Rule 14.11(d)(2)(G), which would be deleted and replaced in proposed Rule 14.11(d)(2)(K)(i)(a). Specifically:

In the case of an Equity Index-Linked Security, each underlying index is required to have at least ten (10) component securities. In addition, the index or indexes to which the security is linked shall either: (1) Have been reviewed and approved for the trading of options or other derivatives by the Commission under Section 19(b)(2) of

the Act and rules thereunder, and the conditions set forth in the Commission’s approval order, including comprehensive surveillance sharing agreements for non-U.S. stocks, continue to be satisfied, or (2) the index or indexes meet the following criteria:

- Each component security has a minimum market value of at least \$75 million, except that for each of the lowest weighted component securities in the index that in the aggregate account for no more than 10% of the weight of the index, the market value can be at least \$50 million;

- each component security shall have trading volume in each of the last six months of not less than 1,000,000 shares, except that for each of the lowest weighted component securities in the index that in the aggregate account for no more than 10% of the weight of the index, the trading volume shall be at least 500,000 shares in each of the last six months;

- indexes based upon the equal-dollar or modified equal-dollar weighting method will be rebalanced at least semiannually;

- in the case of a capitalization-weighted or modified capitalization-weighted index, the lesser of the five highest weighted component securities in the index or the highest weighted component securities in the index that in the aggregate represent at least 30% of the total number of component securities in the index, each have an average monthly trading volume of at least 2,000,000 shares over the previous six months;

- no underlying component security will represent more than 25% of the weight of the index, and the five highest weighted component securities in the index do not in the aggregate account for more than 50% of the weight of the index (60% for an index consisting of fewer than 25 component securities);

- 90% of the index’s numerical value and at least 80% of the total number of component securities will meet the then current criteria for standardized option trading on a national securities exchange or a national securities association, provided, however, that an index will not be subject to this requirement if (i) no underlying component security represents more than 10% of the dollar weight of the index and (ii) the index has a minimum of 20 components; and

- all component securities shall be either (i) securities (other than securities of a foreign issuer and American Depository Receipts (“ADRs”)) that are (a) issued by a 1934 Act reporting company or by an investment company registered under the Investment

Company Act of 1940 that, in each case, has securities listed on a national securities exchange and (b) an “NMS stock” (as defined in Rule 600 of Regulation NMS under the Act), or (ii) securities of a foreign issuer or ADRs, provided that securities of a foreign issuer (including when they underlie ADRs) whose primary trading market outside the United States is not a member of the Intermarket Surveillance Group (“ISG”) or a party to a comprehensive surveillance sharing agreement with the Exchange will not in the aggregate represent more than 20% of the dollar weight of the index.

#### Continued Listing Criteria

Rule 14.11(d)(2)(K)(i)(b) would adopt continued listing criteria for Equity Index-Linked Securities. Specifically, the Exchange will commence delisting or removal proceedings (unless the Commission has approved the continued trading of the subject Equity Index-Linked Security), if any of the standards set forth above are not continuously maintained, except that:

- The criteria that no single component represent more than 25% of the dollar weight of the index and the five highest dollar weighted components in the index cannot represent more than 50% (or 60% for indexes with less than 25 components) of the dollar weight of the index, need only be satisfied at the time the index is rebalanced; and

- component stocks that in the aggregate account for at least 90% of the weight of the index each shall have a minimum global monthly trading volume of 500,000 shares, or minimum global notional volume traded per month of \$12,500,000, averaged over the last six months.

In connection with an Equity Index-Linked Security that is based on an index that has been reviewed and approved for the trading of options or other derivatives by the Commission under Section 19(b)(2) of the Act and rules thereunder and the conditions set forth in the Commission’s approval order, the Exchange will commence delisting or removal proceedings (unless the Commission has approved the continued trading of the subject Equity Index-Linked Security) if an underlying index or indexes fails to satisfy the maintenance standards or conditions for such index or indexes as set forth by the Commission in its order under Section 19(b)(2) of the Act approving the index or indexes for the trading of options or other derivatives. Additionally, the Exchange will commence delisting or removal proceedings (unless the Commission has approved the

<sup>10</sup> The Exchange notes that the proposal is also consistent with NYSE Arca (“Arca”) Equities Rule 5.2(j)(6)(A)(d) and Section 703.22(B)(6) of the New York Stock Exchange Listed Company Manual.

<sup>11</sup> 17 CFR 240.19b-4(e).

<sup>12</sup> See Nasdaq Rule 5710(d). See also Securities Exchange Act Release No. 68721 (January 24, 2013), 78 FR 6379 (January 30, 2013) (SR-NASDAQ-2013-008) (notice of filing and immediate effectiveness of rule change to amend Rule 5710 to allow three times (3x) the performance of the underlying Reference Asset).

<sup>13</sup> See *supra* note 3.

continued trading of the subject Equity Index-Linked Security), under any of the following circumstances:

- If the aggregate market value or the principal amount of the Equity Index-Linked Securities publicly held is less than \$400,000;
- if the value of the index or composite value of the indexes is no longer calculated or widely disseminated on at least a 15-second basis with respect to indexes containing only securities listed on a national securities exchange, or on at least a 60-second basis with respect to indexes containing foreign country securities, provided, however, that, if the official index value does not change during some or all of the period when trading is occurring on the Exchange (for example, for indexes of foreign country securities, because of time zone differences or holidays in the countries where such indexes' component stocks trade) then the last calculated official index value must remain available throughout Regular Trading Hours<sup>14</sup> and both the Pre-Opening<sup>15</sup> and After Hours Trading Sessions;<sup>16</sup> or
- if such other event shall occur or condition exists which in the opinion of the Exchange makes further dealings on the Exchange inadvisable. Equity-Linked Indexes will be rebalanced at least annually.

The proposed rule change relating to Equity-Linked Securities is based on Nasdaq Rule 5710(k)(i).

#### Commodity-Linked Securities

Proposed Rule 14.11(d)(2)(K)(ii) would adopt the initial listing criteria (found in current Rule 14.11(d)(2)(H), which would be deleted and replaced in proposed Rule 14.11(d)(2)(K)(ii)(a) and continued listing criteria for Commodity-Linked Securities, as set forth below.

#### Initial Listing Criteria

The Reference Asset must meet one of the following criteria:

- The Reference Asset to which the security is linked shall have been reviewed and approved for the trading of Commodity-Related Securities or options or other derivatives by the Commission under Section 19(b)(2) of the Act and rules thereunder and the conditions set forth in the Commission's

<sup>14</sup> Regular Trading Hours are defined in Exchange Rule 1.5(w) as the time between 9:30 a.m. to 4:00 p.m. E.T.

<sup>15</sup> The Pre-Opening Session is defined in Exchange Rule 1.5(r) and currently means the time between 8:00 a.m. to 9:30 a.m. E.T.

<sup>16</sup> The After Hours Trading Session is defined in Exchange Rule 1.5(c) and currently means the time between 4:00 p.m. to 5:00 p.m. E.T.

approval order, including with respect to comprehensive surveillance sharing agreements, continue to be satisfied; or

- the pricing information for each component of a Reference Asset other than a Currency must be derived from a market which is an ISG member or affiliate or with which the Exchange has a comprehensive surveillance sharing agreement. Notwithstanding the previous sentence, pricing information for gold and silver may be derived from the London Bullion Market Association. The pricing information for each component of a Reference Asset that is a Currency must be either: (A) The generally accepted spot price for the currency exchange rate in question; or (B) derived from a market of which (i) is an ISG member or affiliate or with which the Exchange has a comprehensive surveillance sharing agreement and (ii) is the pricing source for a currency component of a Reference Asset that has previously been approved by the Commission. A Reference Asset may include components representing not more than 10% of the dollar weight of such Reference Asset for which the pricing information is derived from markets that do not meet the requirements of subparagraph (2) of the proposed rule, provided, however, that no single component subject to this exception exceeds 7% of the dollar weight of the Reference Asset. The term "Currency," as used in the proposed rule, means one or more currencies, or currency options, futures, or other currency derivatives, Commodity-Related Securities if their underlying Commodities are currencies or currency derivatives, or a basket or index of any of the foregoing.

#### Continued Listing Standards

Proposed Rule 14.11(d)(2)(K)(ii)(b) would establish continued listing criteria for Commodity-Linked Securities. Specifically, the Exchange will commence delisting or removal proceedings if any of the initial listing criteria described above are not continuously maintained. Additionally, the Exchange will also commence delisting or removal proceedings under any of the following circumstances:

- If the aggregate market value or the principal amount of the Commodity-Linked Securities publicly held is less than \$400,000;
- if the value of the Commodity Reference Asset is no longer calculated or available and a new Commodity Reference Asset is substituted, unless the new Commodity Reference Asset meets the requirements of the proposed rule; or

- if such other event shall occur or condition exists which in the opinion of the Exchange makes further dealings on the Exchange inadvisable.

The proposed rule change relating to Commodity-Linked Securities is based on Nasdaq Rule 5710(k)(ii).

#### Fixed Income Index-Linked Securities

Proposed Rule 14.11(d)(2)(K)(iii) would set forth the listing criteria for Fixed Income Index-Linked Securities.

#### Initial Listing Standards

Proposed Rule 14.11(d)(2)(k)(iii)(a) states that either the Fixed Income Reference Asset to which the security is linked shall have been reviewed and approved for the trading of options, Index Fund Shares, or other derivatives by the Commission under Section 19(b)(2) of the Securities Exchange Act of 1934 and rules thereunder and the conditions set forth in the Commission's approval order, continue to be satisfied or the issue must meet the following initial listing criteria:

- Components of the Fixed Income Reference Asset that in the aggregate account for at least 75% of the weight of the Fixed Income Reference Asset must each have a minimum original principal amount outstanding of \$100 million or more;
- a component of the Fixed Income Reference Asset may be a convertible security, however, once the convertible security component converts to the underlying equity security, the component is removed from the Fixed Income Reference Asset;
- no component of the Fixed Income Reference Asset (excluding Treasury Securities and GSE Securities) will represent more than 30% of the dollar weight of the Fixed Income Reference Asset, and the five highest dollar weighted components in the Fixed Income Reference Asset will not in the aggregate account for more than 65% of the dollar weight of the Fixed Income Reference Asset;
- an underlying Fixed Income Reference Asset (excluding one consisting entirely of exempted securities) must include a minimum of 13 non-affiliated issuers; and
- component securities that in the aggregate account for at least 90% of the dollar weight of the Fixed Income Reference Asset must be from one of the following: (i) Issuers that are required to file reports pursuant to Sections 13 and 15(d) of the Act; or (ii) issuers that have a worldwide market value of outstanding common equity held by non-affiliates of \$700 million or more; or (iii) issuers that have outstanding securities that are notes, bonds,

debentures, or evidence of indebtedness having a total remaining principal amount of at least \$1 billion; or (iv) exempted securities as defined in Section 3(a)(12) of the Act, or (v) issuers that are a government of a foreign country or a political subdivision of a foreign country.

In addition, proposed Rule 14.11(d)(2)(k)(iii)(b) states the value of the Fixed Income Reference Asset must be widely disseminated to the public by one or more major market vendors at least once per business day.

#### Continued Listing Standards

Proposed Rule 14.11(d)(2)(K)(iii)(c) would provide that the Exchange will commence delisting or removal proceedings if any of the initial listing criteria described above are not continuously maintained, and that the Exchange will also commence delisting or removal proceedings:

- If the aggregate market value or the principal amount of the Fixed Income Index-Linked Securities publicly held is less than \$400,000;
- if the value of the Fixed Income Reference Asset is no longer calculated or available and a new Fixed Income Reference Asset is substituted, unless the new Fixed Income Reference Asset meets the requirements of proposed Rule 14.11(d)(2)(K); or
- if such other event shall occur or condition exists which in the opinion of the Exchange makes further dealings on the Exchange inadvisable.

The proposed rule change relating to Fixed-Income Linked Securities is based on Nasdaq Rule 5710(k)(iii).

#### Futures-Linked Securities

Proposed Rule 14.11(d)(2)(K)(iv) would establish listing standards for Futures-Linked Securities.

#### Initial Listing Standards

Proposed Rule 14.11(d)(2)(K)(iv)(a) states that the issue must meet either of the following the initial listing standards:

- The Futures Reference Asset to which the security is linked shall have been reviewed and approved for the trading of Futures-Linked Securities or options or other derivatives by the Commission under Section 19(b)(2) of the Act and rules thereunder and the conditions set forth in the Commission's approval order, including with respect to comprehensive surveillance sharing agreements, continue to be satisfied, or
- the pricing information for components of a Futures Reference Asset must be derived from a market which is an ISG member or affiliate or with which the Exchange has a

comprehensive surveillance sharing agreement. A Futures Reference Asset may include components representing not more than 10% of the dollar weight of such Futures Reference Asset for which the pricing information is derived from markets that do not meet the requirements of proposed Rule 14.11(d)(2)(K)(iv)(a)(2); provided, however, that no single component subject to this exception exceeds 7% of the dollar weight of the Futures Reference Asset.

In addition, proposed Rule 14.11(d)(2)(k)(iv)(b) states that the issue must meet both of the following initial listing criteria:

- The value of the Futures Reference Asset must be calculated and widely disseminated by one or more major market data vendors on at least a 15-second basis during the regular market session, and
- in the case of Futures-Linked Securities that are periodically redeemable, the value of a share of each series (the "Intraday Indicative Value") of the subject Futures-Linked Securities must be calculated and widely disseminated by the Exchange or one or more major market data vendors on at least a 15-second basis during the Exchange's regular market session.

#### Continued Listing Standards

Proposed Rule 14.11(d)(2)(K)(iv)(c) states that the Exchange will commence delisting or removal proceedings if any of the initial listing criteria described above are not continuously maintained, and that the Exchange will also commence delisting or removal proceedings under any of the following circumstances:

- If the aggregate market value or the principal amount of the Futures-Linked Securities publicly held is less than \$400,000;
- if the value of the Futures Reference Asset is no longer calculated or available and a new Futures Reference Asset is substituted, unless the new Futures Reference Asset meets the requirements of proposed Rule 14.11(d)(2)(K); or
- if such other event shall occur or condition exists which in the opinion of the Exchange makes further dealings on the Exchange inadvisable.

The proposed rule change relating to Futures-Linked Securities is based on Nasdaq Rule 5710(k)(iv).

#### Multifactor Index-Linked Securities

Proposed Rule 14.11(d)(2)(K)(v) would govern the listing standards for Multifactor Index-Linked Securities.

#### Initial Listing Standards

Proposed Rule 14.11(D)(2)(K)(v)(a) states that the issue must meet one of the following initial listing standards:

- Each component of the Multifactor Reference Asset to which the security is linked shall have been reviewed and approved for the trading of either options, Index Fund Shares, or other derivatives under Section 19(b)(2) of the Act and rules thereunder and the conditions set forth in the Commission's approval order continue to be satisfied, or

- each Reference Asset included in the Multifactor Reference Asset must meet the applicable initial and continued listing criteria set forth in the relevant subsection of proposed Rule 14.11(d)(2)(K).

In addition to one of the initial listing standards set forth above, proposed Rule 14.11(d)(2)(K)(v)(b) would state that the issue must meet both of the following initial listing criteria:

- The value of the Multifactor Reference Asset must be calculated and widely disseminated to the public on at least a 15-second basis during the time the Multifactor Index-Linked Security trades on the Exchange; and
- in the case of Multifactor Index-Linked Securities that are periodically redeemable, the indicative value of the Multifactor Index-Linked Securities must be calculated and widely disseminated by one or more major market data vendors on at least a 15-second basis during the time the Multifactor Index-Linked Securities trade on the Exchange.

#### Continued Listing Criteria

Proposed Rule 14.11(d)(2)(K)(v)(c) states that the Exchange will commence delisting or removal proceedings:

- If any of the initial listing criteria described above are not continuously maintained;
- if the aggregate market value or the principal amount of the Multifactor Index-Linked Securities publicly held is less than \$400,000;
- if the value of the Multifactor Reference Asset is no longer calculated or available and a new Multifactor Reference Asset is substituted, unless the new Multifactor Reference Asset meets the requirements of proposed Rule 14.11(d)(2)(K); or
- if such other event shall occur or condition exists which in the opinion of the Exchange makes further dealings on the Exchange inadvisable.

The proposed rule change relating to Multifactor Index-Linked Securities is based on Nasdaq Rule 5710(k)(v).

### Regulatory Requirements for Registered Market Makers in Linked Securities

Interpretation and Policy .01 to proposed Rule 14.11(d)(2)(K) would establish certain regulatory requirements for registered Market Makers in Linked Securities. Specifically, the registered Market Maker in Linked Securities must file with the Exchange, in a manner prescribed by the Exchange, and keep current a list identifying all accounts for trading in the Reference Asset components, the commodities, currencies or futures underlying the Reference Asset components, or any derivative instruments based on the Reference Asset or based on any Reference Asset component or any physical commodity, currency or futures underlying a Reference Asset component, which the registered Market Maker may have or over which it may exercise investment discretion. No registered Market Maker in Linked Securities would be permitted to trade in the Reference Asset components, the commodities, currencies or futures underlying the Reference Asset components, or any derivative instruments based on the Reference Asset or based on any Reference Asset component or any physical commodity, or futures currency underlying a Reference Asset component, in an account in which a registered Market Maker, directly or indirectly, controls trading activities, or has a direct interest in the profits or losses thereof, which has not been reported to the Exchange as required by the proposed Rule.

In addition to the existing obligations under Exchange rules regarding the production of books and records<sup>17</sup> the registered Market Maker in Linked Securities would be required to make available to the Exchange such books, records or other information pertaining to transactions by such entity or any limited partner, officer or approved person thereof, registered or nonregistered employee affiliated with such entity for its or their own accounts in the Reference Asset components, the commodities, currencies or futures underlying the Reference Asset components, or any derivative instruments based on the Reference Asset or based on any Reference Asset component or any physical commodity, currency or futures underlying a Reference Asset component, as may be requested by the Exchange.

The proposed rule change relating to regulatory requirements for registered Market Makers in Linked Securities is

based on Nasdaq Rule 5710, Commentary .01.

### Proposed Rule 14.11(e)—Trading of Certain Derivative Securities

The Exchange proposes to adopt new Rule 14.11(e), Trading of Certain Derivative Securities, which would set forth listing standards for the securities described below.

#### Index-Linked Exchangeable Notes

Proposed Rule 14.11(e)(1) would adopt listing standards for Index-Linked Exchangeable Notes.

#### Description

Index-Linked Exchangeable Notes are exchangeable debt securities that are exchangeable at the option of the holder (subject to the requirement that the holder in most circumstances exchange a specified minimum amount of notes), on call by the issuer, or at maturity for a cash amount (the “Cash Value Amount”) based on the reported market prices of the underlying stocks of an underlying index. Each Index-Linked Exchangeable Note is intended to provide investors with an instrument that closely tracks the underlying index. Notwithstanding that the notes are linked to an index, they will trade as a single security.

#### Initial Listing Standards

Index-Linked Exchangeable Notes will be considered for listing and trading by the Exchange pursuant to Rule 19b–4(e) under the Act,<sup>18</sup> provided:

- Both the issue and the issuer of such security meet the requirements of Rule 14.11(h), Listing Requirements for Securities Not Specified Above (Other Securities), except that the minimum public distribution shall be 150,000 notes with a minimum of 400 public note-holders, except, if traded in thousand dollar denominations or redeemable at the option of the holders thereof on at least a weekly basis, then no minimum public distribution and no minimum number of holders.
- The issue has a minimum term of one year.
- The issuer will be expected to have a minimum tangible net worth in excess of \$250,000,000, and to otherwise substantially exceed the earnings requirements set forth in Rule 14.8(b)(2). In the alternative, the issuer will be expected: (i) To have a minimum tangible net worth of \$150,000,000 and to otherwise substantially exceed the earnings requirements set forth in Rule 14.8(b)(2); and (ii) not to have issued

Index-Linked Exchangeable Notes where the original issue price of all the issuer’s other Index-Linked Exchangeable Note offerings (combined with other index-linked exchangeable note offerings of the issuer’s affiliates) listed on a national securities exchange exceeds 25% of the issuer’s net worth.

The index to which an exchangeable-note is linked shall either be (i) indices that have been created by a third party and been reviewed and have been approved for the trading of options or other derivatives securities (each, a “Third-Party Index”) either by the Commission under Section 19(b)(2) of the Act and rules thereunder or by the Exchange under rules adopted pursuant to Rule 19b–4(e); or (ii) indices which the issuer has created and for which the Exchange will have obtained approval from either the Commission pursuant to Section 19(b)(2) and rules thereunder or from the Exchange under rules adopted pursuant to Rule 19b–4(e) (each an “Issuer Index”). The Issuer Indices and their underlying securities must meet one of the following: (A) The procedures and criteria set forth in BATS Options Rules 29.6(b) and (c), or (B) the criteria set forth in Rules 14.11(e)(12)(B)(iii) and (iv), the index concentration limits set forth in BATS Options Rule 29.6, and BATS Options Rule 29.6(b)(12) insofar as it relates to BATS Options Rule 29.6(b)(6).

Index-Linked Exchangeable Notes will be treated as equity instruments.

Under proposed Rule 14.11(e)(1)(F) the Intraday Indicative Value of the subject Index-Linked Exchangeable Notes must be calculated and widely disseminated by the Exchange on one or more major market data vendors on at least a 15-second basis during the Exchange’s regular market session. Additionally, under proposed Rule 14.11(e)(1)(G), the value of the underlying index must be publicly available to investors, on a real time basis, every 15 seconds. For the avoidance of doubt, proposed Rule 14.11(e)(1)(F) also includes a definition of “Intraday Indicative Value” that is specific to the proposed rule, i.e., for purposes of the proposed rule, the term “Intraday Indicative Value” means an estimate of the value of a note or a share of the series of Index-Linked Exchangeable Notes. Proposed Rules 14.11(e)(1)(F) and (G) would ensure that the value of an Index-Linked Exchangeable Note and its underlying index are publicly available on a real time basis. This will provide investors with up-to-date information on the value of the note and the Third Party Index or Issuer Index. Accordingly, Index-Linked Exchangeable Notes

<sup>17</sup> See, e.g., Exchange Rule 4.2.

<sup>18</sup> 17 CFR 240.19b–4(e).

should allow investors to: (i) Respond quickly to market changes through intra-day trading opportunities; (ii) engage in hedging strategies; and (iii) reduce transaction costs for trading a group or index of securities.

#### Continued Listing Standards

Beginning twelve months after the initial issuance of a series of Index-Linked Exchangeable Notes, the Exchange will consider the suspension of trading in or removal from listing of that series of Index-Linked Exchangeable Notes under any of the following circumstances:

- If the series has fewer than 50,000 notes issued and outstanding;
- If the market value of all Index-Linked Exchangeable Notes of that series issued and outstanding is less than \$1,000,000; or
- if such other event shall occur or such other condition exists which in the opinion of the Exchange makes further dealings on the Exchange inadvisable.

The proposed rule change relating to Index-Linked Exchangeable Notes is based on Nasdaq Rule 5711(a).

#### Equity Gold Shares

##### Description

Proposed Rule 14.11(e)(2) would apply to Equity Gold Shares that represent units of fractional undivided beneficial interest in, and ownership of, the Equity Gold Trust. While Equity Gold Shares are not technically "Index Fund Shares," and thus are not covered by Exchange Rule 14.11(c), all other of the Exchange's rules that reference "Index Fund Shares" shall also apply to Equity Gold Shares.

##### Applicability

Except to the extent that specific provisions in proposed Rule 14.11(e)(2) govern, or unless the context otherwise requires, the provisions of all other Exchange Rules and policies would be applicable to the trading of Equity Gold Shares on the Exchange. The provisions set forth in proposed Rule 14.11(e)(4) relating to Commodity-Based Trust Shares would also apply to Equity Gold Shares.

The proposed rule change relating to Equity Gold Shares is based on Nasdaq Rule 5711(b).

#### Trust Certificates

Proposed Rule 14.11(e)(3) would govern the listing standards applicable to Trust Certificates. The Exchange will consider for trading, whether by listing or pursuant to unlisted trading privileges, Trust Certificates.

##### Description

Trust Certificates represent an interest in a special purpose trust (the "Trust") created pursuant to a trust agreement. The Trust will only issue Trust Certificates. Trust Certificates may or may not provide for the repayment of the original principal investment amount. Trust Certificates pay an amount at maturity which is based upon the performance of specified assets as set forth below:

- An underlying index or indexes of equity securities (an "Equity Reference Asset");
- instruments that are direct obligations of the issuing company, either exercisable throughout their life (*i.e.*, American style) or exercisable only on their expiration date (*i.e.*, European style), entitling the holder to a cash settlement in U.S. dollars to the extent that the foreign or domestic index has declined below (for put warrant) or increased above (for a call warrant) the pre-stated cash settlement value of the index ("Index Warrants"); or
- a combination of two or more Equity Reference Assets or Index Warrants.

The Exchange will file separate proposals under Section 19(b) of the Act before trading, either by listing or pursuant to unlisted trading privileges, Trust Certificates.

#### Continued Listing Standards

Proposed Interpretation and Policy .01 to proposed Rule 14.11(e)(3) would state that the Exchange will commence delisting or removal proceedings with respect to an issue of Trust Certificates (unless the Commission has approved the continued trading of such issue), under any of the following circumstances:

- If the aggregate market value or the principal amount of the securities publicly held is less than \$400,000;
- If the value of the index or composite value of the indexes is no longer calculated or widely disseminated on at least a 15-second basis with respect to indexes containing only securities listed on a national securities exchange, or on at least a 60-second basis with respect to indexes containing foreign country securities, provided, however, that, if the official index value does not change during some or all of the period when trading is occurring on the Exchange (for example, for indexes of foreign country securities, because of time zone differences or holidays in the countries where such indexes' component stocks trade) then the last calculated official index value must remain available

throughout Regular Trading Hours and both the Pre-Opening and After Hours Trading Sessions; or

- If such other event shall occur or condition exists which in the opinion of the Exchange makes further dealings on the Exchange inadvisable.

#### Other Provisions

Proposed Interpretation and Policy .02 to Rule 14.11(e)(3) would provide that the stated term of the Trust shall be as stated in the Trust prospectus.

However, a Trust may be terminated under such earlier circumstances as may be specified in the Trust prospectus.

Proposed Interpretation and Policy .03 to Rule 14.11(e)(3) would provide that the trustee of a Trust must be a trust company or banking institution having substantial capital and surplus and the experience and facilities for handling corporate trust business. In cases where, for any reason, an individual has been appointed as trustee, a qualified trust company or banking institution must be appointed co-trustee. No change is to be made in the trustee of a listed issue without prior notice to and approval of the Exchange.

Proposed Interpretation and Policy .04 to Rule 14.11(e)(3) would provide that voting rights will be as set forth in the applicable Trust prospectus.

Proposed Interpretation and Policy .05 to Rule 14.11(e)(3) would provide that the Exchange will implement written surveillance procedures for Trust Certificates.

Proposed Interpretation and Policy .06 to Rule 14.11(e)(3) would provide that the Trust Certificates will be subject to the Exchange's equity trading rules.

Proposed Interpretation and Policy .07 to Rule 14.11(e)(3) would provide that prior to the commencement of trading of a particular Trust Certificates listing pursuant to this Rule, the Exchange will evaluate the nature and complexity of the issue and, if appropriate, distribute a circular to Members providing guidance regarding compliance responsibilities (including suitability recommendations and account approval) when handling transactions in Trust Certificates.

Proposed Interpretation and Policy .08 to Rule 14.11(e)(3) would provide that Trust Certificates may be exchangeable at the option of the holder into securities that participate in the return of the applicable underlying asset. In the event that the Trust Certificates are exchangeable at the option of the holder and contain an Index Warrant, then a Member must ensure that the Member's account is approved for options trading in accordance with the rules of the

Exchange's options market ("BATS Options") in order to exercise such rights.

Proposed Interpretation and Policy .09 to Rule 14.11(e)(3) would provide that Trust Certificates may pass-through periodic payments of interest and principle of the underlying securities.

Proposed Interpretation and Policy .10 to Rule 14.11(e)(3) would provide that the Trust payments may be guaranteed pursuant to a financial guaranty insurance policy which may include swap agreements.

Proposed Interpretation and Policy .11 to Rule 14.11(e)(3) would provide that the Trust Certificates may be subject to early termination or call features.

The proposed rule change relating to Trust Certificates is based on Nasdaq Rule 5711(c).

#### Commodity-Based Trust Shares

Proposed Rule 14.11(e)(4) would permit the listing and trading, or trading pursuant to unlisted trading privileges, of Commodity-Based Trust Shares on the Exchange. Proposed Rule 14.11(e)(4) would be applicable only to Commodity-Based Trust Shares. Except to the extent inconsistent with the proposed Rule, or unless the context otherwise requires, the provisions of the trust issued receipts rules, Bylaws, and all other rules and procedures of the Board of Directors shall be applicable to the trading on the Exchange of such securities. Commodity-Based Trust Shares are included within the definition of "security" or "securities" as such terms are used in the Rules of the Exchange.

#### Description

"Commodity-Based Trust Shares," as defined in proposed Rule 14.11(e)(4)(C)(i), means a security (a) that is issued by a Trust that holds a specified commodity deposited with the Trust; (b) that is issued by such Trust in a specified aggregate minimum number in return for a deposit of a quantity of the underlying commodity; and (c) that, when aggregated in the same specified minimum number, may be redeemed at a holder's request by such Trust which will deliver to the redeeming holder the quantity of the underlying commodity. Proposed Rule 14.11(e)(4)(C)(ii) states that the term "commodity" is defined in Section 1(a)(4) of the Commodity Exchange Act.

Proposed Rule 14.11(e)(4)(D) states that the Exchange may trade, either by listing or pursuant to unlisted trading privileges, Commodity-Based Trust Shares based on an underlying commodity. Each issue of a Commodity-

Based Trust Share will be designated as a separate series and will be identified by a unique symbol.

#### Initial Listing Standards

Proposed Rule 14.11(e)(4)(E)(i) states that the Exchange will establish a minimum number of Commodity-Based Trust Shares required to be outstanding at the time of commencement of trading on the Exchange.

#### Continued Listing Standards

Proposed Rule 14.11(e)(4)(E)(ii) provides that following the initial 12-month period following commencement of trading on the Exchange of Commodity-Based Trust Shares, the Exchange will consider the suspension of trading in or removal from listing of such series under any of the following circumstances if:

- The Trust has more than 60 days remaining until termination and there are fewer than 50 record and/or beneficial holders of Commodity-Based Trust Shares for 30 or more consecutive trading days;
- The Trust has fewer than 50,000 receipts issued and outstanding;
- The market value of all receipts issued and outstanding is less than \$1,000,000;
- The value of the underlying commodity is no longer calculated or available on at least a 15-second delayed basis from a source unaffiliated with the sponsor, Trust, custodian or the Exchange or the Exchange stops providing a hyperlink on its Web site to any such unaffiliated commodity value;
- The Intraday Indicative Value<sup>19</sup> is no longer made available on at least a 15-second delayed basis; or
- Such other event shall occur or condition exists which in the opinion of the Exchange makes further dealings on the Exchange inadvisable.

#### Other Provisions

Upon termination of a Trust, the Exchange requires that Commodity-Based Trust Shares issued in connection with such entity Trust be removed from Exchange listing. A Trust may terminate in accordance with the provisions of the Trust prospectus, which may provide for termination if the value of the Trust falls below a specified amount.

Proposed Rule 14.11(e)(4)(E)(iii) provides that the stated term of the Trust shall be as stated in the Trust prospectus. However, a Trust may be terminated under such earlier

<sup>19</sup> The Intraday Indicative Value is an estimate, updated at least every 15 seconds, of the value of a share of each series during the Exchange's regular market session. See, e.g., Exchange Rules 14.11(b)(3)(C) and (c)(3)(C).

circumstances as may be specified in the Trust prospectus.

Proposed Rule 14.11(e)(4)(E)(iv) would apply the following requirements to the trustee of a Trust:

- The trustee of a Trust must be a trust company or banking institution having substantial capital and surplus and the experience and facilities for handling corporate trust business. In cases where, for any reason, an individual has been appointed as trustee, a qualified trust company or banking institution must be appointed co-trustee.

- No change is to be made in the trustee of a listed issue without prior notice to and approval of the Exchange.

Proposed Rule 14.11(e)(4)(E)(v) states that voting rights shall be as set forth in the applicable Trust prospectus.

Proposed Rules 14.11(e)(4)(F) and (G) describe the limitation of the Exchange liability and requirements for Market Makers in Commodity-Based Trust Shares (see below for a general discussion of these requirements).

Interpretation and Policy .01 to proposed Exchange Rule 14.11(e)(4) provides that a Commodity-Based Trust Share is a Trust Issued Receipt that holds a specified commodity deposited with the Trust.

Interpretation and Policy .02 to proposed Exchange Rule 14.11(e)(4) provides that the Exchange requires that Members provide all purchasers of newly issued Commodity-Based Trust Shares a prospectus for the series of Commodity-Based Trust Shares.

Interpretation and Policy .03 to proposed Exchange Rule 14.11(e)(4) provides that transactions in Commodity-Based Trust Shares will occur during Regular Trading Hours and both the Pre-Opening and After Hours Trading Sessions.

Interpretation and Policy .04 to proposed Exchange Rule 14.11(e)(4) provides that the Exchange will file separate proposals under Section 19(b) of the Exchange Act before the listing and/or trading of Commodity-Based Trust Shares.

The proposed rule change relating to Commodity-Based Trust Shares is based on Nasdaq Rule 5711(d).

#### Currency Trust Shares

The Exchange proposes to adopt new Exchange Rule 14.11(e)(5) for the purpose of permitting the listing and trading, or trading pursuant to unlisted trading privileges, of Currency Trust Shares. Proposed Rule 14.11(e)(5) would be applicable only to Currency Trust Shares. Except to the extent inconsistent with the proposed Rule, or unless the context otherwise requires, the

provisions of the trust issued receipts rules, Bylaws, and all other rules and procedures of the Board of Directors shall be applicable to the trading on the Exchange of such securities. Currency Trust Shares are included within the definition of "security" or "securities" as such terms are used in the Rules of the Exchange.

#### Description

Proposed Rule 14.11(e)(5)(C) provides that the term "Currency Trust Shares" as used in these proposed rules means, unless the context otherwise requires, a security that:

- is issued by a Trust that holds a specified non-U.S. currency or currencies deposited with the Trust;
- when aggregated in some specified minimum number may be surrendered to the Trust by an Authorized Participant (as defined in the Trust's prospectus) to receive the specified non-U.S. currency or currencies; and
- pays beneficial owners interest and other distributions on the deposited non-U.S. currency or currencies, if any, declared and paid by the Trust.

Proposed Rule 14.11(e)(5)(D) states that the Exchange may trade, either by listing or pursuant to unlisted trading privileges, Currency Trust Shares that hold a specified non-U.S. currency or currencies. Each issue of Currency Trust Shares would be designated as a separate series and shall be identified by a unique symbol.

#### Initial Listing Standards

The Exchange will establish a minimum number of Currency Trust Shares required to be outstanding at the time of commencement of trading on the Exchange.

#### Continued Listing Standards

Proposed Rule 14.11(e)(5)(E)(ii) provides that, following the initial 12 month period following commencement of trading on the Exchange of Currency Trust Shares, the Exchange will consider the suspension of trading in or removal from listing of such series under any of the following circumstances:

- If the Trust has more than 60 days remaining until termination and there are fewer than 50 record and/or beneficial holders of Currency Trust Shares for 30 or more consecutive trading days;
- if the Trust has fewer than 50,000 Currency Trust Shares issued and outstanding;
- if the market value of all Currency Trust Shares issued and outstanding is less than \$1,000,000;

- if the value of the applicable non-U.S. currency is no longer calculated or available on at least a 15-second delayed basis from a source unaffiliated with the sponsor, Trust, custodian or the Exchange or the Exchange stops providing a hyperlink on its Web site to any such unaffiliated applicable non-U.S. currency value;

- if the Intraday Indicative Value is no longer made available on at least a 15-second delayed basis; or
- if such other event shall occur or condition exists which in the opinion of the Exchange makes further dealings on the Exchange inadvisable.

Upon termination of a Trust, the Exchange would require that Currency Trust Shares issued in connection with such entity Trust be removed from Exchange listing. A Trust may terminate in accordance with the provisions of the Trust prospectus, which may provide for termination if the value of the Trust falls below a specified amount.

#### Other

Proposed Rule 14.11(e)(5)(E)(iii) states that the stated term of the Trust shall be as stated in the Trust prospectus. However, a Trust may be terminated under such earlier circumstances as may be specified in the Trust prospectus.

Proposed Rule 14.11(e)(5)(E)(iv) states that the following requirements apply to the trustee of a Trust:

- The trustee of a Trust must be a trust company or banking institution having substantial capital and surplus and the experience and facilities for handling corporate trust business. In cases where, for any reason, an individual has been appointed as trustee, a qualified trust company or banking institution must be appointed co-trustee.

- No change is to be made in the trustee of a listed issue without prior notice to and approval of the Exchange.

Proposed Rule 14.11(e)(5)(E)(v) states that voting rights shall be as set forth in the applicable Trust prospectus.

Proposed Rules 14.11(e)(5)(F) and (G) set forth the requirements respecting limitation of the Exchange liability and Market Maker Accounts (see below for a general discussion of these requirements).

Proposed Rule 14.11(e)(5)(H) states that the Exchange may submit a rule filing pursuant to Section 19(b)(2) of the Act to permit the listing and trading of Currency Trust Shares that do not otherwise meet the standards set forth in Interpretation and Policy .04 to proposed Rule 14.11(e)(5).

Interpretation and Policy .01 to proposed Rule 14.11(e)(5) states that a Currency Trust Share is a Trust Issued

Receipt that holds a specified non-U.S. currency or currencies deposited with the Trust.

Interpretation and Policy .02 to proposed Rule 14.11(e)(5) states that the Exchange requires that Members provide all purchasers of newly issued Currency Trust Shares a prospectus for the series of Currency Trust Shares.

Interpretation and Policy .03 to proposed Rule 14.11(e)(5) provides that transactions in Currency Trust Shares will occur during Regular Trading Hours and both the Pre-Opening and After Hours Trading Sessions.

Interpretation and Policy .04 to proposed Rule 14.11(e)(5) provides that the Exchange may approve an issue of Currency Trust Shares for listing and/or trading (including pursuant to unlisted trading privileges) pursuant to Rule 19b-4(e) under the Act. Such issue shall satisfy the criteria set forth in the proposed rule, together with the following criteria:

- A minimum of 100,000 shares of a series of Currency Trust Shares is required to be outstanding at commencement of trading (this would not apply to issues trading pursuant to unlisted trading privileges);

- the value of the applicable non-U.S. currency, currencies or currency index must be disseminated by one or more major market data vendors on at least a 15-second delayed basis;

- the Intraday Indicative Value must be calculated and widely disseminated by the Exchange or one or more major market data vendors on at least a 15-second basis during the regular market session; and

- The Exchange will implement written surveillance procedures applicable to Currency Trust Shares.

Interpretation and Policy .05 to proposed Rule 14.11(e)(5) states that if the value of a Currency Trust Share is based in whole or in part on an index that is maintained by a broker-dealer, the broker-dealer would be required to erect a "firewall" around the personnel responsible for the maintenance of such index or who have access to information concerning changes and adjustments to the index, and the index shall be calculated by a third party who is not a broker-dealer. Additionally, any advisory committee, supervisory board or similar entity that advises an index licensor or administrator or that makes decisions regarding the index or portfolio composition, methodology and related matters must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material, non-public information regarding the applicable index or portfolio.

Interpretation and Policy .06 to proposed Rule 14.11(e)(5) provides that Currency Trust Shares will be subject to the Exchange's equity trading rules.

#### Trading Halts

Proposed Interpretation and Policy .07 to Rule 14.11(e)(5) states that if the Intraday Indicative Value, or the value of the non-U.S. currency or currencies or the currency index applicable to a series of Currency Trust Shares is not being disseminated as required, the Exchange may halt trading during the day on which such interruption first occurs. If such interruption persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption. If the Exchange becomes aware that the net asset value applicable to a series of Currency Trust Shares is not being disseminated to all market participants at the same time, it will halt trading in such series until such time as the net asset value is available to all market participants.

The proposed rule change relating to Currency Trust Shares is based on Nasdaq Rule 5711(e).

#### Commodity Index Trust Shares

The Exchange will consider for trading, whether by listing or pursuant to unlisted trading privileges, Commodity Index Trust Shares that meet the criteria of proposed Rule 14.11(e)(6). Proposed Rule 14.11(e)(6)(B) states that proposed Rule 14.11(e)(6) would be applicable only to Commodity Index Trust Shares. Except to the extent inconsistent with the proposed Rule, or unless the context otherwise requires, the provisions of the trust issued receipts rules, Bylaws, and all other rules and procedures of the Board of Directors shall be applicable to the trading on the Exchange of such securities. Commodity Index Trust Shares are included within the definition of "security" or "securities" as such terms are used in the Rules of the Exchange.

#### Description

Proposed Rule 14.11(e)(6)(C) defines the term "Commodity Index Trust Shares" to mean, as used in these proposed Rules (unless the context otherwise requires), a security that (i) is issued by a Trust that (a) is a commodity pool as defined in the Commodity Exchange Act and regulations thereunder, and that is managed by a commodity pool operator registered with the Commodity Futures Trading Commission; and (b) that holds long positions in futures contracts on a

specified commodity index, or interests in a commodity pool which, in turn, holds such long positions; and (ii) when aggregated in some specified minimum number may be surrendered to the Trust by the beneficial owner to receive positions in futures contracts on a specified index and cash or short term securities. The term "futures contract" is commonly known as a "contract of sale of a commodity for future delivery" set forth in Section 2(a) of the Commodity Exchange Act.

Proposed Rule 14.11(e)(6)(D) states that the Exchange may trade, either by listing or pursuant to unlisted trading privileges, Commodity Index Trust Shares based on one or more securities. The Commodity Index Trust Shares based on particular securities would be designated as a separate series and would be identified by a unique symbol.

#### Initial Listing Standards

Proposed Rule 14.11(e)(6)(E)(i) states that the Exchange will establish a minimum number of Commodity Index Trust Shares required to be outstanding at the time of commencement of trading on the Exchange.

#### Continued Listing Standards

Under proposed Rule 14.11(e)(6)(E)(ii), the Exchange will consider the suspension of trading in or removal from listing of a series of Commodity Index Trust Shares under any of the following circumstances:

- Following the initial twelve-month period beginning upon the commencement of trading of the Commodity Index Trust Shares, there are fewer than 50 record and/or beneficial holders of Commodity Index Trust Shares for 30 or more consecutive trading days;
  - if the value of the applicable underlying index is no longer calculated or available on at least a 15-second delayed basis from a source unaffiliated with the sponsor, the Trust or the trustee of the Trust;
  - if the net asset value for the trust is no longer disseminated to all market participants at the same time;
  - if the Intraday Indicative Value is no longer made available on at least a 15-second delayed basis; or
  - if such other event shall occur or condition exists which in the opinion of the Exchange makes further dealings on the Exchange inadvisable.

Upon termination of a Trust, the Exchange would require that Commodity Index Trust Shares issued in connection with such entity Trust be removed from Exchange listing. A Trust may terminate in accordance with the provisions of the Trust prospectus,

which may provide for termination if the value of the Trust falls below a specified amount.

Proposed Rule 14.11(e)(6)(E)(iii) provides that the stated term of the Trust shall be as stated in the Trust prospectus. However, a Trust may be terminated under such earlier circumstances as may be specified in the Trust prospectus.

Proposed Rule 14.11(e)(6)(E)(iv) states that the following requirements apply to the trustee of a Trust:

- The trustee of a Trust must be a trust company or banking institution having substantial capital and surplus and the experience and facilities for handling corporate trust business. In cases where, for any reason, an individual has been appointed as trustee, a qualified trust company or banking institution must be appointed co-trustee.

- No change is to be made in the trustee of a listed issue without prior notice to and approval of the Exchange.

Proposed Rule 14.11(e)(6)(E)(v) provides that voting rights shall be as set forth in the applicable Trust prospectus.

Proposed Rules 14.11(e)(6)(F) and (G) set forth the requirements respecting limitation of the Exchange liability and Market Maker Accounts (see below for a general discussion of these requirements).

Interpretation and Policy .01 to proposed Rule 14.11(e)(6) states that a Commodity Index Trust Share is a Trust Issued Receipt that holds long positions in futures contracts on a specified commodity index, or interests in a commodity pool which, in turn, holds such long positions, deposited with the Trust.

Interpretation and Policy .02 to proposed Rule 14.11(e)(6) states that the Exchange requires that Members provide all purchasers of newly issued Commodity Index Trust Shares a prospectus for the series of Commodity Index Trust Shares.

Interpretation and Policy .03 to proposed Rule 14.11(e)(6) states that transactions in Commodity Index Trust Shares will occur during Regular Trading Hours and both the Pre-Opening and After Hours Trading Sessions.

Interpretation and Policy .04 to proposed Rule 14.11(e)(6) states that the Exchange will file separate proposals under Section 19(b) of the Act before trading, either by listing or pursuant to unlisted trading privileges, Commodity Index Trust Shares.

The proposed rule change relating to Commodity Index Trust Shares is based on Nasdaq Rule 5711(f).

### Commodity Futures Trust Shares

Proposed Rule 14.11(e)(7) governs the listing of Commodity Futures Trust Shares. The Exchange will consider for trading, whether by listing or pursuant to unlisted trading privileges, Commodity Futures Trust Shares that meet the criteria of proposed Rule 14.11(e)(7). Proposed Rule 14.11(e)(7)(B) states that proposed Rule 14.11(e)(7) would apply only to Commodity Futures Trust Shares. Except to the extent inconsistent with the proposed Rule, or unless the context otherwise requires, the provisions of the trust issued receipts rules, Bylaws, and all other rules and procedures of the Board of Directors shall be applicable to the trading on the Exchange of such securities. Commodity Futures Trust Shares are included within the definition of "security" or "securities" as such terms are used in the Rules of the Exchange.

### Description

Proposed Rule 14.11(e)(7)(C) states that the term "Commodity Futures Trust Shares" as used in the proposed Rules means, unless the context otherwise requires, a security that: (i) is issued by a Trust that (a) is a commodity pool as defined in the Commodity Exchange Act and regulations thereunder, and that is managed by a commodity pool operator registered with the Commodity Futures Trading Commission, and (b) holds positions in futures contracts that track the performance of a specified commodity, or interests in a commodity pool which, in turn, holds such positions; and (ii) is issued and redeemed daily in specified aggregate amounts at net asset value. The term "futures contract" is a "contract of sale of a commodity for future delivery" set forth in Section 2(a) of the Commodity Exchange Act. The term "commodity" is defined in Section 1(a)(4) of the Commodity Exchange Act.

### Designation of an Underlying Commodity Futures Contract

Proposed Rule 14.11(e)(7)(D) states that the Exchange may trade, either by listing or pursuant to unlisted trading privileges, Commodity Futures Trust Shares based on an underlying commodity futures contract. Each issue of Commodity Futures Trust Shares shall be designated as a separate series and shall be identified by a unique symbol.

### Initial Listing Standards

Proposed Rule 14.11(e)(7)(E)(i) states that the Exchange will establish a minimum number of Commodity Futures Trust Shares required to be

outstanding at the time of commencement of trading on the Exchange.

### Continued Listing Standards

Proposed Rule 14.11(e)(7)(E)(ii) states that the Exchange will consider the suspension of trading in or removal from listing of a series of Commodity Futures Trust Shares under any of the following circumstances:

- If, following the initial twelve-month period beginning upon the commencement of trading of the Commodity Futures Trust Shares: (1) the Trust has fewer than 50,000 Commodity Futures Trust Shares issued and outstanding; or (2) the market value of all Commodity Futures Trust Shares issued and outstanding is less than \$1,000,000; or (3) there are fewer than 50 record and/or beneficial holders of Commodity Futures Trust Shares for 30 consecutive trading days;
  - if the value of the underlying futures contracts is no longer calculated or available on at least a 15-second delayed basis during the Exchange's regular market session from a source unaffiliated with the sponsor, the Trust or the trustee of the Trust;
  - if the net asset value for the Trust is no longer disseminated to all market participants at the same time;
  - if the Intraday Indicative Value is no longer disseminated on at least a 15-second delayed basis during the Exchange's regular market session; or
  - if such other event shall occur or condition exists which in the opinion of the Exchange makes further dealings on the Exchange inadvisable.

Upon termination of a Trust, the Exchange requires that Commodity Futures Trust Shares issued in connection with such trust be removed from Exchange listing. A Trust will terminate in accordance with the provisions of the Trust prospectus.

Proposed Rule 14.11(e)(7)(E)(iii) states that the stated term of the Trust shall be as stated in the prospectus. However, a Trust may be terminated under such earlier circumstances as may be specified in the Trust prospectus.

Proposed Rule 14.11(e)(7)(E)(iv) states that the following requirements apply to the trustee of a Trust:

- The trustee of a Trust must be a trust company or banking institution having substantial capital and surplus and the experience and facilities for handling corporate trust business. In cases where, for any reason, an individual has been appointed as trustee, a qualified trust company or banking institution must be appointed co-trustee.

• No change is to be made in the trustee of a listed issue without prior notice to and approval of the Exchange.

Proposed Rule 14.11(e)(7)(E)(v) states that voting rights shall be as set forth in the applicable Trust prospectus.

Proposed Rules 14.11(e)(7)(F) and (G) describe the requirements for Market Makers and the limitation of the Exchange liability in Commodity Futures Trust Shares (see below for a general discussion of these requirements).

Proposed Rule 14.11(e)(7)(H) states that the Exchange will file separate proposals under Section 19(b) of the Act before listing and trading separate and distinct Commodity Futures Trust Shares designated on different underlying futures contracts.

Interpretation and Policy .01 to proposed Rule 14.11(e)(7) would require Members trading in Commodity Futures Trust Shares to provide all purchasers of newly issued Commodity Futures Trust Shares a prospectus for the series of Commodity Futures Trust Shares.

Interpretation and Policy .02 to proposed Rule 14.11(e)(7) states that transactions in Commodity Futures Trust Shares will occur during Regular Trading Hours and both the Pre-Opening and After Hours Trading Sessions.

Interpretation and Policy .03 to proposed Rule 14.11(e)(7) states that if the Intraday Indicative Value or the value of the underlying futures contract is not being disseminated as required, the Exchange may halt trading during the day in which the interruption to the dissemination of the Intraday Indicative Value or the value of the underlying futures contract occurs. If the interruption to the dissemination of the Intraday Indicative Value or the value of the underlying futures contract persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption.

In addition, if the Exchange becomes aware that the net asset value with respect to a series of Commodity Futures Trust Shares is not disseminated to all market participants at the same time, it will halt trading in such series until such time as the net asset value is available to all market participants.

Interpretation and Policy .04 to proposed Rule 14.11(e)(7) states that the Exchange's rules governing the trading of equity securities apply.

Interpretation and Policy .05 to proposed Rule 14.11(e)(7) states that the Exchange will implement written surveillance procedures for Commodity Futures Trust Shares.

The proposed rule change relating to Commodity Futures Trust Shares is based on Nasdaq Rule 5711(g).

#### Partnership Units

Proposed Rule 14.11(e)(8) would govern the listing of Partnership Units. Under proposed Rule 14.11(e)(8)(A), the Exchange will consider for trading, whether by listing or pursuant to unlisted trading privileges, Partnership Units that meet the criteria of proposed Rule 14.11(e)(8).

#### Description

Under proposed Rule 14.11(e)(8)(B), the following terms as used in the proposed Rule would, unless the context otherwise requires, have the following meanings:

Proposed Rule 14.11(e)(8)(B)(i) states that the term “commodity” is defined in Section 1(a)(4) of the Commodity Exchange Act.

Proposed Rule 14.11(e)(8)(B)(ii) defines a Partnership Unit for purposes of the proposed Rule as a security (a) that is issued by a partnership that invests in any combination of futures contracts, options on futures contracts, forward contracts, commodities and/or securities; and (b) that is issued and redeemed daily in specified aggregate amounts at net asset value.

Proposed Rule 14.11(e)(8)(C) states that the Exchange may list and trade Partnership Units based on an underlying asset, commodity or security. Each issue of a Partnership Unit would be designated as a separate series and would be identified by a unique symbol.

#### Initial Listing Standards

Proposed Rule 14.11(e)(8)(D)(i) states that the Exchange will establish a minimum number of Partnership Units required to be outstanding at the time of commencement of trading on the Exchange.

#### Continued Listing Standards

Proposed Rule 14.11(e)(8)(D)(ii) provides that the Exchange will consider removal of Partnership Units from listing under any of the following circumstances:

- If, following the initial twelve month period from the date of commencement of trading of the Partnership Units, (1) the partnership has more than 60 days remaining until termination and there are fewer than 50 record and/or beneficial holders of the Partnership Units for 30 or more consecutive trading days; (2) the partnership has fewer than 50,000 Partnership Units issued and outstanding; or (3) the market value of

all Partnership Units issued and outstanding is less than \$1,000,000;

- if the value of the underlying benchmark investment, commodity or asset is no longer calculated or available on at least a 15-second delayed basis or the Exchange stops providing a hyperlink on its Web site to any such investment, commodity or asset value;
- if the Intraday Indicative Value is no longer made available on at least a 15-second delayed basis; or
- if such other event shall occur or condition exists which in the opinion of the Exchange makes further dealings on the Exchange inadvisable.

Upon termination of a partnership, the Exchange requires that Partnership Units issued in connection with such partnership be removed from Exchange listing. A partnership will terminate in accordance with the provisions of the partnership prospectus.

Proposed Rule 14.11(e)(8)(D)(iii) provides that the stated term of the partnership shall be as stated in the prospectus. However, such entity may be terminated under such earlier circumstances as may be specified in the Partnership prospectus.

Proposed Rule 14.11(e)(8)(D)(iv) would adopt the following requirements that apply to the general partner of a partnership:

- The general partner of a partnership must be an entity having substantial capital and surplus and the experience and facilities for handling partnership business. In cases where, for any reason, an individual has been appointed as general partner, a qualified entity must also be appointed as general partner.
- No change is to be made in the general partner of a listed issue without prior notice to and approval of the Exchange.

Proposed Rule 14.11(e)(8)(D)(v) states that voting rights shall be as set forth in the applicable partnership prospectus.

Proposed Rules 14.11(e)(8)(E) and (F) describe the limitation of the Exchange liability and requirements for Market Makers in Partnership Units (see below for a general discussion of these requirements).

Proposed Rule 14.11(e)(8)(G) states that the Exchange will file separate proposals under Section 19(b) of the Act before listing and trading separate and distinct Partnership Units designated on different underlying investments, commodities and/or assets.

Interpretation and Policy .01 to proposed Rule 14.11(e)(8) states that the Exchange requires that Members provide to all purchasers of newly issued Partnership Units a prospectus for the series of Partnership Units.

The proposed rule change relating to Partnership Units is based on Nasdaq Rule 5711(h).

#### Trust Units

The Exchange proposes to add new Rule 14.11(e)(9) in order to permit trading, either by listing or pursuant to unlisted trading privileges, of Trust Units.

Proposed Rule 14.11(e)(9)(A) states that the provisions in proposed Rule 14.11(e)(9) are applicable only to Trust Units. In addition, except to the extent inconsistent with this Rule, or unless the context otherwise requires, the rules and procedures of the Board of Directors shall be applicable to the trading on the Exchange of such securities. Trust Units are included within the definition of “security,” “securities” and “derivative securities products” as such terms are used in the Rules of the Exchange.

#### Description

Proposed Rule 14.11(e)(9)(B) states that the following terms as used in the proposed Rule shall, unless the context otherwise requires, have the following meanings:

- The term “commodity” is defined in Section 1(a)(4) of the Commodity Exchange Act.

- A Trust Unit is a security that is issued by a trust or other similar entity that is constituted as a commodity pool that holds investments comprising or otherwise based on any combination of futures contracts, options on futures contracts, forward contracts, swap contracts, commodities and/or securities.

Proposed Rule 14.11(e)(9)(C) states that the Exchange may list and trade Trust Units based on an underlying asset, commodity, security or portfolio. Each issue of a Trust Unit shall be designated as a separate series and shall be identified by a unique symbol.

#### Initial Listing Standards

Proposed Rule 14.11(e)(9)(D)(i) states that the Exchange will establish a minimum number of Trust Units required to be outstanding at the time of commencement of trading on the Exchange. The Exchange will obtain a representation from the issuer of each series of Trust Units that the net asset value per share for the series will be calculated daily and will be made available to all market participants at the same time.

#### Continued Listing Standards

Proposed Rule 14.11(e)(9)(D)(ii)(a) states that the Exchange will remove Trust Units from listing under any of the following circumstances:

- If following the initial twelve month period following the commencement of trading of Trust Units, (A) the trust has more than 60 days remaining until termination and there are fewer than 50 record and/or beneficial holders of Trust Units for 30 or more consecutive trading days; (B) the trust has fewer than 50,000 Trust Units issued and outstanding; or (C) the market value of all Trust Units issued and outstanding is less than \$1,000,000; or

- if such other event shall occur or condition exists which in the opinion of the Exchange makes further dealings on the Exchange inadvisable.

#### Trading Halts

Proposed Rule 14.11(e)(9)(D)(ii)(b) states that the Exchange will halt trading in a series of Trust Units if the circuit breaker parameters in Rule 11.18 have been reached. In exercising its discretion to halt or suspend trading in a series of Trust Units, the Exchange may consider any relevant factors. In particular, if the portfolio and net asset value per share are not being disseminated as required, the Exchange may halt trading during the day in which the interruption to the dissemination of the portfolio holdings or net asset value per share occurs. If the interruption to the dissemination of the portfolio holdings or net asset value per share persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption.

Upon termination of a trust, the Exchange would require that Trust Units issued in connection with such trust be removed from Exchange listing. A trust will terminate in accordance with the provisions of the prospectus.

Proposed Rule 14.11(e)(9)(D)(iii) provides that the stated term of the trust shall be as stated in the prospectus. However, such entity may be terminated under such earlier circumstances as may be specified in the prospectus.

Proposed Rule 14.11(e)(9)(D)(iv) would adopt the following requirements applicable to the trustee of a Trust:

- The trustee of a trust must be a trust company or banking institution having substantial capital and surplus and the experience and facilities for handling corporate trust business. In cases where, for any reason, an individual has been appointed as trustee, a qualified trust company or banking institution must be appointed co-trustee.

- No change is to be made in the trustee of a listed issue without prior notice to and approval of the Exchange.

Proposed Rule 14.11(e)(9)(D)(v) states that voting rights shall be as set forth in the prospectus.

Proposed Rules 14.11(e)(9)(E) and (F) describe the requirements for Market Makers and the limitation of the Exchange liability respecting Trust Units (see below for a general discussion of these requirements).

Interpretation and Policy .01 to proposed Rule 14.11(e)(9) states that the Exchange requires that Members provide to all purchasers of newly issued Trust Units a prospectus for the series of Trust Units.

Interpretation and Policy .02 to proposed Rule 14.11(e)(9) states that transactions in Trust Units will occur during Regular Trading Hours and both the Pre-Opening and After Hours Trading Sessions.

Interpretation and Policy .03 to proposed Rule 14.11(e)(9) states that the Exchange will file separate proposals under Section 19(b) of the Act before listing and trading separate and distinct Trust Units designated on different underlying investments, commodities, assets and/or portfolios.

The proposed rule change relating to Trust Units is based on Nasdaq Rule 5711(i).

#### Managed Trust Securities

Proposed Rule 14.11(e)(10) would adopt listing standards for Managed Trust Securities. Under proposed Rule 14.11(e)(10)(A), the Exchange will consider for trading, whether by listing or pursuant to unlisted trading privileges, Managed Trust Securities that meet the criteria of the proposed Rule. Proposed Rule 14.11(e)(10)(B) states that the proposed Rule would apply only to Managed Trust Securities. Managed Trust Securities are included within the definition of "security" or "securities" as such terms are used in the Rules of the Exchange.

#### Description

Proposed Rule 14.11(e)(10)(C)(i) defines the term "Managed Trust Securities" to mean, unless the context otherwise requires, a security that is registered under the Securities Act of 1933, as amended, and which (a) is issued by a Trust that (1) is a commodity pool as defined in the Commodity Exchange Act and regulations thereunder, and that is managed by a commodity pool operator registered with the Commodity Futures Trading Commission, and (2) holds long and/or short positions in exchange-traded futures contracts and/or certain currency forward contracts selected by the Trust's advisor consistent with the Trust's investment objectives, which

will only include, exchange-traded futures contracts involving commodities, currencies, stock indices, fixed income indices, interest rates and sovereign, private and mortgage or asset backed debt instruments, and/or forward contracts on specified currencies, each as disclosed in the Trust's prospectus as such may be amended from time to time; and (b) is issued and redeemed continuously in specified aggregate amounts at the next applicable net asset value. Proposed Rule 14.11(e)(10)(C) also includes the following definitions concerning Managed Trust Securities:

- **Disclosed Portfolio.** Under proposed Rule 14.11(e)(10)(C)(ii), the term "Disclosed Portfolio" means the identities and quantities of the securities and other assets held by the Trust that will form the basis for the Trust's calculation of net asset value at the end of the business day.

- **Intraday Indicative Value.** Under proposed Rule 14.11(e)(10)(C)(iii), the term "Intraday Indicative Value" is the estimated indicative value of a Managed Trust Security based on current information regarding the value of the securities and other assets in the Disclosed Portfolio.

- **Reporting Authority.** Under proposed Rule 14.11(e)(10)(C)(iv), the term "Reporting Authority" in respect of a particular series of Managed Trust Securities means the Exchange, an institution, or a reporting or information service designated by the Exchange or by the Trust or the exchange that lists a particular series of Managed Trust Securities (if the Exchange is trading such series pursuant to unlisted trading privileges) as the official source for calculating and reporting information relating to such series, including, but not limited to, the Intraday Indicative Value; the Disclosed Portfolio; the amount of any cash distribution to holders of Managed Trust Securities, net asset value, or other information relating to the issuance, redemption or trading of Managed Trust Securities. A series of Managed Trust Securities may have more than one Reporting Authority, each having different functions.

Proposed Rule 14.11(e)(10)(D) states that the Exchange may trade, either by listing or pursuant to unlisted trading privileges, Managed Trust Securities based on the underlying portfolio of exchange-traded futures and/or certain currency forward contracts described in the related prospectus. Each issue of Managed Trust Securities shall be designated as a separate trust or series and shall be identified by a unique symbol.

### Initial Listing Standards

Under proposed Rule

14.11(e)(10)(E)(i), Managed Trust Securities will be listed and traded on the Exchange subject to application of the following initial listing criteria:

- The Exchange will establish a minimum number of Managed Trust Securities required to be outstanding at the time of commencement of trading on the Exchange.

- The Exchange will obtain a representation from the issuer of each series of Managed Trust Securities that the net asset value per share for the series will be calculated daily and that the net asset value and the Disclosed Portfolio will be made available to all market participants at the same time.

### Continued Listing Standards

Under proposed Rule

14.11(e)(10)(E)(ii), each series of Managed Trust Securities will be listed and traded on the Exchange subject to application of the following continued listing criteria:

- The Intraday Indicative Value for Managed Trust Securities will be widely disseminated by one or more major market data vendors at least every 15 seconds during Regular Trading Hours.

- The Disclosed Portfolio will be disseminated at least once daily and will be made available to all market participants at the same time.

- 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.

Under proposed Rule

14.11(e)(10)(E)(ii)(c), the Exchange will consider the suspension of trading in or removal from listing of a series of Managed Trust Securities under any of the following circumstances:

- If, following the initial twelve-month period beginning upon the commencement of trading of the Managed Trust Securities: (A) the Trust has fewer than 50,000 Managed Trust Securities issued and outstanding; (B) the market value of all Managed Trust Securities issued and outstanding is less than \$1,000,000; or (C) there are fewer than 50 record and/or beneficial holders of Managed Trust Securities for 30 consecutive trading days;

- if the Intraday Indicative Value for the Trust is no longer calculated or available or the Disclosed Portfolio is not made available to all market participants at the same time;

- if the Trust issuing the Managed Trust Securities has failed to file any

filings required by the Securities and Exchange Commission or if the Exchange is aware that the Trust is not in compliance with the conditions of any exemptive order or no-action relief granted by the Securities and Exchange Commission to the Trust with respect to the series of Managed Trust Securities; or

- if such other event shall occur or condition exists which in the opinion of the Exchange makes further dealings on the Exchange inadvisable.

### Trading Halts

Proposed Rule 14.11(e)(10)(E)(ii)(d) states that, if the Intraday Indicative Value of a series of Managed Trust Securities is not being disseminated as required, the Exchange may halt trading during the day in which the interruption to the dissemination of the Intraday Indicative Value occurs. If the interruption to the dissemination of the Intraday Indicative Value persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption. If a series of Managed Trust Securities is trading on the Exchange pursuant to unlisted trading privileges, the Exchange will halt trading in that series as specified in Rule 11.18. In addition, if the Exchange becomes aware that the net asset value or the Disclosed Portfolio with respect to a series of Managed Trust Securities is not disseminated to all market participants at the same time, it will halt trading in such series until such time as the net asset value or the Disclosed Portfolio is available to all market participants.

Proposed Rule 14.11(e)(10)(E)(ii)(e) states that upon termination of a Trust, the Exchange requires that Managed Trust Securities issued in connection with such Trust be removed from Exchange listing. A Trust will terminate in accordance with the provisions of the Trust prospectus.

Proposed Rule 14.11(e)(10)(E)(iii) states that the term of the Trust shall be as stated in the prospectus. However, a Trust may be terminated under such earlier circumstances as may be specified in the Trust prospectus.

Proposed Rule 14.11(e)(10)(E)(iv) would state that the following requirements apply to the trustee of a Trust:

- The trustee of a Trust must be a trust company or banking institution having substantial capital and surplus and the experience and facilities for handling corporate trust business. In cases where, for any reason, an individual has been appointed as trustee, a qualified trust company or

banking institution must be appointed co-trustee.

- No change is to be made in the trustee of a listed issue without prior notice to and approval of the Exchange.

Proposed Rule 14.11(e)(10)(E)(v) states that voting rights shall be as set forth in the applicable Trust prospectus.

Proposed Rules 14.11(e)(10)(F) and (G) describe the regulatory requirements for registered Market Makers in Managed Trust Securities, and the limitation of the Exchange liability respecting Managed Trust Securities (see below for a general discussion of these requirements).

Proposed Rule 14.11(e)(10)(H) states that the Exchange will file separate proposals under Section 19(b) of the Act before listing and trading separate and distinct Managed Trust Securities.

In addition to the above, the Interpretations and Policies to proposed Rule 14.11(e)(10) include the following provisions:

Interpretation and Policy .01 to proposed Rule 14.11(e)(10) states that the Exchange requires that Members provide all purchasers of newly issued Managed Trust Securities a prospectus for the series of Managed Trust Securities.

Interpretation and Policy .02 to proposed Rule 14.11(e)(10) states that transactions in Managed Trust Securities will occur during Regular Trading Hours and both the Pre-Opening and After Hours Trading Sessions.

Interpretation and Policy .03 to proposed Rule 14.11(e)(10) states that the Exchange's rules governing the trading of equity securities apply.

Interpretation and Policy .04 to proposed Rule 14.11(e)(10) states that the Exchange will implement written surveillance procedures for Managed Trust Securities.

Interpretation and Policy .05 to proposed Rule 14.11(e)(10) states that if the Trust's advisor is affiliated with a broker-dealer, the broker-dealer shall erect a "fire wall" around the personnel who have access to information concerning changes and adjustments to the Disclosed Portfolio. Personnel who make decisions on the Trust's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the applicable Trust portfolio.

The proposed rule change relating to Managed Trust Securities is based on Nasdaq Rule 5711(j).

### Currency Warrants

Proposed Rule 14.11(e)(11) would govern the listing of Currency Warrants.

Under proposed Rule 14.11(e)(11)(A), the listing of Currency Warrant issues is considered on a case-by-case basis. Currency Warrant issues will be evaluated for listing against the following criteria:

#### Initial Listing Standards

Proposed Rule 14.11(e)(11)(A)(i) requires the warrant issuer to have a minimum tangible net worth in excess of \$250,000,000 and otherwise to exceed substantially the earnings requirements set forth in Rule 14.8(b)(2).<sup>20</sup> In the alternative, the warrant issuer will be expected to have a minimum tangible net worth of \$150,000,000 and otherwise to exceed substantially the earnings requirements set forth in Rule 14.8(b)(2), and not to have issued warrants where the original issue price of all the issuer's currency warrant offerings (combined with currency warrant offerings of the issuer's affiliates) listed on a national securities exchange or traded through the facilities of the Exchange exceeds 25% of the warrant issuer's net worth.

Proposed Rule 14.11(e)(11)(A)(ii) states that the term must be one to five years from date of issuance.

Proposed Rule 14.11(e)(11)(A)(iii) requires that there must be a minimum public distribution of 1,000,000 warrants together with a minimum of 400 public holders, and an aggregate market value of \$4,000,000. In the alternative, there must be a minimum public distribution of 2,000,000 warrants together with a minimum number of public warrant holders determined on a case by case basis, an aggregate market value of \$12,000,000 and an initial warrant price of \$6.

Under proposed Rule 14.11(e)(11)(A)(iv), the warrants will be cash settled in U.S. dollars.

Under proposed Rule 14.11(e)(11)(A)(v), all currency warrants must include in their terms provisions specifying the time by which all exercise notices must be submitted, and that all unexercised warrants that are in the money will be automatically exercised on their expiration date or on or promptly following the date on which such warrants are delisted by the Exchange (if such warrant issue has not been listed on another organized securities market in the United States).

Under proposed Rule 14.11(e)(11)(B), the Exchange will file separate proposals under Section 19(b) of the Act before listing and trading separate and distinct Currency Warrants.

#### Regulatory Matters

Proposed Rule 14.11(e)(11)(C) describes regulatory matters applicable to Currency Warrants. Specifically:

- No Member shall accept an order from a customer to purchase or sell a Currency Warrant unless the customer's account has been approved for options trading pursuant to Rule 26.2.

- Suitability. The provisions of Rule 26.4 shall apply to recommendations in Currency Warrants and the term "option" as used therein shall be deemed for purposes of this Rule to include such warrants.

- Discretionary Accounts. Any account in which a Member exercises discretion to trade in Currency Warrants shall be subject to the provisions of Rule 26.5 with respect to such trading. For purposes of the proposed Rule, the terms, "option" and "options contract" as used in Rule 26.5 shall be deemed to include Currency Warrants.

- Supervision of Accounts. Rule 26.3 shall apply to all customer accounts of a Member in which transactions in Currency Warrants are effected. The term "option" as used in Chapter XI, Section 8 shall be deemed to include Currency Warrants.

- Public Customer Complaints. Rule 26.17 shall apply to all public customer complaints received by a Member regarding Currency Warrants. The term "option" as used in Rule 26.17 shall be deemed to include such warrants.

- Communications with Public Customers. Members participating in Currency Warrants shall be bound to comply with the Communications and Disclosures rule of FINRA, as applicable, as though such rule were part of these Rules.

#### Trading Halts or Suspensions

Under proposed Rule 14.11(e)(11)(D) trading on the Exchange in any Currency Warrant will be halted whenever the Exchange deems such action appropriate in the interests of a fair and orderly market or to protect investors. Trading in Currency Warrants that have been the subject of a halt or suspension by the Exchange may resume if the Exchange determines that the conditions which led to the halt or suspension are no longer present, or that the interests of a fair and orderly market are best served by a resumption of trading.

#### Reporting of Warrant Positions

Proposed Rule 14.11(e)(11)(E) would govern reporting of warrant positions. Proposed Rule 14.11(e)(11)(E)(i) would require each Member to file with the Exchange a report with respect to each

account in which the Member has an interest, each account of a partner, officer, director, or employee of such Member, and each customer account that has established an aggregate position (whether long or short) of 100,000 warrants covering the same underlying currency, combining for purposes of the proposed Rule: (a) long positions in put warrants and short positions in call warrants, and (b) short positions in put warrants with long positions in call warrants. The report shall be in such form as may be prescribed by the Exchange and shall be filed no later than the close of business on the next day following the day on which the transaction or transactions requiring the filing of such report occurred.

Proposed Rule 14.11(e)(11)(E)(ii) states that whenever a report shall be required to be filed with respect to an account pursuant to the proposed Rule, the Member filing the same must file with the Exchange such additional periodic reports with respect to such account as the Exchange may from time to time require.

Proposed Rule 14.11(e)(11)(E)(iii) states that all reports required by the proposed Rule shall be filed with the Exchange in such manner and form as prescribed by the Exchange.

The proposed rule change relating to Currency Warrants is based on Nasdaq Rule 5711(k).

#### General Provisions

To the extent not specifically addressed in the respective proposed rules, the following general provisions apply to all of the proposed rules and subject securities affected by the proposed rules (the "securities"):

#### Trading Rules

The Exchange deems the securities to be equity securities, thus rendering trading in the securities subject to the Exchange's existing rules governing the trading of equity securities. The securities will trade on the Exchange during Regular Trading Hours, as well as during the Pre-Opening Session and the After Hours Trading Session. The Exchange has appropriate rules to facilitate transactions in the securities during all trading sessions. The minimum price increment for quoting and entry of orders in equity securities traded on the Exchange is \$0.01, with the exception of securities that are priced less than \$1.00 for which the minimum price increment for order entry is \$0.0001.<sup>21</sup>

<sup>20</sup> Rule 14.8(b)(2) sets forth initial listing standards for primary equity securities.

<sup>21</sup> See, e.g., Rule 11.11. Regulation NMS Rule 612, Minimum Pricing Increment, provides:

## Information Circular

Prior to the commencement of trading, the Exchange will inform its Members in an Information Circular of the special characteristics and risks associated with trading the securities. Specifically, the Information Circular will discuss the following: (1) The procedures for purchases and redemptions of the securities (and/or that the securities are not individually redeemable); (2) Exchange Rule 3.7, which imposes suitability obligations on the Exchange Members with respect to recommending transactions in the securities to customers; (3) how information regarding the Intraday Indicative Value is disseminated; (4) the requirement that Members deliver a prospectus to investors purchasing newly issued securities prior to or concurrently with the confirmation of a transaction; and (5) trading information.

In addition, the Information Circular will advise Members, prior to the commencement of trading, of the prospectus delivery requirements applicable to the securities. Members purchasing securities for resale to investors will deliver a prospectus to such investors. The Information Circular will also discuss any exemptive, no-action and interpretive relief granted by the Commission from any rules under the Act.

In addition, the Information Circular will reference that the securities are subject to various fees and expenses described in the registration statement. If applicable, the Information Circular will also reference that the CFTC has regulatory jurisdiction over the trading of futures contracts.

The Information Circular will also disclose the trading hours of the securities and, if applicable, the Net Asset Value (“NAV”) calculation time

a. No national securities exchange, national securities association, alternative trading system, vendor, or broker or dealer shall display, rank, or accept from any person a bid or offer, an order, or an indication of interest in any NMS stock priced in an increment smaller than \$0.01 if that bid or offer, order, or indication of interest is priced equal to or greater than \$1.00 per share.

b. No national securities exchange, national securities association, alternative trading system, vendor, or broker or dealer shall display, rank, or accept from any person a bid or offer, an order, or an indication of interest in any NMS stock priced in an increment smaller than \$0.0001 if that bid or offer, order, or indication of interest is priced less than \$1.00 per share.

c. The Commission, by order, may exempt from the provisions of this section, either unconditionally or on specified terms and conditions, any person, security, quotation, or order, or any class or classes of persons, securities, quotations, or orders, if the Commission determines that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

for the securities. The Information Circular will disclose that information about the securities and the corresponding indexes, if applicable, will be publicly available on the Web site for the securities. The Information Circular will also reference, if applicable, the fact that there is no regulated source of last sale information regarding physical commodities, and that the Commission has no jurisdiction over the trading of physical commodities or futures contracts on which the value of the securities may be based.

The Information Circular will also reference the risks involved in trading the securities during the Pre-Opening and After Hours Trading Sessions when an updated Intraday Indicative Value will not be calculated or publicly disseminate and, if applicable, the risks involved in trading the securities during Regular Trading Hours when the Intraday Indicative Value may be static or based in part on the fluctuation of currency exchange rates when the underlying markets have closed prior to the close of the Exchange’s Regular Trading Hours.

## Limitation of Exchange Liability

Neither the Exchange, any agent of the Exchange, nor the Reporting Authority (if applicable), shall have any liability for damages, claims, losses or expenses caused by any errors, omissions, or delays in calculating or disseminating any applicable underlying index or asset value; the current value of the applicable positions or interests required to be deposited to a Trust, if applicable, in connection with issuance of the securities; net asset value; or any other information relating to the purchase, redemption, or trading of the securities, resulting from any negligent act or omission by the Exchange, any agent of the Exchange, or the Reporting Authority (if applicable), or any act, condition or cause beyond the reasonable control of the Exchange, any agent of the Exchange, or the Reporting Authority (if applicable), including, but not limited to, an act of God; fire; flood; extraordinary weather conditions; war; insurrection; riot; strike; accident; action of government; communications or power failure; equipment or software malfunction; or any error, omission or delay in the reports of transactions in the applicable positions or interests.

## Market Maker Accounts

A registered Market Maker in the securities described below must file with the Exchange, in a manner prescribed by the Exchange, and keep

current a list identifying all accounts for trading in:

- In the case of Commodity-Based Trust Shares, the applicable underlying commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, which the registered Market Maker may have or over which it may exercise investment discretion (the “Underlying Commodities”);

- in the case of Currency Trust Shares, the applicable underlying non-U.S. currency, options, futures or options on futures on such currency, or any other derivatives based on such currency, which the registered Market Maker may have or over which it may exercise investment discretion (the “Underlying Currencies”);

- in the case of Commodity Index Trust Shares, the applicable physical commodities included in, or options, futures or options on futures on, an index underlying an issue of Commodity Index Trust Shares or any other derivatives based on such index or based on any commodity included in such index, which the registered Market Maker may have or over which it may exercise investment discretion (the “Underlying Commodity Index Assets”);

- in the case of Commodity Futures Trust Shares, the applicable underlying commodity, related futures or options on futures, or any other related derivatives, which the registered Market Maker may have or over which it may exercise investment discretion (the “Underlying Commodity Futures”);

- in the case of Partnership Units, the applicable underlying asset or commodity, related futures or options on futures, or any other related derivatives, which the registered Market Maker may have or over which it may exercise investment discretion (the “Underlying Partnership Unit Assets”);

- in the case of Trust Units, the applicable underlying commodity, related commodity futures or options on commodity futures, or any other related commodity derivatives, which the registered Market Maker may have or over which it may exercise investment discretion (the “Underlying Trust Unit Assets”); and

- in the case of Managed Trust Securities, the underlying commodity or applicable currency, related futures or options on futures, or any other related derivatives, which a registered Market Maker may have or over which it may exercise investment discretion (the “Underlying Managed Trust Assets”).

No registered Market Maker in the above mentioned securities shall trade in the respective Underlying

Commodities, Underlying Currencies, Underlying Commodity Index Assets, Underlying Commodity Futures, Underlying Partnership Unit Assets, Underlying Trust Unit Assets, and/or the Underlying Managed Trust Assets (collectively, the “Underlying Assets”) in an account in which a market maker, directly or indirectly, controls trading activities, or has a direct interest in the profits or losses thereof, which has not been reported to the Exchange.

In addition to the existing obligations under Exchange rules regarding the production of books and records (see e.g., Rule 4.2), a registered Market Maker in the above mentioned securities is required to make available to the Exchange such books, records or other information pertaining to transactions by such entity or registered or non-registered employee affiliated with such entity for its or their own accounts for trading the applicable Underlying Assets as may be requested by the Exchange.

#### Surveillance

The Exchange believes that its surveillance procedures are adequate to address any concerns about the trading of the securities on the Exchange. Trading of the securities on the Exchange will be subject to the Exchange’s surveillance procedures during all trading sessions in order to deter and detect violations of Exchange rules and the applicable federal securities laws. Trading of the securities on the Exchange will be subject to the Exchange’s surveillance procedures for derivative products. The Exchange may obtain information via the ISG from other exchanges who are members or affiliates of the ISG or any other exchanges with which the Exchange has comprehensive surveillance sharing agreements.<sup>22</sup>

In addition, to the extent that a fund invests in futures contracts, not more than 10% of the weight of such futures contracts in the aggregate shall consist of components whose principal trading market is not a member of ISG or is a market with which the Exchange does not have a comprehensive surveillance sharing agreement. The Exchange has a general policy prohibiting the distribution of material, non-public information by its employees.

As a general matter, the Exchange has regulatory jurisdiction over its Members and their associated persons, which includes any person or entity controlling a Member, as well as a subsidiary or affiliate of a Member that

is in the securities business. A subsidiary or affiliate of a Member that does business only in commodities or futures contracts would not be subject to the Exchange jurisdiction, but the Exchange could obtain information regarding the activities of such subsidiary or affiliate through surveillance sharing agreements with regulatory organizations of which such subsidiary or affiliate is a Member.

#### Trading Halts

With respect to trading halts, in addition to the halt requirements in the proposed rules, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the securities. Trading in the securities may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the securities inadvisable. These may include: (1) The extent to which trading in the underlying asset or assets is not occurring; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. In addition, trading in the securities will be subject to trading halts caused by extraordinary market volatility pursuant to the Exchange’s “circuit breaker” Rule 11.18(d) or by the halt or suspension of the trading of the current underlying asset or assets.

If the applicable Intraday Indicative Value, value of the underlying index, or the value of the underlying asset or assets (e.g., securities, commodities, currencies, futures contracts, or other assets) is not being disseminated as required, the Exchange may halt trading during the day in which such interruption to the dissemination occurs. If the interruption to the dissemination of the applicable Intraday Indicative Value, value of the underlying index, or the value of the underlying asset or assets persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption. In addition, if the Exchange becomes aware that the net asset value with respect to a series of the securities is not disseminated to all market participants at the same time, it will halt trading in such series until such time as the net asset value is available to all market participants.

#### Suitability

Currently, Exchange Rule 3.7 governs Recommendations to Customers (Suitability). Prior to the commencement of trading of any inverse, leveraged, or inverse leveraged

securities, the Exchange will inform its Members of the suitability requirements of Exchange Rule 3.7 in an Information Circular. Specifically, Members will be reminded in the Information Circular that, in recommending transactions in these securities, they must have a reasonable basis to believe that (1) the recommendation is suitable for a customer given reasonable inquiry concerning the customer’s other securities holdings, financial situation and needs, and (2) the customer can evaluate the risks of the recommended transaction and is financially able to bear the risks of an investment in the securities.

In addition, FINRA has implemented increased sales practice and customer margin requirements for FINRA members applicable to inverse, leveraged, and inverse leveraged securities and options on such securities, as described in FINRA Regulatory Notices 09–31 (June 2009), 09–53 (August 2009) and 09–65 (November 2009) (“FINRA Regulatory Notices”). Members that carry customer accounts will be required to follow the FINRA guidance set forth in the FINRA Regulatory Notices. The Information Circular will reference the FINRA Regulatory Notices regarding sales practice and customer margin requirements for FINRA members applicable to inverse, leveraged, and inverse leveraged securities and options on such securities.

The Exchange notes that, for such inverse, leveraged, and inverse leveraged securities, the corresponding funds seek leveraged, inverse, or leveraged inverse returns on a daily basis, and do not seek to achieve their stated investment objective over a period of time greater than one day because compounding prevents the funds from perfectly achieving such results. Accordingly, results over periods of time greater than one day typically will not be a leveraged multiple (+200%), the inverse (–100%) or a leveraged inverse multiple (–200%) of the period return of the applicable benchmark and may differ significantly from these multiples. The Exchange’s Information Circular, as well as the applicable registration statement, will provide information regarding the suitability of an investment in such securities.

#### 2. Statutory Basis

The proposed rule change, as amended, is consistent with section 6(b) of the Act,<sup>23</sup> in general, and furthers the

<sup>22</sup> For a list of the current members and affiliate members of ISG, see [www.isgportal.com](http://www.isgportal.com).

<sup>23</sup> 15 U.S.C. 78f(b).

objectives of section 6(b)(5),<sup>24</sup> particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange further believes that the proposal, as amended by this Amendment No. 1, remains consistent the Act because this Amendment No. 1 does not propose to make any substantive changes to the proposal as originally filed.

Specifically, the Exchange believes that the proposed rule change should enhance depth and liquidity, and should promote narrower markets in the subject securities. Furthermore, the Exchange's listing requirements as proposed herein are at least as stringent as those of any other national securities exchange and, consequently, the proposed rule change is consistent with the protection of investors and the public interest.

Additionally, the proposal is designed to prevent fraudulent and manipulative acts and practices, as all of the proposed new products are subject to existing Exchange trading rules, together with specific requirements for registered market makers, books and record production, surveillance procedures, suitability and prospectus requirements, and requisite the Exchange approvals, all set forth above. With respect to the proposed changes to Rule 14.11(h), the proposal is designed to avoid duplication within the Exchange's rules.

The proposal is intended to ensure that investors receive up-to-date information on the value of certain underlying securities and indices in the products in which they invest, and protect investors and the public interest, enabling investors to: (i) Respond quickly to market changes through intraday trading opportunities; (ii) engage in hedging strategies; and (iii) reduce transaction costs for trading a group or index of securities.

The proposal is also designed to promote just and equitable principles of trade by way of initial and continued listing standards which, if not maintained, will result in the discontinuation of trading in the affected products. These requirements, together with the applicable the Exchange equity trading rules (which apply to the proposed products), ensure that no investor would have an unfair advantage over another respecting the trading of the subject products. On the

contrary, all investors will have the same access to, and use of, information concerning the specific products and trading in the specific products, all to the benefit of public customers and the marketplace as a whole.

Furthermore, the proposal is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system by adopting listing standards that will lead ultimately to the trading of the proposed new products on the Exchange, just as they are currently traded on other exchanges. The Exchange believes that individuals and entities permitted to make markets on the Exchange in the proposed new products should enhance competition within the mechanism of a free and open market and a national market system, and customers and other investors in the national market system should benefit from more depth and liquidity in the market for the proposed new products.

#### *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 current variances between the Exchange's listing rules and the listing rules of other exchanges limit competition in that there are certain products that the Exchange cannot list while other exchanges can list such products. Thus, approval of the proposed rule change will promote competition because it will allow the Exchange to compete with other national securities exchanges for additional product listings.

#### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

The Exchange has neither solicited nor received written comments on the proposed rule change.

#### **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) as the Commission may designate 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 or disapprove the 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, as modified, 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](mailto:rule-comments@sec.gov). Please include File Number SR-BATS-2013-038 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-2013-038. 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-2013-038, and should be submitted on or before July 31, 2013.

<sup>24</sup> 15 U.S.C. 78f(b)(5).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>26</sup>

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2013-16528 Filed 7-9-13; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-69934; File No. SR-C2-2013-024]

### Self-Regulatory Organizations; C2 Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to the Correction of a Typographical Error in Rule 6.15.08

July 3, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that, on July 2, 2013, 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 is proposing to correct an administrative typographical error in Rule 6.15.08, "Obvious Error and Catastrophic Errors." 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 Statutory Basis for, the Proposed Rule Change

##### 1. Purpose

The Exchange proposes to make an administrative change to correct an inadvertent typographical error to Exchange Rule 6.15.08. The Exchange proposes to make the proposed change so the text properly reflects the intention and practice of Rule 6.15.08. The administrative changes and typographical error are explained below.

The Exchange recently filed a rule change, SR-C2-2013-013 to, among other things, amend the Exchange's Obvious and Catastrophic Error rules.<sup>3</sup> As part of that filing, an inadvertent typographical error was made in the changes made to Rule 6.15.08. The error can be found in the third sentence in .08 of the Interpretations and Policies section of Rule 6.15. In the last clause of the third section, the word "transition" was used; however, the intended word was "transaction." The Exchange is now proposing to amend this error to more accurately describe the intention and practice of the rule.

##### 2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the "Act") and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.<sup>4</sup> Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>5</sup> requirements that the rules of an exchange 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 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. Additionally, the Exchange believes the proposed rule change is consistent with

the Section 6(b)(5)<sup>6</sup> requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Specifically, the proposed rule change is consistent with these provisions as it will more accurately describe the practice of the Exchange in the Exchange Rulebook. There are no substantive changes being made in the proposed rule change, and thus, the current practices of the Exchange will remain the same. The Exchange believes the proposed rule change is necessary to accurately describe to Exchange Trading Permit Holders how Obvious and Catastrophic Errors described in Rule 06.15.08 operate on the Exchange.

#### 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. The Exchange does not believe the proposed rule change imposes any burden on intramarket competition because it applies to all Trading Permit Holders. Additionally, the Exchange does not believe the proposed rule change will impose any burden on intermarket competition as it merely attempting to correct a typographical error. There will be no substantive changes to the Exchange's operations nor its rules.

#### 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) of the Act<sup>7</sup> and Rule 19b-4(f)(6)<sup>8</sup> thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if

<sup>6</sup> *Id.*

<sup>7</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>8</sup> 17 CFR 240.19b-4(f)(6).

<sup>3</sup> See Securities Exchange Act Release No. 34-69345 (April 8, 2013), 78 FR 21985 (April 12, 2013) (order approving SR-CBOE-2012-064 [sic] as modified by Amendments 1 and 2).

<sup>4</sup> 15 U.S.C. 78f(b).

<sup>5</sup> 15 U.S.C. 78f(b)(5).

<sup>26</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

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 will institute proceedings to determine whether the proposed rule change 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, as amended, 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](mailto:rule-comments@sec.gov). Please include File Number SR-C2-2013-024 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-C2-2013-024. 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-C2-2013-024 and should be submitted on or before July 31, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>9</sup>

**Elizabeth M. Murphy,**  
*Secretary.*

[FR Doc. 2013-16533 Filed 7-9-13; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-69938; File No. SR-CBOE-2013-069]

### Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Extending FLEX AIM Pilot Program Until July 18, 2014

July 5, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on July 2, 2013, Chicago Board Options Exchange, Incorporated ("Exchange" or "CBOE") 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 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 rules related to its Automated Improvement Mechanism ("AIM") for Flexible Exchange Options ("FLEX Options"). The text of the proposed rule change is provided below.

(additions are italicized; deletions are [bracketed])

\* \* \* \* \*

#### Chicago Board Options Exchange, Incorporated Rules

\* \* \* \* \*

Rule 24B.5A. FLEX Automated Improvement Mechanism

Notwithstanding the provisions of Rule 24B.5, a FLEX Trader that

<sup>9</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

represents agency orders may electronically execute an order it represents as agent ("Agency Order") against principal interest and/or against solicited orders provided it submits the Agency Order for execution into the automated improvement mechanism auction ("AIM Action") pursuant to this Rule.

(a)-(b) No change.

This rule supersedes Exchange Rule 6.74A.

. . . Interpretations and Policies:

.01-.02 No change.

.03 Initially, and for at least a Pilot Period expiring on July 18, 2013<sup>4</sup>, there will be no minimum size requirement for orders to be eligible for the AIM Auction. During this Pilot Period, the Exchange will submit certain data, periodically as required by the Commission, to provide supporting evidence that, among other things, there is meaningful competition for all size orders and that there is an active and liquid market functioning on the Exchange outside of the AIM Auction. Any data which is submitted to the Commission will be provided on a confidential basis.

.04-.07 No change.

\* \* \* \* \*

The text of the proposed rule change is also 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 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

In March 2012, CBOE obtained approval from the Commission to adopt the AIM auction process for FLEX

Options.<sup>3</sup> AIM for FLEX Options exposes certain FLEX Options orders electronically to an auction process to provide these orders with the opportunity to receive an execution at an improved price. The FLEX AIM auction is available only for orders that a Trading Permit Holder represents as agent (“Agency Order”) and for which a second order of the same size as the Agency Order (and on the opposite side of the market) is also submitted (effectively stopping the Agency Order at a given price).

The Commission approved on a pilot basis the component of AIM for FLEX Options that there is no minimum size requirement for orders to be eligible for the auction.<sup>4</sup> In connection with the pilot program, the Exchange has submitted to the Commission reports providing detailed FLEX AIM auction and order execution data, and the Exchange will continue to submit to the Commission these reports. One one-year extension to the pilot program has previously become effective.<sup>5</sup> The proposed rule change merely extends the duration of the pilot program until July 18, 2014. Extending the pilot for an additional year will allow the Commission more time to consider the impact of the pilot program on AIM order executions for FLEX Options.

## 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.<sup>6</sup> Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>7</sup> requirements that the rules of an exchange 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 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. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>8</sup> requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the proposed rule change protects investors and the public interest by allowing for an extension of the AIM pilot program for FLEX Options, and thus allowing additional time for the Commission to evaluate the pilot program. The FLEX AIM pilot program will continue to allow smaller FLEX Options orders to receive the opportunity for price improvement pursuant to the AIM auction.

### *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. The Exchange does not believe the proposed rule change imposes any burden on intramarket competition because it applies to all Trading Permit Holders. All Trading Permit Holders that submit FLEX Options orders into an AIM auction are still subject to the same requirements. In addition, the Exchange does not believe the proposed rule change will impose any burden on intermarket competition, as it merely extends the duration of an existing pilot program, which is available to all market participants through Trading Permit Holders. AIM for FLEX Options will continue to function in the same manner as it currently functions for an extended period of time.

### *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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>9</sup> and Rule 19b-4(f)(6)<sup>10</sup> thereunder because the proposal does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) by its terms, become operative for 30 days

from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest.<sup>11</sup>

A proposed rule change filed under Rule 19b-4(f)(6) normally may not become operative prior to 30 days after the date of filing. However, Rule 19b-4(f)(6)(iii)<sup>12</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay period. The Commission believes that waiver of the 30-day operative delay period is consistent with the protection of investors and the public interest. Specifically, the Commission believes that the proposal would allow the pilot program to continue uninterrupted and would avoid potential investor confusion that may result from the interruption of the pilot program. Moreover, the Commission notes that the Exchange submitted the proposal prior to the expiration of the pilot program, which would afford interested parties to comment on the proposal. For these reasons, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, and designates the proposed rule change to be operative on July 18, 2013.<sup>13</sup>

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.<sup>14</sup>

## 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:

<sup>11</sup> In addition, Rule 19b-4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's 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.

<sup>12</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>13</sup> For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>14</sup> 15 U.S.C. 78s(b)(3)(C).

<sup>3</sup> See Securities Exchange Release No. 66702 (March 30, 2012), 77 FR 20675 (April 5, 2012) (SR-CBOE-2011-123).

<sup>4</sup> The pilot for the FLEX AIM auction process was modeled after a similar existing pilot for non-FLEX Options, and included an initial expiration date of July 18, 2012 so that the FLEX pilot would coincide with the existing non-FLEX pilot.

<sup>5</sup> See Securities Exchange Act Release No. 67302 (June 28, 2012), 77 FR 39779 (July 5, 2012) (SR-CBOE-2012-061).

<sup>6</sup> 15 U.S.C. 78f(b).

<sup>7</sup> 15 U.S.C. 78f(b)(5).

<sup>8</sup> *Id.*

<sup>9</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>10</sup> 17 CFR 240.19b-4(f)(6).

*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](mailto:rule-comments@sec.gov). Please include File Number SR-CBOE-2013-069 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-CBOE-2013-069. 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-2013-069 and should be submitted on or before July 31, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>15</sup>

**Elizabeth M. Murphy,**  
Secretary.

[FR Doc. 2013-16589 Filed 7-9-13; 8:45 am]

**BILLING CODE 8011-01-P**

**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-69936; File No. SR-BATS-2013-39]

**Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Impose Fees for Market Data**

July 3, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on June 26, 2013, BATS Exchange, Inc. ("BATS" or the "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 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 filed with the Commission a proposed rule change to amend its fee schedule applicable to Exchange Members and other market data recipients to (i) assess market data fees for internal and external distribution of the BATS PITCH (including both TCP PITCH and Multicast PITCH) and BATS TOP data feed products, and (ii) amend the market data fee for internal and external distribution of the BATS Last Sale Feed (PITCH, TOP and Last Sale Feed collectively referred to in this proposal as the "Data Feeds"). Although changes to the fee schedule pursuant to this proposal are effective upon filing, the Exchange will implement the proposed revised fees on July 1, 2013.

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 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 the proposed rule change is to amend the "Equities Pricing" section of the BATS fee schedule which relates to fees for the BATS PITCH (including both TCP PITCH and Multicast PITCH), BATS TOP and BATS Last Sale Feed data products. For BATS PITCH, data recipients would pay a single fee, regardless if the data recipient receives BATS TCP PITCH, BATS Multicast PITCH, or both. The Exchange's other data products, other than BATS Historical Data,<sup>3</sup> will continue to be offered free of charge. Below is a description of each of the Data Feeds, as well as a brief description of the other data products offered by the Exchange that are impacted by this proposal. As specified in the descriptions below, the Data Feeds are applicable to the Exchange's equity securities platform ("BATS Equities"), its equity options platform ("BATS Options"), or both; however, the proposed fees would only be applicable to BATS Equities Data Feeds.

**(i) TCP PITCH**

The BATS TCP PITCH data feed is available for BATS Equities only, and provides Exchange data recipients with depth of book quotations, execution information, and auction update information during auctions for BATS listed securities. The PITCH feeds offered by BATS (including Multicast PITCH) are the data feeds through which Exchange data recipients can receive full, real-time quotation and execution information. Each PITCH message reflects the addition, deletion or execution of an order in the System.<sup>4</sup>

<sup>3</sup> The cost of user-accessible BATS Historical TOP Data, BATS Historical PITCH Data or BATS Historical Last Sale Data is \$500 per month of data accessed by any individual user. For data that the Exchange provides on an external hard drive to a market participant, the cost is \$2,500 per 1 terabyte (TB) drive generated by the Exchange. Securities Exchange Act Release No. 34-61885 (April 9, 2010), 75 FR 20018 (April 16, 2010) (SR-BATS-2010-002).

<sup>4</sup> As defined in BATS Rule 1.5(aa), the term "System" means "the electronic communications and trading facility designated by the Board through which securities orders of Users are consolidated

Continued

<sup>15</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

TCP PITCH is the data feed used by Exchange data recipients to receive BATS PITCH information via a TCP/IP connection.

(ii) Multicast PITCH

The BATS Multicast PITCH data feed is available for BATS Equities and BATS Options. The Multicast PITCH data feed, like TCP PITCH, offers depth of book quotations, execution information, and auction information, however, unlike TCP PITCH, this data feed is transmitted in a manner that can be processed more efficiently by recipients. This is achieved by using binary messages. BATS offers both WAN-shaped and Gig-shaped versions of the Multicast feed. Exchange data recipients may choose one or more Multicast PITCH feed options depending on their location and connectivity to BATS.

(iii) TOP

The BATS TOP data feed is available for BATS Equities only, and offers top of book quotations and last sale execution information. By only providing top of book quotations and last sale information, TOP offers data recipients a significant reduction in required bandwidth and processing when compared to BATS' standard TCP PITCH data feed. The quotations made available via TOP provide an aggregated size and do not indicate the size or number of individual orders at the best bid or ask.

(iv) Last Sale Feed

The BATS Last Sale Feed is available for BATS Equities only, and offers real-time, intraday trade information, including price, volume and time of executions. Because quotes are not shown, the BATS Last Sale Feed results in much less data than other BATS data feeds and requires less technology development for data recipients.

(v) Historical Data

The BATS Historical Data (PITCH, TOP and Last Sale Feed) offers up to three months of data on a T+1 basis available via download from the BATS Web site or additional data beyond three months available via an external hard drive.

(vi) Other BATS Data Feeds

The Exchange will continue to offer certain other market data products to Members and other market data

recipients free of charge. These data products include (i) Multicast Latency Feed, which offers real-time latency information; and (ii) DROP, which contains order execution and other information (e.g., modifications and cancellations) specific to the Exchange activity of one or more Users.

In SR-BATS-2010-002,<sup>5</sup> the Exchange made available the BATS Last Sale Feed and BATS Historical Data for a fee. Currently, the cost of the BATS Last Sale Feed is \$5,000 per month for any data recipient that chooses to receive the data feed for internal use only and \$25,000 per month for any data recipient that distributes the BATS Last Sale Feed externally. Indirect recipients do not pay the Exchange for the BATS Last Sale Feed, nor do they need to enter into a contract with the Exchange to receive the BATS Last Sale Feed. Currently, the cost of user-accessible BATS Historical TOP, BATS Historical PITCH or BATS Historical Last Sale is \$500 per month of data accessed by any individual data recipient. Up to three months of data is available via download from the BATS Web site. For data beyond three months, which the Exchange provides on an external hard drive to a market participant, the cost is \$2,500 per 1 terabyte (TB) drive generated by the Exchange, regardless of how much data is placed on the drive.<sup>6</sup>

Upon the Exchange's initial offering of the BATS PITCH (including both TCP PITCH and Multicast PITCH) and BATS TOP data products, such services were provided at no cost. In SR-BATS-2011-017, the Exchange stated that "should the Exchange determine to charge fees associated with [BATS PITCH (including both TCP PITCH and Multicast PITCH) and BATS TOP], the Exchange will submit a proposed rule change to the Commission in order to implement those fees."<sup>7</sup>

This proposal is designed to implement fees for the receipt of PITCH (including both TCP PITCH and Multicast PITCH) and TOP data products, and revise the fee for the receipt of the Last Sale Feed data product.

The proposed amendment to the BATS fee schedule codifies such fees associated with the receipt of PITCH (including both TCP PITCH and

Multicast PITCH), TOP and Last Sale Feed. The Exchange, like other market centers and other data providers, intends to assess fees for individuals and entities that receive real-time market data directly or indirectly and act as either internal or external distributors of such market data.

A "Data Recipient" of Exchange data is any entity that receives a Data Feed directly from the Exchange or indirectly through another entity and then distributes such data internally (within that entity) to "Internal Subscribers" or externally (outside that entity) to "External Subscribers" or "Data Feed Subscribers." An "Internal Subscriber" is any end-user of the Exchange data affiliated with the Data Recipient where the Data Recipient can substantially control the Exchange data for purpose of reporting usage or qualification of the end-user. An "External Subscriber" is any end-user of the Exchange data not affiliated with the Data Recipient where the Data Recipient can substantially control the Exchange data for purpose of reporting usage or qualification of the end-user. A "Data Feed Subscriber" is any end-user of the Exchange data outside of the Data Recipient that receives the Exchange data from a Data Recipient for which the Data Recipient cannot substantially control the Exchange data for the purpose of reporting usage or qualification of the end-user.

All Data Recipients and Data Feed Subscribers must execute a BATS Global Markets, Inc. Data Agreement with BATS Global Markets, Inc., acting on behalf of itself and the Exchange, and, as a result, would be charged the applicable monthly access fee described below. All External Subscribers must execute a BATS Global Markets, Inc. Subscriber Agreement or equivalent with the Data Recipient that is distributing the Exchange data to such External Subscriber; however, neither External Subscribers nor Internal Subscribers would be charged the monthly access fee described below for the receipt of such data.

Data Recipients (including Data Feed Subscribers) would be charged a separate monthly access fee to access: (i) The BATS PITCH data product; (ii) the BATS TOP data product; and/or (iii) the BATS Last Sale Feed data product. The amount of the monthly access fees would depend on whether the Data Recipient is distributing the Exchange data internally or externally. Data Recipients distributing the Exchange data internally are proposed to be charged \$1,000 per month for access to the BATS PITCH data product, \$500 per month for access to the BATS TOP data

for ranking, execution and, when applicable, routing away." As defined in BATS Rule 1.5(cc), the term "User" means "any Member or Sponsored Participant who is authorized to obtain access to the [Exchange's] System pursuant to Rule 11.3."

<sup>5</sup> Securities Exchange Act Release No. 34-61885 (April 9, 2010), 75 FR 20018 (April 16, 2010) (SR-BATS-2010-002); see also Securities Exchange Act Release No. 34-61885 (April 9, 2010), 75 FR 20018 (April 16, 2010) (SR-BATS-2010-002).

<sup>6</sup> *Id.*

<sup>7</sup> Securities Exchange Act Release No. 34-64445 (May 9, 2011) 76 FR 28108 (May 13, 2011) (File No. SR-BATS-2011-017).

product, and \$500 per month for access to the BATS Last Sale Feed data product. Data Recipients distributing the Exchange data externally are proposed to be charged \$5,000 per month for access to the BATS PITCH data product, \$2,500 per month for access to the BATS TOP data product, and \$2,500 for access to the BATS Last Sale Feed data product. The fee paid by a Data Recipient distributing the Exchange data externally includes the fee for distributing the Exchange data internally and thus permits a Data Recipient distributing the Exchange data externally to also provide the data internally (*i.e.*, to users within their own organization) for a single access fee. The Exchange does not propose to charge Data Recipients a per user fee for internal or external distribution of Exchange Data.

The Exchange will use commercially reasonable efforts to provide at least 60 days advance notice to Data Recipients (delivered via email and posted to BATS' Web site) of any changes to fees for the Exchange data, provided, however, that such notice shall be not less than 30 days prior to the effectiveness of the change. Receipt or use of the Exchange data after the applicable notice period will constitute acceptance of such fees.

Data Recipients will only pay one access fee, regardless of the number of locations or users to which the Data Feeds are received or distributed. In addition, neither Data Recipients nor their end-users will be charged per-user device fees when used to receive the Data Feeds, nor will they be charged per-user display fees when used to present the Data Feeds.

If a Data Recipient desires to have one or more of its affiliates<sup>8</sup> be bound by the terms and conditions of the BATS Global Markets, Inc. Data Agreement, the Data Recipient may submit a list of any such affiliate(s) to BATS Global Markets, Inc. Including affiliates under the same data agreement would entitle any such affiliate to access and use data from the Exchange for no additional fee (assuming either (i) the Data Recipient and the affiliate each are distributing the data internally, or (ii) the Data Recipient is distributing the data externally and the affiliate is distributing the data either internally or externally). One or more of the entities (each a "Connected

Entity") that is part of the group comprised of the Data Recipient and the affiliates included under the same agreement (collectively, the "Affiliate Group") is permitted to own connectivity directly with BATS. Further, any member of the Affiliate Group that, in addition to receiving Exchange data directly from BATS, also receives uncontrolled Exchange data indirectly from another Data Recipient (in addition to the Connected Entity) is not required to execute a separate data agreement; rather, that entity is bound by the same data agreement executed by the applicable member of the Affiliate Group. Lastly, if a Data Recipient is receiving Exchange data from (i) multiple third-party distributors or (ii) from one or more third-party distributors and the Exchange, the Data Recipient would only be required to pay one access fee—either the internal distribution access fee or the external distribution access fee—depending on whether the Data Recipient is distributing the Exchange data internally or externally.

The Exchange intends to implement the proposed fees on July 1, 2013.

## 2. Statutory Basis

The Exchange believes that the rule change proposed in this submission 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(b) of the Act.<sup>9</sup> Specifically, the Exchange believes that the proposed change is consistent with Section 6(b)(4) and 6(b)(5) of the Act,<sup>10</sup> because it provides an equitable allocation of reasonable fees among its Members and other recipients of Exchange data and is not designed to permit unfair discrimination between them. The Exchange believes that its proposed fees for the data products described herein are reasonable in light of the benefits to data recipients and the fact that certain other Exchange data feeds will continue to be provided free of charge.

As described in more detail below, the proposed fees are based on pricing conventions and distinctions that exist in the fee schedules of other exchanges. These distinctions (depth-of-book versus top-of-book and internal distribution versus external distribution) are each based on principles of fairness and equity that have helped for many years to maintain fair, equitable, and not unreasonably discriminatory fees, and that apply with

equal or greater force to the current proposal.

For example, NASDAQ Exchange ("NASDAQ") charges data recipients of its NASDAQ TotalView data feed \$2,000 per month for NASDAQ-listed security depth entitlements and \$1,000 per month for non NASDAQ-listed security depth entitlements to receive the data feed directly from NASDAQ. If the data recipient then distributes the data, it pays an additional internal or external distribution fee depending on the method of distribution. NASDAQ charges \$1,000 per month for internal distribution of NASDAQ-listed security depth entitlements and \$500 per month for internal distribution of non NASDAQ-listed security depth entitlements, and \$2,500 per month for external distribution of NASDAQ-listed security depth entitlements and \$1,250 per month for external distribution of non NASDAQ-listed security depth entitlements. NASDAQ also charges end-user fees per professional and non-professional subscriber for NASDAQ TotalView.<sup>11</sup>

NASDAQ charges data recipients that distribute its NASDAQ Basic data feed \$1,500 per month for best bid and offer and last sale information for all U.S. exchange-listed securities. Data recipients that subscribe to the NASDAQ Basic web service must pay a fee of \$1,500 per month, plus the applicable distribution and subscriber fees. NASDAQ also charges end-user fees per professional and non-professional subscriber or, in the alternative, NASDAQ charges per query fees for NASDAQ Basic.<sup>12</sup>

NASDAQ OMX PSX ("PSX") charges data recipients of its book feed, PSX TotalView, a \$1,000 monthly fee to receive its data feed directly from PSX. If the data recipient then distributes the data, it pays an additional internal or external distribution fee depending on the method of distribution. These distribution fees are \$500 per month for internal distribution and \$1,250 per month for external distribution. PSX also charges end-user fees per professional and non-professional subscriber for PSX TotalView.<sup>13</sup> NASDAQ OMX BX ("BX") charges data recipients of its book feed, BX TotalView, the same access fees and distribution fees as PSX, and also charges end-user fees per professional

<sup>8</sup> An "affiliate" of a Data Recipient includes any entity that, from time to time, directly or indirectly Controls, is Controlled by, or is under common Control with the Data Recipient. "Control" means the power to direct or cause the direction of the management of policies of another entity, whether through the ownership of voting securities, by contract, or otherwise.

<sup>9</sup> 15 U.S.C. 78f(b).

<sup>10</sup> 15 U.S.C. 78f(b)(4) and (5).

<sup>11</sup> See NASDAQ OMX Rule 7019 and NASDAQ OMX Rule 7023.

<sup>12</sup> *Id.*

<sup>13</sup> See NASDAQ PSX Pricing Schedule.

and non-professional subscriber for BX TotalView.<sup>14</sup>

NYSE charges data recipients of its book feed, NYSE OpenBook, a \$5,000 monthly fee to receive its data feed directly or indirectly from NYSE. NYSE also charges end-user fees per professional and non-professional subscriber for NYSE OpenBook. NYSE charges data recipients of its last sale feed, NYSE Real-Time Reference Prices, a \$60,000 monthly fee to receive this feed containing only NYSE data directly or indirectly from NYSE. If a data recipient wishes to receive NYSE, NYSE Arca and NYSE MKT data, NYSE charges the data recipient a \$100,000 monthly fee to receive this feed.<sup>15</sup>

Each of EDGX Exchange (“EDGX”) and EDGA Exchange (“EDGA”) charge \$500 per month for internal distribution and \$2,500 per month for external distribution of their EDGX and EDGA book feeds, respectively. In addition, each of EDGX and EDGA charge \$2,500 per month for internal distribution and \$5,000 per month for external distribution of their EdgeBook Attributed feeds.<sup>16</sup> Neither EDGX nor EDGA charge a per user fee for internal or external distribution of its data.

Revenue generated from Exchange data fees will help offset the costs that the Exchange incurs in operating and regulating a highly efficient and reliable platform for the trading of U.S. equities and options. This increased revenue stream will permit the Exchange to offer an innovative service at a reasonable rate, structured in a manner comparable to and consistent with other market centers that provide similar market data products.<sup>17</sup>

The Exchange will continue to make such data available until such time as it changes its rule.

The Exchange believes that the proposal is also consistent with Section 6(b)(8) of the Act<sup>18</sup> in that it does not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The fees charged would be the same for all similarly-situated market participants, and therefore do not unreasonably discriminate among market participants.

In adopting Regulation NMS, the Commission granted self-regulatory organizations (“SROs”) and broker-dealers (“BDs”) increased authority and flexibility to offer new and unique market data to the public. It was

believed that this authority would expand the amount of data available to consumers and also spur innovation and competition for the provision of market data.

The Exchange believes that its Data Feeds are precisely the sort of market data products that the Commission envisioned when it adopted Regulation NMS. The Commission concluded that Regulation NMS—by deregulating the market in proprietary data—would itself further the Act’s goals of facilitating efficiency and competition:

[E]fficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information are not required to receive (and pay for) such data. The Commission also believes that efficiency is promoted when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data.<sup>19</sup>

By removing “unnecessary regulatory restrictions” on the ability of exchanges to sell their own data, Regulation NMS advanced the goals of the Act and the principles reflected in its legislative history. If the free market should determine whether proprietary data is sold to BDs at all, it follows that the price at which such data is sold should be set by the market as well.

On July 21, 2010, President Barak [sic] Obama signed into law H.R. 4173, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”), which amended Section 19 of the Act. Among other things, Section 916 of the Dodd-Frank Act amended paragraph (A) of Section 19(b)(3) of the Act by inserting the phrase “on any person, whether or not the person is a member of the self-regulatory organization” after “due, fee or other charge imposed by the self-regulatory organization.” As a result, all SRO rule proposals establishing or changing dues, fees, or other charges are immediately effective upon filing regardless of whether such dues, fees, or other charges are imposed on members of the SRO, non-members, or both. Section 916 further amended paragraph (C) of Section 19(b)(3) of the Act to read, in pertinent part, “At any time within the 60-day period beginning on the date of filing of such a proposed rule change in accordance with the provisions of paragraph (1) [of Section 19(b)], the Commission summarily may temporarily suspend the change in the rules of the self-regulatory organization made thereby, 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 this title. If the Commission takes such action, the Commission shall institute proceedings under paragraph (2)(B) [of Section 19(b)] to determine whether the proposed rule should be approved or disapproved.”

The decision of the United States Court of Appeals for the District of Columbia Circuit in *NetCoalition v. SEC*, 615 F.3d 525 (D.C. Cir. 2010), although reviewing a Commission decision made prior to the effective date of the Dodd-Frank Act, upheld the Commission’s reliance upon competitive markets to set reasonable and equitably allocated fees for 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.’”<sup>20</sup> 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.’”<sup>21</sup>

The Exchange believes that the proposed fees are fair and equitable, and not unreasonably discriminatory. Specifically, the Exchange believes that the fees proposed for the Data Feeds are fair and equitable in that they are optional and apply uniformly to all data recipients irrespective of each recipient’s relationship to the Exchange (e.g., Member, non-Member data recipient, etc.) except with respect to reasonable distinctions as between internal and external distribution.<sup>22</sup> The proposed fees are based on pricing conventions and distinctions (e.g., internal versus external distribution and controlled versus uncontrolled data

<sup>20</sup> *NetCoalition*, at 535 (quoting H.R. Rep. no. 94–229, at 92 (1975), as reprinted in 1975 U.S.C.C.A.N. 321, 323).

<sup>21</sup> *Id.*

<sup>22</sup> The Exchange notes that distinctions based on internal versus external distribution have been previously filed with the Commission by NASDAQ, BX, PSX, and EDGX. See Nasdaq Rule 7019(b). See also Securities Exchange Act Release Nos. 62876 (September 9, 2010), 75 FR 56624 (September 16, 2010) (File No. SR-PHLX–2010–120); 62907 (September 14, 2010), 75 FR 57314 (September 20, 2010) (File No. SR-NASDAQ–2010–110); 63442 (December 6, 2010), 75 FR 77029 (December 10, 2010) (File No. SR-BX–2010–081); 66864 (April 26, 2012), 77 FR 26064 (May 2, 2012) (File No. SR-EDGX–2012–14).

<sup>14</sup> See NASDAQ OMX BX Rule 7019 and NASDAQ OMX BX Rule 7023.

<sup>15</sup> See NYSE Schedule of Fees.

<sup>16</sup> See EDGX Exchange Fee Schedule; See also EDGA Exchange Fee Schedule.

<sup>17</sup> See *infra* note 22 and accompanying text.

<sup>18</sup> 15 U.S.C. 78f(b)(8).

<sup>19</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

feed) based on established principles of fairness and equity that have helped to maintain fair, equitable, and not unreasonably discriminatory fees, and that apply with equal or greater force to the current proposal.

Regardless of a Data Recipient's reasons for subscribing to the Data Feeds, the fees for such feeds apply equally to all Data Recipients that wish to use the feeds for internal use only and equally to all Data Recipients that wish to redistribute the feeds.

The Exchange proposes charging Data Recipients that distribute Exchange data externally more than Data Recipients that distribute Exchange data internally because of higher administrative costs associated with monitoring methods of distribution and ongoing reporting by those Data Recipients distributing the data externally, as required in the BATS Global Markets, Inc. Data Agreement and Exchange requirements referenced therein. The Exchange believes that the access fees for the Data Feeds are reasonable and fair in light of alternatives offered by other market centers, as described above.

Efficiency is promoted when Members who do not need the Data Feeds are not required to receive (and pay for) such data. The Exchange also believes that efficiency is promoted when Members may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data. Only those consumers that deem such products to be of sufficient overall value and usefulness will purchase them. The Exchange is not required to make the Data Feeds available or to offer specific pricing alternatives for potential purchases. The Exchange has chosen to make the Data Feeds available to improve market quality, attract order flow, and increase transparency. The Exchange can discontinue offering a pricing alternative and firms can discontinue their use at any time and for any reason, including due to their assessment of the reasonableness of fees charged.

Lastly, competition is promoted as the Exchange cannot set unreasonable fees without losing business to its competitors.<sup>23</sup> The Exchange continues to establish and revise pricing policies aimed at increasing fairness and equitable allocation of fees among data recipients. If the market deems the proposed fees to be unfair or

inequitable, firms can diminish or discontinue their use of the data.

#### *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. Notwithstanding its determination that the Commission may rely upon competition to establish fair and equitable allocated fees for market data, the *NetCoalition* court found that the Commission had not, in that case, compiled a record that adequately supported its conclusion that the market for the data at issue in the case was competitive. The Exchange believes that a record may readily be established to demonstrate the competitive nature of the market in question.

The proposal is, as described below, pro-competitive. There is intense competition between trading platforms that provide transaction execution and routing services and proprietary data products. 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 [sic] 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 the prospect of a taking order seeing and reacting to a posted order on a particular platform, the posting of the order would accomplish little. Without orders entered and trades executed, exchange data products cannot exist. 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.

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. 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 BD customers view the costs of transaction executions and of data as a unified cost of doing business with the exchange. A BD 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 BD 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 product exceeds its expected value, the BD will choose not to buy it.

Moreover, as a BD chooses to direct fewer orders to a particular exchange, the value of the product to that BD decreases, for two reasons. First, the product will contain less information, because executions of the BD's orders will not be reflected in it. Second, and perhaps more important, the product will be less valuable to that BD because it does not provide information about the venue to which it is directing its orders. Data from the competing venue to which the BD is directing orders will become correspondingly more valuable. Thus, a super-competitive increase in the fees charged for either transactions or data has the potential to impair revenues from both products.

"No one disputes that competition for order flow is 'fierce.'" <sup>24</sup> However, the existence of fierce competition for order flow implies a high degree of price sensitivity on the part of BDs with order flow, since they may readily reduce costs by directing orders toward the lowest-cost trading venues. A BD 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. Similarly, if a platform increases its market data fees, the change will affect the overall cost of doing business with the platform, and affected BDs will assess whether they can lower their trading costs by directing orders elsewhere and thereby lessening the need for the more expensive data.

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 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

<sup>23</sup> See *infra* discussion in Section 4 [sic], "Self-Regulatory Organization's Statement on Burden on Competition."

<sup>24</sup> *NetCoalition*, at 24 [sic].

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 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. Such regulation is unnecessary because an "excessive" price for one of the joint products will ultimately have to be reflected in lower prices for other products sold by the firm, or otherwise the firm will experience a loss in the volume of its sales that will be adverse to its overall profitability. In other words, an increase in the price of data will ultimately have to be accompanied by a decrease in the cost of executions, or the volume of both data and executions will fall.

The market for market data products is 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 exchanges compete with each other for listings, trades, and market data itself, 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, as well as other entities, in a vigorously competitive market.

BDs currently have numerous alternative venues for their order flow, including thirteen SRO markets, as well as internalizing BDs and various forms of alternative trading systems ("ATSs"), including dark pools and electronic communication networks ("ECNs").

Each SRO market competes to produce transaction reports via trade executions, and two FINRA-regulated Trade Reporting Facilities ("TRFs") compete to attract internalized transaction reports. Competitive markets for order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary data products.

The large number of SROs, TRFs, BDs, and ATSs that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO, TRF, ATS, and BD is currently permitted to produce proprietary data products, and many currently do or have announced plans to do so, including, but not limited to, NASDAQ, NYSE, NYSE MKT, NYSE Arca, Direct Edge and International Securities Exchange.

Any ATS or BD can combine with any other ATS, BD, or multiple ATSs or BDs to produce joint proprietary data products. Additionally, order routers and market data vendors can facilitate single or multiple BDs' production of proprietary data products. The potential sources of proprietary products are virtually limitless.

The fact that proprietary data from ATSs, BDs, and vendors can by-pass SROs is significant in two respects. First, non-SROs can compete directly with SROs for the production and sale of proprietary data products, as the Exchange and Arca did before registering as exchanges by publishing proprietary book data on the Internet. Second, because a single order or transaction report can appear in an SRO proprietary product, a non-SRO proprietary product, or both, the data available in proprietary products is exponentially greater than the actual number of orders and transaction reports that exist in the marketplace. Indeed, in the case of the Data Feeds, the data provided through these products appears both in (i) real-time core data products offered by the SIPs for a fee, and (ii) free SIP data products with a 15-minute delay, and find close substitutes in products of competing venues.

Market data vendors provide another form of price discipline for proprietary data products because they control the primary means of access to end users. Vendors impose price restraints based upon their business models. For example, vendors such as Bloomberg and Reuters that assess a surcharge on data that 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. Retail BDs, such as Schwab and Fidelity, offer their customers proprietary data only if it promotes trading and generates sufficient commission revenue. 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 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 such as the Data Feeds 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 by investors with access to the Internet and television. Conversely, the value of such products to distributors and investors decreases if order flow falls, because the products contain less content.

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, including the Exchange, that swiftly grew into some of the largest electronic trading platforms and proprietary data producers: Archipelago, Bloomberg Tradebook, Island, REDIBook, Attain, TracECN and Direct Edge. A proliferation of dark pools and other ATSs operate profitably with fragmentary shares of consolidated market volume.

Regulation NMS, by deregulating the market for proprietary data, has increased the contestability of that market. While BDs have previously published their proprietary data individually, Regulation NMS encourages market data vendors and BDs to produce proprietary products cooperatively in a manner never before possible. Multiple market data vendors already have the capability to aggregate data and disseminate it on a profitable scale, including Bloomberg, and Thomson Reuters.

Competition among platforms has driven the Exchange continually to improve its market data offerings and to cater to customers' data needs. For example, the Exchange has developed and maintained multiple delivery mechanisms that enable customers to receive data in the form and manner

they prefer and at the lowest cost to them.

The Exchange offers data via multiple extranet providers, thereby helping to reduce network and total cost for its data products. Despite these enhancements and a dramatic increase in message traffic, to date the Exchange has been able to offer most of its market data without charge. Moreover, platform competition has intensified as new entrants have emerged, constraining prices for both executions and for data.

The Exchange has witnessed competitors creating new products and innovative pricing in this space over the last few years. In all cases, firms make decisions on how much and what types of data to consume on the basis of the total cost of interacting with the Exchange or other exchanges. Of course, the explicit data fees are but one factor in a total platform analysis. Some competitors have lower transactions fees and higher data fees, and others are vice versa. The market for the proposed data is highly competitive and continually evolves as products develop and change.

In establishing the fees for the Data Feeds, the Exchange considered the competitiveness of the market for the type of data being offered and all of the implications of that competition. The Exchange believes that it has considered all relevant 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 Data Feeds, 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, without losing business to these alternatives.

#### *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 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<sup>25</sup> and Rule

19b-4(f)(2) thereunder,<sup>26</sup> because it establishes a due, fee, or other charge imposed by BATS.

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](mailto:rule-comments@sec.gov). Please include File Number SR-BATS-2013-39 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-2013-39. 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 BATS. 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-2013-39 and should be submitted on or before July 31, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>27</sup>

**Elizabeth M. Murphy,**  
Secretary.

[FR Doc. 2013-16535 Filed 7-9-13; 8:45 am]

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## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-69928; File No. SR-NASDAQ-2013-094]

### **Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness to Conform Rule 5705 Governing Exchange Traded Funds to the Listing Requirements of Another Market**

July 3, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that, on June 27, 2013, The NASDAQ Stock Market LLC ("NASDAQ" or "Exchange") filed with the Securities and Exchange Commission ("Commission") a 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 is filing with the Commission a proposal to amend Rule 5705 (Exchange Traded Funds: Portfolio Depository Receipts and Index Fund Shares) regarding the definition of Derivative Securities Products, weight of component stocks of an index or portfolio, averaging minimum notional value traded per month, and minimum number of component stocks. The Exchange is making these changes to

<sup>27</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>25</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>26</sup> 17 CFR 240.19b-4(f)(2).

conform its rules with those of another market.

The text of the proposed rule change is available from NASDAQ's Web site 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 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

The purpose of this proposed rule change is to amend Rule 5705(b)(3) and (b)(4) regarding the definition of Derivative Securities Products, weight of component stocks of an index or portfolio,<sup>3</sup> averaging minimum notional value traded per month, and minimum number of component stocks.

The Exchange is making the proposed changes to conform its Rule 5705(b) with the rule of another market, namely NYSE Arca ("Arca"). The proposed changes are all based on, and virtually identical to, equivalent provisions in Arca Equities Rule 5.2(j)(3), Commentary .01(a)(A) and Commentary .02(a)(5) (the "Arca rule").<sup>4</sup>

By way of background, the Exchange has ETF listing provisions in Rule 5705 for different types of ETFs, including domestic and international Portfolio Depository Receipts ("PDRs")<sup>5</sup> in

<sup>3</sup> "Index or portfolio" is discussed in Rule 5705(b)(3)(A)(i).

<sup>4</sup> While in all instances the rule changes proposed by the Exchange are done to conform Exchange Rule 5705(b) with Arca Equities Rule 5.2(j)(3), Commentary .01(a)(A), and in all instances are based on Arca rule language, the rule changes proposed by the Exchange are tailored to work within the existing structure of Exchange Rule 5705(b).

<sup>5</sup> The term "Portfolio Depository Receipt" means a security: (i) That is based on a unit investment trust ("Trust") which holds the securities which comprise an index or portfolio underlying a series of Portfolio Depository Receipts; (ii) that is issued by the Trust in a specified aggregate minimum number in return for a "Portfolio Deposit" consisting of specified numbers of shares of stock and/or a cash amount, a specified portfolio of fixed

subsection (a) and Index Fund Shares ("IFSs")<sup>6</sup> in subsection (b). Subsection (a) and (b) include listing provisions pursuant to Rule 19b-4(e) under the Act<sup>7</sup> indicating that the component stocks of (i) an index or portfolio of U.S. Component Stocks<sup>8</sup> underlying a series of PDRs or IFSs shall meet five criteria;<sup>9</sup> and (ii) regarding global indexes or portfolios,<sup>10</sup> underlying a series of PDRs or IFSs shall meet five criteria.<sup>11</sup> Rule 5705(a) and (b) are like the Arca rule, except that Rule 5705(b) lacks certain language regarding listing IFSs. This proposal simply adds language to

income securities and/or a cash amount and/or a combination of the above; (iii) that, when aggregated in the same specified minimum number, may be redeemed from the Trust which will pay to the redeeming holder the stock and/or cash, fixed income securities and/or cash and/or a combination thereof then comprising the "Portfolio Deposit"; and (iv) that pays holders a periodic cash payment corresponding to the regular cash dividends or distributions declared with respect to the component securities of the securities index or portfolio of securities underlying the Portfolio Depository Receipts, less certain expenses and other charges as set forth in the Trust prospectus. Rule 5705(a)(1)(A).

<sup>6</sup> The term "Index Fund Share" means a security: (i) That is issued by an open-end management investment company based on a portfolio of stocks or fixed income securities or a combination thereof, that seeks to provide investment results that correspond generally to the price and yield performance or total return performance of a specified foreign or domestic stock index, fixed income securities index or combination thereof; (ii) that is issued by such an open-end management investment company in a specified aggregate minimum number in return for a deposit of specified numbers of shares of stock and/or a cash amount, a specified portfolio of fixed income securities and/or a cash amount and/or a combination of the above, with a value equal to the next determined net asset value; and (iii) that, when aggregated in the same specified minimum number, may be redeemed at a holder's request by such open-end investment company which will pay to the redeeming holder the stock and/or cash, fixed income securities and/or cash and/or a combination thereof, with a value equal to the next determined net asset value. Rule 5705(b)(1)(A).

<sup>7</sup> 17 CFR 240.19b-4(e).

<sup>8</sup> The term "U.S. Component Stock" means an equity security that is registered under Sections 12(b) or 12(g) of the Act, or an American Depository Receipt, the underlying equity security of which is registered under Sections 12(b) or 12(g) of the Act. Rule 5705(b)(1)(D).

<sup>9</sup> Rule 5705(a)(3)(A)(i) a. through e. and (b)(3)(A)(i) a. through e.

<sup>10</sup> The components of a global (aka international) index or portfolio consists of either only Non-U.S. Component Stocks or both U.S. Component Stocks and Non-U.S. Component Stocks. The term "Non-U.S. Component Stock" means an equity security that (a) is not registered under Sections 12(b) or 12(g) of the Act, (b) is issued by an entity that is not organized, domiciled or incorporated in the United States, and (c) is issued by an entity that is an operating company (including Real Estate Investment Trusts (REITs) and income trusts, but excluding investment trusts, unit trusts, mutual funds, and derivatives). Rule 5705(a)(1)(D) and (b)(1)(E).

<sup>11</sup> Rule 5705(a)(3)(A)(ii) a. through e and (b)(3)(A)(ii) a. through e.

subsections (b)(3) and (b)(4) of Rule 5705 to make it similar to the Arca rule.

#### The Proposed Rule Changes

First, the Exchange proposes to exclude "Derivative Securities Products" from Rule 5705(b)(3)(A)(i) a., b., and c. for U.S. Indexes or portfolios, and from Rule 5705(b)(3)(A)(ii) a., b., and c. for international or global indexes or portfolios. "Derivative Securities Products" include the following types of products: ETFs consisting of PDRs and IFSs (Rule 5705); Trust Issued Receipts (Rule 5720); Managed Fund Shares (Rule 5735); and Commodity-Based Trust Shares, Currency Trust Shares, Commodity Index Trust Shares, Commodity Futures Trust Shares, Partnership Units, Trust Units, Managed Trust Shares, (Rule 5711).<sup>12</sup> Arca's definition of Derivative Securities Products<sup>13</sup> includes one product (Paired Trust Shares) that is not included in the Exchange's definition of Derivative Securities Products. As such, the Exchange and Arca definitions of Derivative Securities Products as proposed are therefore similar. In addition, the Exchange proposes in Rule 5705(b) to exclude Derivative Securities Products in exactly the same places, and in same manner, as the equivalent sections of the Arca rule.

Second, the Exchange proposes to modify Rule 5705(b)(3)(A)(i)(b) and 5705(b)(3)(A)(ii)(b) to indicate the appropriate value or weight of the index and the averaged minimum notional value traded per month. Specifically, these proposed sections would indicate that component stocks (excluding Derivative Securities Products) that in the aggregate account for at least 70% of the weight of the index or portfolio (excluding Derivative Securities Products) each shall have a minimum monthly trading volume of 250,000 shares or minimum notional volume traded per month of \$25,000,000, averaged over the last six months.<sup>14</sup> The proposed changes would make Rule 5705(b)(3)(A)(i)(b) and 5705(b)(3)(A)(ii)(b) exactly like the equivalent sections of the Arca rule. The proposed changes allow setting the weight of the index or portfolio at 70%

<sup>12</sup> Definitions of or discussions regarding the noted products can be found in the specified Exchange rules.

<sup>13</sup> Arca states in Equities Rule 5.2(j)(3), Commentary .01(a)(A) that Derivative Securities Products include Units (known as ETFs on the Exchange) and securities defined in Section 2 of Arca Equity Rule 8.

<sup>14</sup> Rule 5705(b)(3)(A)(ii)(b), which deals with global (international) indexes or portfolios is, however, written in terms of worldwide monthly trading volume and global notional volume.

and averaging trading volume over six months, as allowed by the Arca rule.

Third, the Exchange proposes to modify Rule 5705(b)(3)(A)(i)(d) and 5705(b)(3)(A)(ii)(d) to indicate how many component stocks an index or portfolio must have at a minimum. Specifically, the proposed sections would indicate that the index or portfolio shall include a minimum of 13 component stocks; provided, however, that there shall be no minimum number of component stocks if either one or more series of IFSs or PDRs constitute, at least in part, components underlying a series of IFSs, or one or more series of Derivative Securities Products account for 100% of the weight of the index or portfolio.<sup>15</sup> This change would indicate that the Exchange, like Arca, does not require a set minimum number of component stocks if, for example, IFSs or PDRs (which must each meet specified Exchange listing standards in their own right) underlie a series of IFSs. Again, the proposed changes would make Rule 5705(b)(3)(A)(i)(d) and 5705(b)(3)(A)(ii)(d) exactly like the equivalent sections of the Arca rule.

Fourth, the Exchange proposes to modify Rule 5705(b)(3)(A)(i)(c) and 5705(b)(3)(A)(ii)(c) to clarify that, to the extent applicable, the five most heavily weighted component stocks would not exceed a given weight. Specifically, these proposed sections would, like the Arca rule, indicate that, to the extent applicable, the five most heavily weighted component stocks (excluding Derivative Securities Products) shall not exceed 65% of the weight of the index or portfolio.<sup>16</sup>

Fifth, the Exchange proposes to modify Rule 5705(b)(4)(A)(v) to insert "one consisting entirely of" into the existing rule text. The proposed rule text would state that an underlying index or portfolio (excluding one consisting entirely of exempted securities) must include securities from a minimum of 13 non-affiliated issuers. As with all other proposed rule changes, this is done to conform Rule 5705(b)(4)(A)(v) to the Arca rule.

All of the rule changes proposed are done solely to align Exchange Rule 5705 and the Arca rule. The Exchange believes that by conforming the rules, and allowing listing opportunities on the Exchange that are already allowed by rule on another market, the proposal would offer another venue for listing

and trading Index Fund Shares on equivalent terms, and thereby promote competition.<sup>17</sup>

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act<sup>18</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>19</sup> in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. For the reasons noted in the filing, the Exchange proposes to amend Rule 5705 regarding the definition of Derivative Securities Products, weight of component stocks of an index or portfolio, averaging minimum notional value traded per month, and minimum number of component stocks. The proposed changes do nothing more than match Exchange rules with what is currently available on other exchanges. The Exchange believes that by conforming its rules and allowing listing opportunities on the Exchange that are already allowed by rule on another market, the proposal would offer another venue for listing and trading Index Fund Shares products and thereby promote broader competition among exchanges.

### 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, where the current variance in the rules of the exchanges limits competition, the proposal will allow listing equivalent products on the Exchange, thereby promoting increased competition for listings among markets.

### 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 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 if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>20</sup> and Rule 19b-4(f)(6)(iii) thereunder.<sup>21</sup>

The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it may enable the Exchange to compete more effectively for listings, and this competition could inure to the benefit of issuers and market participants generally. For this reason, the Commission waives the operative delay and designates the proposed rule change to be operative upon filing.<sup>22</sup>

## 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](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2013-094 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-2013-094. This file number should be included on the subject line if email is used. To help the Commission process and review your

<sup>20</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>21</sup> 17 CFR 240.19b-4(f)(6)(iii). As required under Rule 19b-4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the 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.

<sup>22</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>15</sup> Rule 5705(b)(3)(A)(ii)(d), however, which deals with global (international) indexes or portfolios, requires a minimum of 20 component stocks.

<sup>16</sup> Rule 5705(b)(3)(A)(ii)(c), however, which deals with global (international) indexes or portfolios, is written in terms of 60% of the weight of the index or portfolio.

<sup>17</sup> No other changes are made or intended by this filing and existing listing and trading rules continue to be applicable to Index Fund Shares.

<sup>18</sup> 15 U.S.C. 78f(b).

<sup>19</sup> 15 U.S.C. 78f(b)(5).

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-2013-094, and should be submitted on or before July 31, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>23</sup>

**Elizabeth M. Murphy**,  
Secretary.

[FR Doc. 2013-16529 Filed 7-9-13; 8:45 am]

**BILLING CODE 8011-01-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

[FHWA Docket No. FHWA-2013-0041]

#### Buy America Policy

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Notice and request for comments.

**SUMMARY:** The FHWA is seeking comments regarding the continued need, in whole or in part, for the general waivers from Buy America for manufactured products; for ferry boat equipment; and for pig iron and processed, pelletized, and reduced iron ores. These waivers have been in effect since 1983, 1994, and 1995, respectively. The FHWA is also seeking comment on the continuing need for the FHWA's minimal use threshold

(currently established at \$2,500 or 1/10 of 1 percent of the total contract value, whichever is greater).

**DATES:** Comments must be received on or before August 9, 2013. Late comments will be considered to the extent practicable.

**ADDRESSES:** Mail or hand deliver comments to the U.S. Department of Transportation, Dockets Management Facility, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC 20590, or submit electronically at <http://www.regulations.gov> or fax comments to (202) 493-2251. All comments should include the docket number that appears in the heading of this document. All comments received will be available for examination and copying at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification or receipt of comments must include a self-addressed, stamped postcard or you may print the acknowledgment page that appears after submitting comments electronically. You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70, Page 19477-78).

**FOR FURTHER INFORMATION CONTACT:** Mr. Gerald Yakowenko, Contract Administration Team Leader, Office of Program Administration, (202) 366-1562, or Mr. Michael Harkins, Office of the Chief Counsel, (202) 366-4928, Federal Highway Administration, 1200 New Jersey Avenue SE., Washington, DC 20590. Office hours are from 8 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

#### SUPPLEMENTARY INFORMATION:

##### Electronic Access and Filing

This document and all comments received may be viewed online through the Federal eRulemaking portal at: <http://www.regulations.gov>. Regulations.gov is available 24 hours each day, 365 days each year. Electronic submission and retrieval help and guidelines are available under the help section of the Web site. An electronic copy of this document may also be downloaded by accessing the Office of the Federal Register's home page at: <http://www.archives.gov/federal-register/>, or the Government Printing Office's Web page at: <http://www.gpo.gov/fdsys>.

##### Regulatory Background

The FHWA's Buy America policy in 23 CFR 635.410 requires a domestic manufacturing process for any steel or iron products (including protective

coatings) that are permanently incorporated into a Federal-aid highway construction project. The regulation is based on the statutory authority in 23 U.S.C. 313(a) which states:

"Notwithstanding any other provision of law, the Secretary of Transportation shall not obligate any funds authorized to be appropriated to carry out the Surface Transportation Assistance Act of 1982 (96 Stat. 2097) or this title and administered by the Department of Transportation, unless steel, iron, and manufactured products used in such project are produced in the United States."

The statute provides for the application of the Buy America requirements to any project using Title 23 funding; however, exceptions are provided where the Secretary finds that: (1) The application of the requirement would be inconsistent with the public interest, (2) where materials and products are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or (3) that inclusion of domestic material will increase the cost of the overall project contract by more than 25 percent.

Based on the Secretary's authority to grant waivers from Buy America, the FHWA has issued three general waivers from Buy America. These waivers pertain to manufactured products, ferry boat equipment, and pig iron and processed, pelletized, and reduced iron ores, and have been in effect since 1983, 1994, and 1995, respectively. With this notice, the FHWA is seeking comment regarding whether these waivers continue to be necessary, in whole or in part, and, if so, what limits should be placed on these waivers. Additionally, FHWA's regulations at 23 CFR 635.410(b)(4) permit the incorporation of foreign steel and iron into a project if the cost of such items does not exceed one-tenth of one percent (0.1 percent) of the total contract cost or \$2,500, whichever is greater. The FHWA is also seeking comment on the continuing need for the provision and, if so, whether the threshold is appropriate.

#### Manufactured Products

##### General Manufactured Products

Section 165 of the Surface Transportation Assistance Act (STAA) of 1982, Public Law 97-424 (1983), is the source legislation for FHWA's Buy America requirements.<sup>1</sup> This statute

<sup>1</sup> Congress codified Section 165 of the STAA of 1982, as amended, at 23 U.S.C. 313 with the enactment of Section 1903 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A

<sup>23</sup> 17 CFR 200.30-3(a)(12).

replaced an earlier statutory version of Buy America from Section 401 of the STAA of 1978, Public Law 95–599 (1978), that applied to the Federal-aid highway program. Section 165 of the STAA of 1982 was implemented with a November 25, 1983, final rule which implemented FHWA's Buy America regulatory policies now found in 23 CFR 635.410. In the preamble to the 1983 final rule (48 FR 53099), the FHWA summarized and addressed more than 560 public comments, including comments on the FHWA's interim decision to waive the application of Buy America to manufactured products (48 FR 1946), and found that it was in the public interest to waive application of Buy America to manufactured products other than steel and iron manufactured products.

In discussing the rationale for continuing the general waiver for manufactured products in the preamble to the 1983 final rule, the FHWA stated that the agency had issued an identical general waiver for manufactured products in implementing the 1978 Buy America provisions. In issuing the waiver for the 1978 Buy America statute (43 FR 53717 and 45 FR 77455), the FHWA explained that steel was the only significant foreign commodity having a significant nationwide effect on the cost of Federal-aid highway construction projects.<sup>2</sup> While natural materials (e.g., sand, stone, gravel, and earth materials) and petroleum-based products (e.g., fuels, lubricants, and bituminous products) are also used in large amounts in Federal-aid highway construction projects, foreign competition in natural materials was not significant due to their high cost in transportation and petroleum-based products were not available from domestic sources in sufficient and reasonable quantities.

In examining the legislative history of the 1983 Buy America statute, the FHWA found that Congress considered which products should specifically be covered (such as steel, cement, and asphalt), and focused solely on steel and cement. Therefore, the FHWA determined that the best interpretation of congressional intent was that Congress, with the enactment of Section

165 of the STAA of 1982, did not intend to override the existing policy with respect to manufactured products that applied to the 1978 Buy America statute. While Congress subsequently modified the 1983 Buy America statute to repeal the statute's coverage of cement (Pub. L. 98–229, Section 10 (1984) and to add coverage for iron (Intermodal Surface Transportation Efficiency Act (ISTEA), Pub. L. 102–240, Section 1048(a) (1991)), Congress left the remaining provisions intact.

Additionally, in the preamble to the 1983 final rule, the FHWA noted, and agreed with, statements from commenters who noted the difficulty in tracing the origin of various materials comprising manufactured products. The FHWA further noted comments regarding the difficulty of tracing the origin of steel components and subcomponents of various manufactured products, such as traffic controllers. After consideration of all the comments, the FHWA found that it was in the public interest to waive the application of Buy America to manufactured products other than steel and cement manufactured products. Subsequently, in a December 12, 1997, memorandum, the FHWA reinforced and clarified the concept of this public interest exclusion by stating that Buy America requirements are applicable to the steel components of predominantly steel products. However, that memo did not define the term “predominantly steel product.”

The American Recovery and Reinvestment Act of 2009 (Recovery Act) brought a renewed interest from public and industry representatives in ensuring that Federal funds were used to support domestic manufacturing. While the “Buy American” provisions of the Recovery Act Section 1605 did not apply to the Federal-aid highway program, the FHWA took great efforts to ensure that Buy America provisions were included and enforced on all Recovery Act projects.<sup>3</sup>

As a result of this heightened awareness, construction project inspection staff and audit representatives spent significant resources in examining compliance with Buy America requirements for all steel or iron products. Compliance issues were noted regarding manufactured

products that contained miscellaneous steel or iron components such as light bulbs, sinks, toilets, faucets, tie wires, lifting hooks, traffic controller mounting brackets, nuts, bolts, washers and screws. Many of these products would typically have been labeled as miscellaneous steel components or steel subcomponents comprising part of a manufactured product that would have been subject to the general waiver granted in the 1983 final rule.

Nevertheless, continuing requests for clarifications regarding Buy America requirements during Recovery Act implementation and National Review Team oversight efforts led the FHWA to issue a memorandum on December 21, 2012. Moreover, given the broadened scope of the Federal-aid highway program since 1983 as well as the evolution of technologies, products, and construction methods used in highway and bridge construction, the FHWA felt that issuing some guidance to clarify the existence and use of this waiver was prudent. This December 2012 memorandum was intended to clarify the long-standing policy regarding the application of Buy America requirements to steel or iron manufactured products as it related to the waiver granted for manufactured products in the 1983 final rule. Since the existence of this waiver is found in the preamble of the 1983 rulemaking document with very little other guidance available regarding its existence and application, the FHWA wanted to ensure that FHWA Division Offices were aware of the existence of the waiver and that the waiver was consistently applied. The memorandum specifically identified a list of products that are subject to Buy America requirements, defined the term “predominantly steel or iron manufactured product” by a 90 percent content requirement, and provided examples of miscellaneous steel or iron products.

However, this correspondence has triggered opposition from various groups in the manufacturing industry. Also, a bill has been introduced in the House of Representatives (HR 949) that would require the FHWA to reexamine the agency's standing nationwide Buy America waivers by issuing a notice and request for public comments on the continuing need for these waivers. While the FHWA maintains that the agency has not changed the application or scope of the manufactured products waiver, the FHWA agrees with the intent of HR 949 that, due to the age of the manufactured products waiver, it is prudent to seek public comments as part

Legacy for Users (SAFETEA-LU), Public Law 109–59 (2005).

<sup>2</sup> Note that the 1983 final rule did not use the term “general waiver.” Instead, the 1983 final rule simply said that the FHWA found it in the public interest to waive the application of Buy America to manufactured products other than steel and cement manufactured products. The term “general waiver” is being used for purposes of this notice to help clarify that the waiver issued for manufactured products in the 1983 final rule is a waiver of general applicability that is not subject to a project-by-project determination.

<sup>3</sup> Title XII of the Recovery Act specifically stated that Recovery Act funded highway projects were to be administered as if apportioned under chapter 1 of title 23 U.S.C. Therefore, Recovery Act-funded highway projects were administered under the FHWA's traditional Buy America requirements in 23 CFR 635.410 instead of the Recovery Act specific Buy American provisions codified in 2 CFR Part 172.

of a review of the continued need for this waiver.

The FHWA supports the application of Buy America in the most effective and efficient manner possible. The application of Buy America is most effective and efficient whenever it is applied to products that are available from domestically produced sources in sufficient and reasonably available quantities and of a satisfactory quality. As stated in the 1983 final rule, the FHWA found that the waiver of Buy America to manufactured products does not have any significant impact since manufactured products comprised a small percent of the highway construction program. With this notice, the FHWA is reevaluating this finding and requesting comments on the manufactured products waiver as well as the needed parameters of the waiver if continued.

The most prevalent materials used in highway construction can be included in four major material categories: Bituminous products, Portland cement products, aggregates, and steel products. Based on a report titled "Distribution of Costs on Federal-aid Highway Construction Contracts Over \$1,000,000 on the National Highway System Reported During Calendar Year 2004" (the last year for which data was available), the approximate value of the materials used as a percentage of the overall value of all construction contract was as follows: Bituminous products (7.8%), Portland cement products (0.7%), aggregates (17.8%) and steel products (4.8%) (<http://www.fhwa.dot.gov/policy/ohim/hs04/htm/costpie.htm#alt1>). Of these materials, it appears that only steel/iron products would be appropriate for consideration under the public interest waiver provisions available under 23 U.S.C. 313.

The market conditions and assumptions that led to FHWA's decision not to include oil products (bituminous products or asphaltic cement) in the November 25, 1983, general waiver still exist today. Petroleum and petroleum-based products that are permanently incorporated in a project (such as asphalt cement) are generally not available from domestic sources in sufficient and reasonably available quantities. In the preamble to the 1983 final rule, the FHWA noted that over 200 comments were received regarding the application of Buy America provisions to oil products and virtually all commenters asked that oil and/or petroleum products and/or asphalt be exempt from coverage.

As noted above, Congress specifically modified the 1983 Buy America statute to repeal the statute's coverage of cement. Aggregates and other natural materials, such as sand, stone, and gravel are used in large quantities in highway construction; however, foreign competition is very limited due to the difficulty and high cost of transporting these heavy materials over long distances. Thus, subjecting these products to Buy America requirements will place an undue administrative burden on State DOTs in ensuring Buy America compliance and could unnecessarily delay, or even halt, projects for difficulties in tracing the origin of all items used to manufacture these products. Moreover, some of the ingredients used to make concrete products, such as Portland cement in concrete or asphalt cement in bituminous concrete, are not domestically manufactured in sufficient and reasonably available quantities to meet the demand for these products.

Thus, the application of Buy America to only steel and iron products seems to have the highest potential of realizing the intent of the Buy America statutory provisions in protecting the domestic manufacturing industry. The FHWA has applied, and intends to continue to apply, Buy America to predominantly steel and iron products delivered to a project site for permanent incorporation into that project. This includes predominantly steel and iron products that are incorporated into precast concrete products.

Additionally, for items that may be comprised of steel and iron components or subcomponents, the application of Buy America to the steel and iron in these items would have no impact because the availability of these items are not driven by the demands of the needs for highway construction. For example, some projects, such as in the construction and improvement of rest areas, may involve the incorporation of light bulbs. Light bulbs are not made special for highway construction and, thus, there is no way to trace where the steel and iron that is incorporated into a light bulb is manufactured. The same problem is attendant with other products, also involved in the construction and improvement of rest areas, such as faucets and door hinges. The preamble to the 1983 final rule cited the example of a traffic controller as a manufactured product, where it would be inconsistent with the public interest to apply Buy America requirements. In general, traffic controllers and traffic management hardware and equipment are examples of manufactured products that are

composed of multiple components and subcomponents whose origins are difficult, if not impossible to trace.

#### Vehicles

One example of the broadened scope of the Federal-aid highway program involves the Congestion Mitigation and Air Quality Improvement (CMAQ) Program. The CMAQ program was created under the Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991, Public Law 102-240, and is codified at 23 U.S.C. 149. The CMAQ Program provides annual apportionments to States for projects or programs that will contribute to attainment or maintenance of the national ambient air quality standards (NAAQS) for ozone, carbon monoxide (CO), and particulate matter (PM). One type of CMAQ project that is being programmed at a growing rate by State, local governments, and private sector sponsors is acquisition of fuel efficient and low emission vehicles and equipment. With recent developments in clean fuel and low emission technologies as well as broader production and availability of these types of vehicles in the U.S. market by the automotive industry, the FHWA is seeing an increased demand to use CMAQ funds to purchase these vehicles and associated items, such as construction equipment and locomotives.

The FHWA currently has not established a Buy America policy for these types of projects. While vehicles are a manufactured product, with the increased use of CMAQ funds for these types of projects, the FHWA has recently determined that the Buy America program is appropriate to apply to these types of projects. For example, the FHWA granted conditional waivers given to Alameda County, San Francisco County, and Merced County, CA, for vehicle purchases on November 21, 2011, notices (76 FR 72027 and 76 FR 72028) and March 30, 2012 (77 FR 19410). These waivers were granted upon the condition that the final assembly of the vehicles occur in the United States. However, the FHWA did not apply a domestic content standard to these waivers. A vehicle manufacturer relies on numerous international sources for various components and it is virtually impossible to track the specific country of origin for small steel components and subcomponents even though a manufacturer can certify where the final assembly of the vehicle occurs. The difficulty of tracing and documenting domestic manufacturing processes for every manufacturing step for all

components and subcomponents illustrates the need for the public interest exception provided by 23 U.S.C. 313(b).

The FHWA was, and remains, uncertain whether such a domestic content requirement would further the objectives of the CMAQ Program in encouraging State and local entities to pursue clean fuel technologies. Moreover, the FHWA has no data to determine what such a content standard should be. Also, the practicality of establishing such a limit for just the iron and steel components in vehicles or equipment is questionable. The FHWA is unaware of any method the agency can use to determine where the components and subcomponents, including the steel and iron contained in the steel and iron components of a vehicle, were manufactured. Similarly, the FHWA has no basis for defining the point of final assembly for vehicles as well as vehicle retrofit projects.

#### Ferry Boat Equipment

On February 9, 1994, FHWA published a notice in the **Federal Register** (59 FR 6080) announcing a nationwide waiver of the Buy America requirements for certain steel products used in the construction of ferry boats. The FHWA granted this waiver after publishing a notice in the **Federal Register** (58 FR 33295) and requesting comment for which two comments were received. The items included in the waiver are marine diesel engines, electrical switchboards and switchgear, electric motors, pumps, ventilation fans, boilers, electrical controls, and electronic equipment. Other steel and iron products used in the construction of ferry boats that are manufactured domestically are not waived, including steel and stainless steel plate and shapes, sheet steel and stainless steel, steel and stainless steel pipe and tubing, and galvanized steel products. The FHWA has not reevaluated the continuing need for this waiver since it was issued in 1994. Based on the FHWA's present knowledge, however, the FHWA has no information that would lead us to believe that domestic manufacturers of the waived ferry boat components are now available. The FHWA invites comments on the continuing need for this nationwide waiver.

#### Pig Iron and Processed, Pelletized, and Reduced Iron Ores

On March 24, 1995, FHWA published a notice in the **Federal Register** announcing a nationwide waiver of the Buy America requirements for certain components used in the manufacturing

process for steel and iron products. The specific components include pig iron and processed, pelletized, and reduced iron ores. The FHWA granted this waiver after publishing a notice in the **Federal Register** (59 FR 43376) and requesting comment for which 10 comments were received. Based on the findings of a nationwide review, and a review of the comments submitted in response to the waiver proposal, the FHWA believed that the supply from domestic sources of pig iron and processed, pelletized, and reduced iron ore was not adequate to permit full compliance with the Buy America requirements. The FHWA has not reevaluated the continuing need for this waiver since it was issued in 1995. Based on the FHWA's present knowledge, however, the FHWA has no information that would lead us to believe that the supply of domestic pig iron and processed, pelletized, and reduced iron ore is adequate to meet the needs of domestic steel and iron manufacturers. The FHWA invites comments on the continuing need for this nationwide waiver.

#### Minimal Use Exclusion

One regulatory criterion that was addressed in the November 25, 1983, final rule to implement the public-interest exclusion provision of 23 U.S.C. 313(b) is the minimal use provision in 23 CFR 635.410(b)(4). This provision allows for a minimal amount of non-domestic steel to be incorporated if “. . . the cost of such materials used does not exceed one-tenth of one percent (0.1 percent) of the total contract cost or \$2,500, whichever is greater.” However, this provision requires the contracting agency to maintain a running list of non-domestic steel or iron components or subcomponents as a construction project proceeds. The threshold amounts have not been revised since the November 25, 1983, final rule and managing the documentation of compliance with this threshold can be problematic on large, complex projects.

One potential method of easing the inspection and reporting burden on contracting agencies for Buy America compliance would be to raise the minimal use threshold; however, there is no clear approach for doing so. Consideration could be given to raising the \$2,500 threshold by a multiplier related to relevant producer price indices for steel or iron products or relevant cost indices for highway construction. In either case, it is difficult to establish an index that is representative of all of the iron and steel products that are used in the Federal-aid

highway program. The multiplier could be as high as 2.5 (based on the Producer Price Index Commodity information for iron and steel products for the period 1983 to 2013 for group WPS101). (<http://data.bls.gov/pdq/querytool.jsp?survey=wp>). The FHWA invites comment on the continuing need for the minimal use threshold contained in the regulations. For commenters believing that this provision continues to be needed, the FHWA requests comment on whether the monetary threshold should be raised and the appropriate method of doing so.

#### Invitation for Public Comment

The FHWA requests public comment and input on issues related to the application of Buy America requirements to manufactured products, including various manufactured products that include steel or iron subcomponents. Specifically, the FHWA invites public comment on the following issues:

1. Has the nature of the Federal-aid highway program and the U.S. steel/iron manufacturing industry changed to such a degree that FHWA needs to reconsider its criteria for applying Buy America requirements to manufactured products?

2. Are there specific or general types of manufactured products that should not be covered by a public interest waiver and why?

3. Are there specific or general types of manufactured products that should be covered by a public interest waiver and why?

4. Are there specific issues that should be considered for manufactured products that include steel or iron components and subcomponents? Should the FHWA continue to distinguish manufactured products that are comprised predominantly of steel and iron for purposes of requiring all manufacturing processes to occur in the United States? How should a predominantly steel and iron product be defined? Should the FHWA continue to consider a predominantly steel and iron product as one comprising 90 percent steel and iron?

5. Should vehicles be subject to Buy America? If so, what types of vehicles? How should the FHWA define vehicle? Should the definition of vehicle include construction equipment, such as street sweepers, backhoes, refuse trucks, dump trucks, graders, etc.? Should the FHWA broaden the definition of vehicle to include bicycles, electric bicycles, and neighborhood vehicles? Also, what standard should the FHWA apply (i.e., final assembly in the U.S.)? For final assembly, what constitutes final assembly? Should there be a domestic

content threshold? If so, what content should be covered (i.e., steel and iron or all content comprising a vehicle) and what should the percentages be? Should there be different percentages for different types of vehicles? What data is available to support the use of a percentage? What types of vehicles would be available to State and local agencies at any given percentage?

6. Should vehicle retrofits be subject to Buy America? If so, what standard should be applied? Should the standard differ from that of a whole vehicle (i.e., if final assembly is the standard for a vehicle, should the FHWA be concerned about Buy America when an engine is purchased on its own for incorporation into a vehicle)?

7. What standard should apply to locomotives, rail cars, and locomotive parts that are purchased for locomotive retrofits? Should the FHWA require the application of the Federal Railroad Administration's policy, which views locomotives and rail cars as "end products" that must be assembled in the United States and all components (including components purchased for retrofits) be manufactured in the United States?

8. Do the minimal use threshold provisions of 23 CFR 635.410(b)(4) represent reasonable criteria for expressing the public interest exclusion limitations for the Federal-aid highway program, and present an appropriate balance between an undue administrative burden in accounting for every steel and iron item in a project versus giving effect to the intent of Buy America?

9. Are there any domestic suppliers available that can domestically produce pig iron and processed, pelletized, and reduced iron ores in sufficient quantities of a satisfactory quality to supply the entire need for Federal-aid highway projects?

10. Are there any domestic suppliers available that can domestically produce ferry boat equipment in compliance with the FHWA's Buy America requirements?

11. If any of the general waivers (manufactured products, ferry boat equipment, and pig iron) to Buy America are rescinded, what would be the implications to administering Federal-aid highway projects?

12. What would be the potential advantages or disadvantages of FHWA adopting a policy for manufactured products similar to that used by many Federal agencies who implemented the Recovery Act Buy America requirements? (**Note:** 2 CFR 176.70(a)(2)(i) states: "Production in the United States of the iron or steel used

in the project requires that all manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel additives. These requirements do not apply to iron or steel used as components or subcomponents of manufactured goods used in the project.")

Issued on: July 3, 2013.

**Victor M. Mendez,**

*Federal Highway Administrator.*

[FR Doc. 2013-16554 Filed 7-9-13; 8:45 am]

**BILLING CODE 4910-22-P**

## DEPARTMENT OF TRANSPORTATION

### Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA-2013-0156]

#### Pipeline Safety: Meetings of the Gas and Liquid Pipeline Advisory Committees

**AGENCY:** Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

**ACTION:** Notice of advisory committee meeting.

**SUMMARY:** This notice announces a public meeting of the Gas Pipeline Advisory Committee (GPAC) also known as the Technical Pipeline Safety Standards Committee, and the Liquid Pipeline Advisory Committee (LPAC) also known as the Technical Hazardous Liquid Pipeline Safety Standards Committee. The committees will meet in joint session to discuss a variety of topics to keep committee members up-to-date on DOT's pipeline safety program.

**DATES:** The meetings will be held on August 8-9, 2013.

**ADDRESSES:** The meeting will take place at The Westin Arlington Gateway, 801 Glebe Road, Arlington, VA 22203, Fitzgerald Ballroom, Phone (703) 717-6200, Web site <http://www.starwoodhotels.com/westin/property/overview/index.html?propertyID=1513>.

Any additional information will be published on the PHMSA Web site at <http://www.phmsa.dot.gov/public>, under "News and Updates" on the homepage.

The meetings will not be web cast; however, presentations will be available on the meeting Web site and posted in the E-Gov Web site at <http://www.regulations.gov> in docket number PHMSA-2013-0156 within 30 days following the meeting.

**Comments:** Comments on the meeting may be submitted to the docket in the following ways:

**E-Gov Web site:** <http://www.regulations.gov>. This site allows the public to enter comments on any **Federal Register** notice issued by any agency.

**Fax:** 1-202-493-2251.

**Mail:** Docket Management Facility; U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE., West Building, Room W12-140, Washington, DC 20590-001.

**Hand Delivery:** Room W12-140 on the ground level of the DOT West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays.

**Instructions:** Identify the docket number PHMSA-2013-0156 at the beginning of your comments. Note that all comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. You should know that anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). Therefore, you may want to review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000, (65 FR 19477) or view the Privacy Notice at <http://www.regulations.gov> before submitting any such comments.

**Docket:** For access to the docket or to read background documents or comments, go to <http://www.regulations.gov> at any time or to Room W12-140 on the ground level of the DOT West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays.

If you wish to receive confirmation of receipt of your written comments, please include a self-addressed, stamped postcard with the following statement: "Comments on PHMSA-2013-0156." The Docket Clerk will date-stamp the postcard prior to returning it to you via the U.S. mail. Please note that due to delays in the delivery of U.S. mail to Federal offices in Washington, DC, we recommend that persons consider an alternative method (internet, fax, or professional delivery service) of submitting comments to the docket and ensuring their timely receipt at DOT.

### Privacy Act Statement

Anyone may search the electronic form of comments received in response to any of our dockets by the name of the individual who submitted the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.).

### Information on Services for Individuals With Disabilities

For information on facilities or services for individuals with disabilities, or to seek special assistance at the meeting, please contact Cheryl Whetsel at 202-366-4431 by July 22, 2013.

**FOR FURTHER INFORMATION CONTACT:** For information about the meeting, contact Cheryl Whetsel by phone at 202-366-4431 or by email at [cheryl.whetsel@dot.gov](mailto:cheryl.whetsel@dot.gov).

**SUPPLEMENTARY INFORMATION:** Members of the public may attend and make a statement during the advisory committee meeting. If you intend to make a statement, please notify PHMSA in advance by forwarding an email to [cheryl.whetsel@dot.gov](mailto:cheryl.whetsel@dot.gov) by July 22, 2013.

### Committee Background

The GPAC and LPAC are statutorily mandated advisory committees that advise PHMSA on proposed safety standards, risks assessments, and safety policies for natural gas pipelines and for hazardous liquid pipelines. Both committees were established under the Federal Advisory Committee Act (Pub. L. 92-463, 5 U.S.C. App. 1) and the pipeline safety law (49 U.S.C. Chap. 601). Each committee consists of 15 members—with membership evenly divided among the Federal and state government, the regulated industry, and the public. The committees advise PHMSA on the technical feasibility, practicability, and cost-effectiveness of each proposed pipeline safety standard.

### Agenda

On Thursday, August 8, 2013, from 9:00 a.m. to 5:00 p.m. and on August 9, 2013, from 9:00 a.m. to 12:00 p.m. the GPAC and LPAC will hold joint meetings. A detailed Agenda will be published on the PHMSA (DOT) Web site.

**Authority:** 49 U.S.C. 60102, 60115; 60118.

Issued in Washington, DC on July 3, 2013.

**Jeffrey D. Wiese,**

*Associate Administrator for Pipeline Safety.*

[FR Doc. 2013-16513 Filed 7-9-13; 8:45 am]

**BILLING CODE 4910-60-P**

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

[Docket No. FD 35749]

#### Boston and Maine Corporation and Springfield Terminal Railroad Company—Petition for Declaratory Order

The Boston and Maine Corporation and Springfield Terminal Railway Company (collectively, Pan Am), filed a petition for declaratory order on July 1, 2013 (Petition), requesting that the Board declare that 49 U.S.C. 10501(b) preempts actions taken by the Town of Winchester (the Town) to ban certain rail transportation conducted by Pan Am. For the reasons discussed below, a declaratory order proceeding will be instituted and an expedited procedural schedule will be adopted.

The Petition requests that the Board find that the Town is preempted from enforcing a zoning decision and an order, each of which would prevent Pan Am from providing freight rail transportation to a warehouse in the Town. According to Pan Am, it provides common carrier rail transportation to the warehouse, through the Montvale Yard, on behalf of shippers, and it holds out this transportation service to the public. The zoning decision states that the Montvale Yard “is being used as a freight yard which is not allowed” pursuant to municipal zoning laws.<sup>1</sup> The order requires all rail traffic to the warehouse “to immediately cease and desist.”<sup>2</sup>

The Board has discretionary authority under 5 U.S.C. 554(e) and 49 U.S.C. 721 to issue a declaratory order to eliminate a controversy or remove uncertainty. Here, a controversy exists as to whether enforcement of the Town’s zoning laws is preempted under 49 U.S.C. 10501(b). Therefore, a declaratory order proceeding will be instituted, and the Board will consider this matter under the modified procedure rules at 49 CFR pt. 1112.

Pan Am states that the Town has announced plans to seek a state court injunction to enforce its cease and desist order, with a hearing on the motion to be set for the week of July 22, 2013. Pan Am further states that the Town rejected a request to hold state court proceedings in abeyance to allow Pan Am’s Petition to be considered by the Board. In a letter filed July 3, 2013, the Town indicates that it will reply to the Petition on or before July 22 and asserts that “there is no emergency requiring the Board’s

immediate action” because no petition for a temporary restraining order or preliminary injunction “as yet has been filed” with the state court. But there remains a cease and desist order issued by the Town that purports to ban all rail transportation to the warehouse. Moreover, the Town does not dispute Pan Am’s assertion that the Town had announced plans to seek state court action on the schedule Pan Am claims, nor does it commit to refraining from these actions or consenting to abeyance of the state court proceedings. Therefore, an expedited procedural schedule will be adopted, with replies to the Petition due by July 10, 2013.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

*It is ordered:*

1. A declaratory order proceeding is instituted.
2. Replies to the Petition are due by July 10, 2013.
3. This decision is effective on its service date.

Decided: July 3, 2013.

By the Board, Rachel D. Campbell,  
Director, Office of Proceedings.

**Jeffrey Herzig,**  
*Clearance Clerk.*

[FR Doc. 2013-16549 Filed 7-9-13; 8:45 am]

**BILLING CODE 4915-01-P**

## DEPARTMENT OF THE TREASURY

### Submission for OMB Review, Comment Request

**ACTION:** Notice and request for comments.

**SUMMARY:** The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on one new proposed information collection, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3506(c)(2)(A)). The new clearance will allow the Office of Financial Stability, within the Department of the Treasury, to collect information from homeowners that have received mortgage modifications under the Home Affordable Modification Program (HAMP), in order to study the performance of HAMP modifications.

**DATES:** Written comments should be received on or before September 9, 2013 to be assured of consideration.

**ADDRESSES:** Comments regarding these information collections should be addressed to the Department of the

<sup>1</sup> Pet., Ex. B at 2.

<sup>2</sup> *Id.* at 4 (Amended Decision After Remand).

Treasury, Departmental Offices, Office of Financial Stability, ATTN: Karen Chang, 1500 Pennsylvania Avenue NW., Washington, DC 20220.

**FOR FURTHER INFORMATION CONTACT:**

Requests for additional information should be directed to the Department of the Treasury, Departmental Offices, Office of Financial Stability, ATTN: Karen Chang, 1500 Pennsylvania Avenue NW., Washington, DC 20220.

**SUPPLEMENTARY INFORMATION:**

*Title:* Study of MHA Program Performance.

*OMB Control Number:* NEW.

*Abstract:* Pursuant to its authority under the Emergency Economic Stabilization Act (EESA) of 2008 (Pub. L. 110-343), the Department of the Treasury established the Making Home Affordable Program (MHA), a voluntary foreclosure prevention program, to help stabilize the housing market. Under MHA, the Department pays financial incentives to homeowners, servicers and investors to facilitate loan modifications and other foreclosure alternatives. MHA includes, among other things, the Home Affordable Modification Program

(HAMP). HAMP is designed to reduce each qualifying homeowner's first lien mortgage payments to an affordable level. The Department, through its financial agent, plans to conduct a survey of homeowners who have received mortgage modifications under HAMP and subsequently missed three consecutive payments, in order to collect information about the reasons for loss of good standing and the homeowner's experience during the HAMP modification process.

*Type of Review:* New Collection.

*Affected Public:* Individuals, Households.

*Respondent's Obligation:* Voluntary.

The study will likely involve up to 2400 subjects. Each individual data collection session will be approximately 15 to 20 minutes long.

*Estimated Average Time per Respondent:* 15 to 20 minutes per response.

*Estimated Total Annual Burden Hours:* Approximately 800 burden hours.

*Request for Comments:* Comments submitted in response to this notice will

be summarized and/or included in the request for Office of Management and Budget approval. All comments will become a matter of public record. The public is invited to submit written comments concerning: (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 the burden of the 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 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.

**Robert Dahl,**

*Treasury Department PRA Clearance Officer.*

[FR Doc. 2013-16580 Filed 7-9-13; 8:45 am]

**BILLING CODE 4810-25-P**



# FEDERAL REGISTER

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Part II

## Department of the Interior

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Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Threatened Status for the Northern Mexican Gartersnake and Narrow-headed Gartersnake; Proposed Rule

**DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service****50 CFR Part 17**

[Docket No. FWS-R2-ES-2013-0071;  
4500030113]

RIN 1018-AY23

**Endangered and Threatened Wildlife and Plants; Threatened Status for the Northern Mexican Gartersnake and Narrow-headed Gartersnake**

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

**ACTION:** Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), propose to list the northern Mexican gartersnake (*Thamnophis eques megalops*) and narrow-headed gartersnake (*Thamnophis rufipunctatus*) as threatened species under the Endangered Species Act of 1973, as amended (Act). If we finalize this rule as proposed, it would extend the Act's protections to these species. The effect of this regulation is to conserve northern Mexican and narrow-headed gartersnakes under the Act.

**DATES:** We will accept comments received or postmarked on or before September 9, 2013. 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 **FOR FURTHER INFORMATION CONTACT** section by August 26, 2013.

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

(1) *Electronically:* Go to the Federal eRulemaking Portal: <http://www.regulations.gov>. Search for Docket No. FWS-R2-ES-2013-0071, which is the docket number for this rulemaking. When you locate this document, you may submit a comment by clicking on "Comment Now!"

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS-R2-ES-2013-0071; 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 Information Requested section below for more information).

**FOR FURTHER INFORMATION CONTACT:** Steve Spangle, Field Supervisor, U.S. Fish and Wildlife Service, Arizona Ecological Services Field Office, 2321 West Royal Palm Road, Suite 103, Phoenix, AZ 85021; telephone: 602-242-0210; facsimile: 602-242-2513. 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 (Act), if a species is determined to be an endangered or threatened species throughout all or a significant portion of its range, we are required to promptly publish a proposal in the **Federal Register** and make a determination on our proposal within one year. Listing a species as an endangered or threatened species can only be completed by issuing a rule. Elsewhere in today's **Federal Register**, we propose to designate critical habitat for the northern Mexican and narrow-headed gartersnakes under the Act.

This document consists of:

- A proposed rule to list the northern Mexican and narrow-headed gartersnakes as threatened species throughout their ranges, and
- A proposed special rule under section 4(d) under the Act that outlines the prohibitions necessary and advisable for the conservation of the northern Mexican gartersnake.

*The basis for our action.* Under the Act, we can determine that a species is an endangered or threatened species based on any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. In the case of the northern Mexican and narrow-headed gartersnakes, we have determined that harmful nonnative species (spiny-rayed fish, bullfrogs, and crayfish), wildfires, and land uses that divert, dry up, or significantly pollute aquatic habitat have solely or collectively affected these gartersnakes, and several of their native prey species, such that their resiliency, redundancy, and representation across their ranges have been significantly compromised.

*We will seek peer review.* We are seeking comments from knowledgeable individuals with scientific expertise to review our analysis of the best available

science and application of that science and to provide any additional scientific information to improve this proposed rule. Because we will consider all comments and information received during the comment period, our final determinations may differ from this proposal.

**Information Requested**

We intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from other concerned governmental agencies, Native American tribes, the scientific community, industry, or any other interested parties concerning this proposed rule. We particularly seek comments concerning:

- (1) The species' biology, range, and population trends, including:
  - (a) Habitat requirements for feeding, breeding, and sheltering;
  - (b) Genetics and taxonomy;
  - (c) Historical and current range, including distribution patterns;
  - (d) Historical and current population levels, and current and projected trends; and
  - (e) Past and ongoing conservation measures for these species, their habitat or both.

(2) The factors that are the basis for making a listing determination for these species under section 4(a) of the Act (16 U.S.C. 1531 *et seq.*), which are:

- (a) The present or threatened destruction, modification, or curtailment of its habitat or range;
- (b) Overutilization for commercial, recreational, scientific, or educational purposes;
- (c) Disease or predation;
- (d) The inadequacy of existing regulatory mechanisms; or
- (e) Other natural or manmade factors affecting its continued existence.

(3) Biological, commercial trade, or other relevant data concerning any threats (or lack thereof) to these species and existing regulations that may be addressing those threats.

(4) 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.

(5) Any information on the biological or ecological requirements of these species, and ongoing conservation measures for the species and their habitats.

(6) Any information on the projected and reasonably likely impacts of climate

change on the northern Mexican gartersnake and narrow-headed gartersnake.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

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, Arizona Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

#### Previous Federal Actions

The northern Mexican and narrow-headed gartersnakes were placed on the list of candidate species as Category 2 species on September 18, 1985 (50 FR 37958). Category 2 species were those for which existing information indicated that listing was possibly appropriate, but for which substantial supporting biological data to prepare a proposed rule were lacking. In the 1996 Candidate Notice of Review (February 28, 1996; 61 FR 7596), the use of Category 2 candidates was discontinued, and the northern Mexican and narrow-headed

gartersnakes were no longer recognized as candidates.

On December 19, 2003, we received a petition from the Center for Biological Diversity (“petitioner”) dated December 15, 2003, requesting that we list the northern Mexican gartersnake as threatened or endangered, and that we designate critical habitat concurrently with the listing. The petition was clearly identified as a petition for a listing rule and contained the names, signatures, and addresses of the requesting parties. Included in the petition was supporting information regarding the species’ taxonomy and ecology, historical and current distribution, present status, and actual and potential causes of decline. We acknowledged the receipt of the petition in a letter to the petitioner, dated March 1, 2004. In that letter, we also advised that, due to funding constraints in fiscal year (FY) 2004, we would not be able to begin processing the petition at that time.

On May 17, 2005, the petitioner filed a complaint for declaratory and injunctive relief, challenging our failure to issue a 90-day finding for the northern Mexican gartersnake in response to the petition as required by 16 U.S.C. 1533(b)(3)(A) and (B). In a stipulated settlement agreement, we agreed to submit a 90-day finding to the **Federal Register** by December 16, 2005, and if substantial, submit a 12-month finding to the **Federal Register** by September 15, 2006 (*Center for Biological Diversity v. Norton*, CV–05–341–TUC–CKJ (D. Az)). The settlement agreement was signed and adopted by the District Court of Arizona on August 2, 2005.

On December 13, 2005, we made our 90-day finding that the petition presented substantial scientific information indicating that listing the northern Mexican gartersnake may be warranted; the finding and our initiation of a status review was published in the **Federal Register** on January 4, 2006 (71 FR 315).

On September 26, 2006, we published a 12-month finding that listing of the northern Mexican gartersnake was not warranted because we determined that not enough information on the subspecies’ status and threats in Mexico was known at that time (71 FR 56227). On November 17, 2007, the petitioner filed a complaint for declaratory and injunctive relief pursuant to section 11 of the Act (16 U.S.C. 1540), seeking to set aside the 12-month finding. Additionally, a formal opinion was issued by the Solicitor of the Department of the Interior, “The Meaning of In Danger of Extinction Throughout All or a Significant Portion

of Its Range” (U.S. DOI 2007), which provides further guidance on how to conduct a detailed analysis of whether a species is in danger of extinction throughout a significant portion of its range. In December 2007, the Service withdrew the September 26, 2006, 12-month finding in order to consider the new “Significant Portion of the Range” policy. In a stipulated settlement agreement with the petitioner, we agreed to submit a new 12-month finding to the **Federal Register** by November 17, 2008 (*Center for Biological Diversity v. Kempthorne*, CV–07–596–TUC–RCCJ (D. Az)). The settlement agreement was signed and adopted by the District Court of Arizona on June 18, 2008.

On May 28, 2008, we published notice (73 FR 30596) of our intent to initiate a status review for the northern Mexican gartersnake and solicited the public for information on the status of, and potential threats to, this species.

On November 25, 2008, we published a second 12-month finding that listing of the northern Mexican gartersnake was warranted but precluded by other listing priorities at that time (73 FR 71788). The petitioner described three potentially listable entities of northern Mexican gartersnake for consideration by the Service: (1) Listing the U.S. population as a distinct population segment (DPS); (2) listing the subspecies throughout its range in the United States and Mexico based on its rangewide status; or (3) listing the subspecies throughout its range in the United States and Mexico based on its status in the United States. Because we found that listing the northern Mexican gartersnake rangewide was warranted, there was no need to conduct any further analysis of the remaining two options, which are smaller geographic entities and are subsumed by the rangewide listing.

#### Status Assessments for Northern Mexican and Narrow-headed Gartersnakes

##### Background

##### *Northern Mexican Gartersnake* Subspecies Description

The northern Mexican gartersnake ranges in color from olive to olive-brown or olive-gray with three lighter-colored stripes that run the length of the body, the middle of which darkens towards the tail. It may occur with other native gartersnake species and can be difficult for people without specific expertise to identify. The snake may reach a maximum known length of 44 inches (in) (112 centimeters (cm)). The pale yellow to light-tan lateral (side of

body) stripes distinguish the northern Mexican gartersnake from other sympatric (co-occurring) gartersnake species because a portion of the lateral stripe is found on the fourth scale row, while it is confined to lower scale rows for other species. Paired black spots extend along the olive dorsolateral fields (region adjacent to the top of the snake's back) and the olive-gray ventrolateral fields (region adjacent to the area of the snake's body in contact with the ground). The scales are keeled (possessing a ridge down the center of each scale). A more detailed subspecies description can be found in our September 26, 2006 (71 FR 56227), or November 25, 2008 (73 FR 71788) 12-month findings for this subspecies, or by reviewing Rosen and Schwalbe (1988, p. 4), Rossman *et al.* (1996, pp. 171–172), Ernst and Ernst (2003, pp. 391–392), or Manjarrez and Garcia (1993, pp. 1–5).

#### Taxonomy

The northern Mexican gartersnake is a member of the family Colubridae and subfamily Natricinae (harmless live-bearing snakes) (Lawson *et al.* 2005, p. 596). The taxonomy of the genus *Thamnophis* has a complex history, partly because many of the species are similar in appearance and arrangement of scales, but also because many of the early museum specimens were in such poor and faded condition that it was difficult to study them (Conant 2003, p. 6).

Prior to 2003, *Thamnophis eques* was considered to have three subspecies, *T. e. eques*, *T. e. megalops*, and *T. e. virgatenuis* (Rossman *et al.* 1996, p. 175). In 2003, an additional seven new subspecies were identified under *T. eques*: (1) *T. e. cuitzoensis*; (2) *T. e. patzcuaroensis*; (3) *T. e. insperatus*; (4) *T. e. obscurus*; (5) *T. e. diluvialis*; (6) *T. e. carmenensis*; and (7) *T. e. scotti* (Conant 2003, p. 3). Common names were not provided, so in this proposed rule, we use the scientific name for all subspecies of Mexican gartersnake other than the northern Mexican gartersnake. These seven new subspecies were described based on morphological differences in coloration and pattern; have highly restricted distributions; and occur in isolated wetland habitats within the mountainous Transvolcanic Belt region of southern Mexico, which contains the highest elevations in the country (Conant 2003, pp. 7–8). The validity of the current taxonomy of the 10 subspecies of *T. eques* is accepted within the scientific community. A more detailed description of the taxonomy of the northern Mexican gartersnake is found in our September

26, 2006 (71 FR 56227) and November 25, 2008 (73 FR 71788) 12-month findings for this subspecies. Additional information regarding this subspecies' taxonomy can be found in de Queiroz *et al.* (2002, p. 323), de Queiroz and Lawson (1994, p. 217), Rossman *et al.* (1996, pp. xvii–xviii, 171–175), Rosen and Schwalbe (1988, pp. 2–3), Liner (1994, p. 107), and Crother *et al.* (2012, p. 70).

#### Habitat and Natural History

Throughout its rangewide distribution, the northern Mexican gartersnake occurs at elevations from 130 to 8,497 feet (ft) (40 to 2,590 meters (m)) (Rossman *et al.* 1996, p. 172) and is considered a “terrestrial-aquatic generalist” by Drummond and Marcías-García (1983, pp. 24–26). The northern Mexican gartersnake is a riparian obligate (restricted to riparian areas when not engaged in dispersal behavior) and occurs chiefly in the following general habitat types: (1) Source-area wetlands (e.g., cienegas (mid-elevation wetlands with highly organic, reducing (basic or alkaline) soils), or stock tanks (small earthen impoundment)); (2) large-river riparian woodlands and forests; and (3) streamside gallery forests (as defined by well-developed broadleaf deciduous riparian forests with limited, if any, herbaceous ground cover or dense grass) (Hendrickson and Minckley 1984, p. 131; Rosen and Schwalbe 1988, pp. 14–16). Emmons and Nowak (2013, p. 14) found this subspecies most commonly in protected backwaters, braided side channels and beaver ponds, isolated pools near the river mainstem, and edges of dense emergent vegetation that offered cover and foraging opportunities when surveying in the upper Verde River region. Additional information on the habitat requirements of the northern Mexican gartersnake within the United States and Mexico can be found in our 2006 (71 FR 56227) and 2008 (73 FR 71788) 12-month findings for this subspecies and in Rosen and Schwalbe (1988, pp. 14–16), Rossman *et al.* (1996, p. 176), McCranie and Wilson (1987, pp. 11–17), Ernst and Ernst (2003, p. 392), and Cirtt-Galan (1996, p. 156).

The northern Mexican gartersnake is surface active at ambient (air) temperatures ranging from 71 degrees Fahrenheit (°F) to 91 °F (22 degrees Celsius (°C) to 33 °C) and forages along the banks of waterbodies (Rosen 1991, p. 305, Table 2). Rosen (1991, pp. 308–309) found that northern Mexican gartersnakes spent approximately 60 percent of their time moving, 13 percent of their time basking on vegetation, 18 percent of their time basking on the

ground, and 9 percent of their time under surface cover; body temperatures ranged from 75 to 91 °F (24 to 33 °C) and averaged 82 °F (28 °C), which is lower than other, similar species with comparable habitat and prey preferences. Rosen (1991, p. 310) suggested that lower preferred body temperatures exhibited by northern Mexican gartersnakes may be due to: (1) Their tendency to occupy cienega-like habitat, where warm air temperatures are relatively unavailable; and (2) their tendency to remain in dense cover. In the northern-most part of its range, the northern Mexican gartersnake appears to be most active during July and August, followed by June and September.

The northern Mexican gartersnake is an active predator and is believed to heavily depend upon a native prey base (Rosen and Schwalbe 1988, pp. 18, 20). Northern Mexican gartersnakes forage along vegetated banklines, searching for prey in water and on land, using different strategies (Alfaro 2002, p. 209). Generally, its diet consists of amphibians and fishes, such as adult and larval (tadpoles) native leopard frogs (e.g., lowland leopard frog (*Lithobates yavapaiensis*) and Chiricahua leopard frog (*Lithobates chiricahuensis*)), as well as juvenile and adult native fish species (e.g., Gila topminnow (*Poeciliopsis occidentalis occidentalis*), desert pupfish (*Cyprinodon macularius*), Gila chub (*Gila intermedia*), and roundtail chub (*Gila robusta*)) (Rosen and Schwalbe 1988, p. 18). Drummond and Marcías-García (1983, pp. 25, 30) found that as a subspecies, Mexican gartersnakes fed primarily on frogs. Auxiliary prey items may also include young Woodhouse's toads (*Anaxyrus woodhousei*), treefrogs (Family Hylidae), earthworms, deermice (*Peromyscus* spp.), lizards of the genera *Aspidoscelis* and *Sceloporus*, larval tiger salamanders (*Ambystoma tigrinum*), and leeches (Gregory *et al.* 1980, pp. 87, 90–92; Rosen and Schwalbe 1988, p. 20; Holm and Lowe 1995, pp. 30–31; Degenhardt *et al.* 1996, p. 318; Rossman *et al.* 1996, p. 176; Manjarrez 1998, p. 465). In situations where native prey species are rare or absent, this snake's diet may include nonnative species, including larval and juvenile bullfrogs (*Lithobates catesbeianus*), mosquitofish (*Gambusia affinis*) (Holycross *et al.* 2006, p. 23; Emmons and Nowak 2013, p. 5), or other soft-rayed fish species. Chinese mystery snails (*Cipangopaludina chinensis*) have been reported as a prey item for northern Mexican gartersnakes at the Page Springs and Bubbling Ponds State Fish

Hatcheries in Arizona, but some predation attempts on snails have proven fatal for gartersnakes because of their lower jaw becoming permanently lodged in the snails' shell (Young and Boyarski 2012, p. 498). Venegas-Barrera and Manjarrez (2001, p. 187) reported the first observation of a snake in the natural diet of any species of *Thamnophis* after documenting the consumption by a Mexican gartersnake (subspecies not provided) of a Mexican alpine blotched gartersnake (*Thamnophis scalaris*).

Marcías-García and Drummond (1988, pp. 129–134) sampled the stomach contents of Mexican gartersnakes and the prey populations at (ephemeral) Lake Tecocomulco, Hidalgo, Mexico. Field observations indicated, with high statistical significance, that larger Mexican gartersnakes fed primarily upon aquatic vertebrates (fishes, frogs, and larval salamanders) and leeches, whereas smaller Mexican gartersnakes fed primarily upon earthworms and leeches (Marcías-García and Drummond 1988, p. 131). Marcías-García and Drummond (1988, p. 130) also found that the birth of newborn *T. eques* tended to coincide with the annual peak density of annelids (earthworms and leeches). There is also preliminary evidence that birth may coincide with a pronounced influx of available prey in a given area, especially with that of explosive breeders, such as toads, but more research is needed to confirm such a relationship (Boyarski 2012, pers. comm.). Positive correlations were also made with respect to capture rates (which are correlated with population size) of *T. eques* to lake levels and to prey scarcity; that is, when lake levels were low and prey species scarce, Mexican gartersnake capture rates declined (Marcías-García and Drummond 1988, p. 132). This indicates the importance of available water and an adequate prey base to maintaining viable populations of Mexican gartersnakes. Marcías-García and Drummond (1988, p. 133) found that while certain prey items were positively associated with size classes of snakes, the largest of specimens consume any prey available.

Native predators of the northern Mexican gartersnake include birds of prey, other snakes (kingsnakes (*Lampropeltis* sp.), whipsnakes (*Coluber* sp.), regal ring-necked snakes (*Diadophis punctatus regalis*), etc.), wading birds, mergansers (*Mergus merganser*), belted kingfishers (*Megasceryle alcyon*), raccoons (*Procyon lotor*), skunks (*Mephitis* sp.), and coyotes (*Canis latrans*) (Rosen and Schwalbe 1988, pp. 18, 39; Brennan et

al. 2009, p. 123). Historically, large, highly predatory native fish species such as Colorado pikeminnow may have preyed upon northern Mexican gartersnake where the subspecies co-occurred. Native chubs (*Gila* sp.) may also prey on neonatal gartersnakes.

Parasites have been observed in northern Mexican gartersnakes. Boyarski (2008b, pp. 5–6) recorded several snakes within the population at the Page Springs and Bubbling Ponds fish hatcheries with interior bumps or bulges along the anterior one-third of the body. The cause of these bumps was not identified or speculated upon, nor were there any signs of trauma to the body of these snakes in the affected areas. Dr. Jim Jarchow, a veterinarian with herpetological expertise, reviewed photographs of affected specimens and suggested the bumps may likely contain plerocercoid larvae of a pseudophyllidean tapeworm (possibly *Spirometra* spp.), which are common in fish- and frog-eating gartersnakes. This may not be detrimental to their health, provided the bumps do not grow large enough to impair movement or other bodily functions (Boyarski 2008b, p. 8). However, Gúzman (2008, p. 102) documented the first observation of mortality of a Mexican gartersnake from a larval *Eustrongylides* sp. (endoparasitic nematode) which “raises the possibility that infection of Mexican gartersnakes by *Eustrongylides* sp. larvae might cause mortality in some wild populations,” especially if those populations are under stress as a result of the presence of other threats.

Sexual maturity in northern Mexican gartersnakes occurs at 2 years of age in males and at 2 to 3 years of age in females (Rosen and Schwalbe 1988, pp. 16–17). Northern Mexican gartersnakes are viviparous (bringing forth living young rather than eggs). Mating has been documented in April and May followed by the live birth of between 7 and 38 newborns (average is 13.6) in July and August (Rosen and Schwalbe 1988, p. 16; Nowak and Boyarski 2012, pp. 351–352). However, field observations in Arizona provide preliminary evidence that mating may also occur during the fall, but further research is required to confirm this hypothesis (Boyarski 2012, pers. comm.). Unlike other gartersnake species, which typically breed annually, one study suggests that only half of the sexually mature females within a population of northern Mexican gartersnake might reproduce in any one season (Rosen and Schwalbe 1988, p. 17).

#### Historical Distribution

Within the United States, the northern Mexican gartersnake historically occurred predominantly in Arizona at elevations ranging from 130 to 6,150 ft (40 to 1,875 m). It was generally found where water was relatively permanent and supported suitable habitat. The northern Mexican gartersnake historically occurred in every county and nearly every subbasin within Arizona, from several perennial or intermittent creeks, streams, and rivers as well as lentic (still, non-flowing water) wetlands such as cienegas, ponds, or stock tanks. Northern Mexican gartersnake records exist within the following subbasins in Arizona: Colorado River, Bill Williams River, Agua Fria River, Salt River, Tonto Creek, Verde River, Santa Cruz River, Cienega Creek, San Pedro River, Babocomari River, and the Rio San Bernardino (Black Draw) (Woodin 1950, p. 40; Nickerson and Mays 1970, p. 503; Bradley 1986, p. 67; Rosen and Schwalbe 1988, Appendix I; 1995, p. 452; 1997, pp. 16–17; Holm and Lowe 1995, pp. 27–35; Sredl et al. 1995b, p. 2; 2000, p. 9; Rosen et al. 2001, Appendix I; Holycross et al. 2006, pp. 1–2, 15–51; Brennan and Holycross 2006, p. 123; Radke 2006, pers. comm.; Rosen 2006, pers. comm.; Holycross 2006, pers. comm.; Cotton et al. 2013, p. 111). Numerous records for the northern Mexican gartersnake (through 1996) in Arizona are maintained in the Arizona Game and Fish Department's (AGFD) Heritage Database (1996a).

Historically, the northern Mexican gartersnake had a limited distribution in New Mexico that consisted of scattered locations throughout the Upper Gila River watershed in Grant and western Hidalgo Counties, including the Upper Gila River, Mule Creek in the San Francisco River subbasin, and the Mimbres River (Price 1980, p. 39; Fitzgerald 1986, Table 2; Degenhardt et al. 1996, p. 317; Holycross et al. 2006, pp. 1–2).

One record for the northern Mexican gartersnake exists for the State of Nevada, opposite Fort Mohave, in Clark County along the shore of the Colorado River that was dated 1911 (De Queiroz and Smith 1996, p. 155). The subspecies may have occurred historically in the lower Colorado River region of California, although we were unable to verify any museum records for California. Any populations of northern Mexican gartersnakes that may have historically occurred in either Nevada or California were likely associated directly with the Colorado River, and

we believe them to be currently extirpated.

Within Mexico, northern Mexican gartersnakes historically occurred within the Sierra Madre Occidental and the Mexican Plateau in the Mexican states of Sonora, Chihuahua, Durango, Coahuila, Zacatecas, Guanajuato, Nayarit, Hidalgo, Jalisco, San Luis Potosí, Aguascalientes, Tlaxacala, Puebla, México, Veracruz, and Querétaro, comprising approximately 85 percent of the total rangewide distribution of the subspecies (Conant 1963, p. 473; 1974, pp. 469–470; Van Devender and Lowe 1977, p. 47; McCranie and Wilson 1987, p. 15; Rossman *et al.* 1996, p. 173; Lemos-Espinal *et al.* 2004, p. 83). We are not aware of any systematic, rangewide survey effort for the northern Mexican gartersnake in Mexico and have not found survey data for the subspecies in Mexico to be published in the scientific literature or otherwise readily available, outside of the information already obtained. Therefore, we use other, tightly correlated ecological surrogates (such as native freshwater fish) to inform discussion on the status of aquatic communities and aquatic habitat in Mexico, and therefore on the likely status of northern Mexican gartersnake populations. This discussion is found below in the subheadings pertinent to Mexico.

Current Distribution and Population Status

Where northern Mexican gartersnakes are locally abundant, they are usually reliably detected with significantly less effort than populations characterized as having low densities. Northern Mexican gartersnakes are well-camouflaged, secretive, and very difficult to detect in structurally complex, dense habitat where they could occur at very low population densities, which characterizes most occupied sites. Water clarity can also affect survey accuracy. We considered factors such as the date of the last known records for northern Mexican gartersnakes in an area, as well as records of one or more native prey species in making a conclusion on occupancy of the subspecies. We used the year 1980 to qualify occupancy

because the 1980s marked the first systematic survey efforts for northern Mexican gartersnakes across their range (see Rosen and Schwalbe (1988, entire) and Fitzgerald (1986, entire)) and the last, previous records were often dated several decades prior and may not accurately represent the likelihood for current occupation. Several areas where northern Mexican gartersnakes were known to occur have received no, or very little, survey effort in the past several decades. Variability in survey design and effort makes it difficult to compare population sizes or trends among sites and between sampling periods. For each of the sites discussed in Appendix A (available at <http://www.regulations.gov> under Docket No. FWS–R2–ES–2013–0071), we have attempted to translate and quantify search and capture efforts into comparable units (*i.e.*, person-search hours and trap-hours) and have conservatively interpreted those results. Because the presence of suitable prey species in an area may provide evidence that the northern Mexican gartersnake may still persist in low density where survey data are sparse, a record of a native prey species was considered in our determination of occupancy of this subspecies.

Data on population status of northern Mexican gartersnakes in the United States are largely summarized in gray literature provided through agency reports and related documents. In our literature review efforts that resulted in our 2006 and 2008 12-month findings (71 FR 56227 and 73 FR 71788, respectively), we found that the status of the northern Mexican gartersnake has declined significantly in the last 30 years. We found that, in as much as 90 percent of the northern Mexican gartersnakes’ historical distribution in the United States, the subspecies occurs at low to very low population densities or may even be extirpated. The decline of the northern Mexican gartersnake is primarily the result of predation by and competition with harmful nonnative species, such as spiny-rayed fish, bullfrogs, and crayfish, that have been intentionally released, accidentally released, or dispersed through natural mechanisms. Regardless of how they got

into the wild, harmful nonnative species are now virtually ubiquitous throughout the range of the northern Mexican gartersnake. Land uses that result in the dewatering of habitat, combined with increasing drought, have destroyed significant amounts of habitat throughout the northern Mexican gartersnake’s range and have also contributed to population declines.

Holycross *et al.* (2006, p. 66) detected the northern Mexican gartersnake at only 2 of 11 historical localities along the northern-most part of its range from which the subspecies was previously known. The only viable northern Mexican gartersnake populations in the United States where the subspecies remains reliably detected are all located in Arizona: (1) The Page Springs and Bubbling Ponds State Fish Hatcheries along Oak Creek, (2) lower Tonto Creek, (3) the upper Santa Cruz River in the San Rafael Valley, (4) the Bill Williams River, and (5) the upper Verde River. In New Mexico, the northern Mexican gartersnake may occur in extremely low population densities within its historical distribution; limited survey effort is inconclusive to determine extirpation. The status of the northern Mexican gartersnake on tribal lands, such as those owned by the White Mountain or San Carlos Apache Tribes, is poorly known due to historically limited survey access. As stated previously, less is known specifically about the current distribution of the northern Mexican gartersnake in Mexico due to limited access to information on survey efforts and field data from Mexico.

In Table 1 below, we summarize the population status of northern Mexican gartersnakes at all known localities throughout their United States distribution, as supported by museum records or reliable observations. For a detailed discussion that explains the rationale for site-by-site conclusions on occupancy, please see Appendix A (available at <http://www.regulations.gov> under Docket No. FWS–R2–ES–2013–0071). General rationale is provided in the introductory paragraph to this section, “Current Distribution and Population Status.”

TABLE 1—CURRENT POPULATION STATUS OF THE NORTHERN MEXICAN GARTERSNAKE IN THE UNITED STATES. REFERENCES CITED ARE PROVIDED IN APPENDIX A

Location	Last record	Suitable physical habitat present	Native prey species present	Harmful non-native species present	Population status
Gila River (NM, AZ)	2002	Yes	Yes	Yes	Likely not viable.
Spring Canyon (NM)	1937	Yes	Possible	Likely	Likely extirpated.
Mule Creek (NM)	1983	Yes	Yes	Yes	Likely not viable.

TABLE 1—CURRENT POPULATION STATUS OF THE NORTHERN MEXICAN GARTERSNAKE IN THE UNITED STATES. REFERENCES CITED ARE PROVIDED IN APPENDIX A—Continued

Location	Last record	Suitable physical habitat present	Native prey species present	Harmful non-native species present	Population status
Mimbres River (NM)	Likely early 1900s.	Yes	Yes	Yes	Likely extirpated.
Lower Colorado River (AZ)	1904	Yes	Yes	Yes	Likely extirpated.
Bill Williams River (AZ)	2012	Yes	Yes	Yes	Likely viable.
Agua Fria River (AZ)	1986	Yes	Yes	Yes	Likely not viable.
Little Ash Creek (AZ)	1984	Yes	Yes	Yes	Likely not viable.
Lower Salt River (AZ)	1964	Yes	Yes	Yes	Likely extirpated.
Black River (AZ)	1982	Yes	Yes	Yes	Likely not viable.
Big Bonito Creek (AZ)	1986	Yes	Yes	Yes	Likely not viable.
Tonto Creek (AZ)	2005	Yes	Yes	Yes	Likely viable.
Upper Verde River (AZ)	2012	Yes	Yes	Yes	Likely viable.
Oak Creek (AZ) (Page Springs and Bubbling Ponds State Fish Hatcheries).	2012	Yes	Yes	Yes	Likely viable.
Spring Creek (AZ)	1986	Yes	Yes	Yes	Likely not viable.
Sycamore Creek (AZ)	1954	Yes	Possible	Yes	Likely extirpated.
Upper Santa Cruz River/San Rafael Valley (AZ).	2012	Yes	Yes	Yes	Likely viable.
Redrock Canyon (AZ)	2008	Yes	Yes	Yes	Likely not viable.
Sonoita Creek (AZ)	1974	Yes	Possible	Yes	Likely extirpated.
Scotia Canyon (AZ)	2009	Yes	Yes	No	Likely not viable.
Parker Canyon (AZ)	1986	Yes	Possible	Yes	Likely not viable.
Las Cienegas National Conservation Area and Cienega Creek Natural Preserve (AZ).	2012	Yes	Yes	Possible	Likely not viable.
Lower Santa Cruz River (AZ)	1956	Yes	Yes	Yes	Likely extirpated.
Buenos Aires National Wildlife Refuge (AZ)	2000	Yes	Yes	Yes	Likely not viable.
Bear Creek (AZ)	1987	Yes	Yes	Yes	Likely not viable.
San Pedro River (AZ)	1996	Yes	Yes	Yes	Likely not viable.
Babocomari River and Cienega (AZ)	1986	Yes	Possible	Yes	Likely not viable.
Canelo Hills-Sonoita Grasslands Area (AZ)	2012	Yes	Yes	Yes	Likely not viable.
San Bernardino National Wildlife Refuge (AZ).	1997	Yes	Yes	Yes	Likely not viable.

**Notes:** "Possible" means there were no conclusive data found. "Likely extirpated" means the last record for an area pre-dated 1980 and existing threats suggest the species is likely extirpated. "Likely not viable" means the last record for an area pre-dated 1980 and existing threats suggest the species is likely extirpated. "Likely viable" means that the species is reliably found with minimal to moderate survey effort and the population is generally considered viable.

Table 1 lists the 29 known localities for the northern Mexican gartersnake in the United States. Appendix A (available at <http://www.regulations.gov> under Docket No. FWS-R2-ES-2013-0071) discusses such considerations as the physical condition of habitat, the composition of the aquatic biological community, the existence of significant threats, and the length of time since the last known observation of the subspecies in presenting rationale for determining occupancy status at each locality. We have concluded that in as many as 24 of 29 known localities in the United States (83 percent), the northern Mexican gartersnake population is likely not viable and may exist at low population densities that could be threatened with extirpation or may already be extirpated. In most localities where the species may occur at low population densities, existing survey data are insufficient to prove extirpation. Only five populations of northern Mexican gartersnakes in the United States are considered likely

viable where the species remains reliably detected. When considering the total number of stream miles in the United States that historically supported the northern Mexican gartersnake that are now permanently dewatered (except in the case of temporary flows in response to heavy precipitation), we concluded that as much as 90 percent of historical populations in the United States either occur at low densities or are extirpated. As displayed in Table 1, harmful nonnative species are a concern in almost every northern Mexican gartersnake locality in the United States and the most significant reason for their decline, as discussed in depth in our threats analysis below.

Listed as threatened throughout its range in Mexico by the Mexican Government, our understanding of the northern Mexican gartersnake's specific population status throughout its range in Mexico is less precise than that known for its United States distribution because survey efforts are less, and sufficient, available records do not exist

or are difficult to obtain. However, we have assembled and reviewed an extensive body of scientific information on known, regional threats to northern Mexican gartersnakes and to their primary prey species. This information is presented in greater detail below in our specific discussion of threats to the species in Mexico.

#### *Narrow-Headed Gartersnake*

##### Species Description

The narrow-headed gartersnake is a small to medium-sized gartersnake with a maximum total length of 44 in (112 cm mm) (Painter and Hibbitts 1996, p. 147). Its eyes are set high on its unusually elongated head, which narrows to the snout, and it lacks striping on the dorsum (top) and sides, which distinguishes its appearance from other gartersnake species with which it could co-occur (Rosen and Schwalbe 1988, p. 7). The base color is usually tan or grey-brown (but may darken) with conspicuous brown, black, or reddish spots that become indistinct towards the

tail (Rosen and Schwalbe 1988, p. 7; Boundy 1994, p. 126). The scales are keeled. Degenhardt *et al.* (1996, p. 327), Rossman *et al.* (1996, pp. 242–244), and Ernst and Ernst (2003, p. 416) further describe the species.

#### Taxonomy

The narrow-headed gartersnake is a member of the family Colubridae and subfamily Natricinae (harmless live-bearing snakes) (Lawson *et al.* 2005, p. 596). The taxonomy of the genus *Thamnophis* has a complex history partly because many of the species are similar in appearance and scutellation (arrangement of scales), but also because many of the early museum specimens were in such poor and faded condition that it was difficult to study them (Conant 2003, p. 6). The narrow-headed gartersnake has a particularly complex taxonomic history due to its morphology and feeding habits. There are approximately 30 species described in the gartersnake genus *Thamnophis* (Rossman *et al.* 1996, pp. xvii–xviii). Two large overlapping clades (related taxonomic groups) of gartersnakes have been identified called the “Mexican” and “widespread” clades, supported by allozyme and mitochondrial DNA genetic analyses (de Queiroz *et al.* 2002, p. 321). *Thamnophis rufipunctatus* is a member of the “Mexican” clade and is most closely related taxonomically to the southern Durango spotted gartersnake (*Thamnophis nigronuchalis*) (de Queiroz and Lawson 1994, p. 217; de Queiroz *et al.* 2002; p. 321).

Due to the narrow-headed gartersnake’s morphology and feeding habits, there has been considerable deliberation among taxonomists about the correct association of this species within seven various genera over time (Rosen and Schwalbe 1988, pp. 5–6); chiefly, between the genera *Thamnophis* (the “gartersnakes”) and *Nerodia* (the “watersnakes”) (Pierce 2007, p. 5). Chaisson and Lowe (1989, pp. 110–118) argued that the pattern of ultrastructural (as revealed by an electron microscope) pores in the scales of narrow-headed gartersnakes provided evidence that the species is more appropriately placed within the genus *Nerodia*. However, De Queiroz and Lawson (1994, p. 217) rejected this premise using mitochondrial DNA (mtDNA) genetic analyses to refute the inclusion of the narrow-headed gartersnake in the genus *Nerodia* and maintain the species within the genus *Thamnophis*.

The narrow-headed gartersnake was first described as *Chilopoma rufipunctatum* by E. D. Cope (in Yarrow, 1875). Recently, *Thamnophis*

*rufipunctatus nigronuchalis* and *T. r. unilabialis* were recognized as subspecies under *T. rufipunctatus* and comprised what was considered the *T. rufipunctatus* complex. However, Rossman *et al.* (1996, pp. 244–246) elevated *T. r. nigronuchalis* to full species designation and argued recognition of *T. r. unilabialis* be discontinued due to the diagnostic differences being too difficult to discern. Wood *et al.* (2011, p. 14) used genetic analysis of the *T. rufipunctatus* complex to propose the elevation of these three formerly recognized subspecies as three distinct species, as a result of a combination of interglacial warming, ecological and life-history constraints, and genetic drift, which promoted differentiation of these three species throughout the warming and cooling periods of the Pleistocene epoch (Wood *et al.* 2011, p. 15). We use these most recent and complete data in acknowledging these three entities as unique species: *T. rufipunctatus* (along the Mogollon Rim of Arizona and New Mexico), *T. unilabialis* (Chihuahua, eastern Sonora, and northern Durango, Mexico), and *T. nigronuchalis* (southern Durango, Mexico).

Several common names have been used for this species including the red-spotted gartersnake, the brown-spotted gartersnake, and the currently used, narrow-headed gartersnake (Rosen and Schwalbe 1988, p. 5). Further discussion of the taxonomic history of the narrow-headed gartersnake is available in Crother (2012, p. 71), Degenhardt *et al.* (1996, p. 326); Rossman *et al.* (1996, p. 244), De Queiroz and Lawson (1994, pp. 213–229); Rosen and Schwalbe (1988, pp. 5–7); and De Queiroz *et al.* (2002, p. 321).

#### Habitat and Natural History

The narrow-headed gartersnake is widely considered to be one of the most aquatic of the gartersnakes (Drummond and Marcias Garcia 1983, pp. 24, 27; Rossman *et al.* 1996, p. 246). This species is strongly associated with clear, rocky streams, using predominantly pool and riffle habitat that includes cobbles and boulders (Rosen and Schwalbe 1988, pp. 33–34; Degenhardt *et al.* 1996, p. 327; Rossman *et al.* 1996, p. 246; Ernst and Ernst 2003, p. 417). Rossman *et al.* (1996, p. 246) also note the species has been observed using lake shoreline habitat in New Mexico. Narrow-headed gartersnakes occur at elevations from approximately 2,300 to 8,200 ft (700 to 2,500 m), inhabiting Petran Montane Conifer Forest, Great Basin Conifer Woodland, Interior Chaparral, and the Arizona Upland subdivision of Sonoran Desertscrub

communities (Rosen and Schwalbe 1988, p. 33; Brennan and Holycross 2006, p. 122). An extensive evaluation of habitat use of narrow-headed gartersnakes along Oak Creek in Arizona is provided in Nowak and Santana-Bendix (2002, pp. 26–37). Rosen and Schwalbe (1988, p. 35) found narrow-headed gartersnake densities may be highest at the conjunction of cascading riffles with pools, where waters were deeper than 20 in (0.5 m) in the riffle and deeper than 40 in (1 m) in the immediately adjoining area of the pool, but more than twice the number of snakes were found in pools rather than riffles.

Where narrow-headed gartersnakes are typically found in the water, little aquatic vegetation exists (Rosen and Schwalbe 1988, p. 34). However, bank-line vegetation is an important component to suitable habitat for this species. Narrow-headed gartersnakes will usually bask in situations where a quick escape can be made, whether that is into the water or under substrate such as rocks (Fleharty 1967, p. 16). Common plant species associations include Arizona alder (*Alnus oblongifolia*) (highest correlation with occurrence of the narrow-headed gartersnake), velvet ash (*Fraxinus pennsylvanica*), willows (*Salix* ssp.), canyon grape (*Vitis arizonica*), blackberry (*Rubus* ssp.), Arizona sycamore (*Platanus wrightii*), Arizona black walnut (*Juglans major*), Fremont cottonwood (*Populus fremontii*), Gambel oak (*Quercus gambelii*), and ponderosa pine (*Pinus ponderosa*) (Rosen and Schwalbe 1988, pp. 34–35). Rosen and Schwalbe (1988, p. 35) noted that the composition of bank-side plant species and canopy structure were less important to the species’ needs than was the size class of the plant species present; narrow-headed gartersnakes prefer to use shrub- and sapling-sized plants for thermoregulating (basking) at the waters’ edge (Degenhardt *et al.* 1996, p. 327).

Narrow-headed gartersnakes may opportunistically forage within dammed reservoirs formed by streams that are occupied habitat, such as at Wall Lake (located at the confluence of Taylor Creek, Hoyt Creek, and the East Fork Gila River) (Fleharty 1967, p. 207) and most recently at Snow Lake in 2012 (located near the confluence of Snow Creek and the Middle Fork Gila River) (Hellekson 2012b, pers. comm.) in New Mexico, but records from impoundments are rare in the literature. The species evolved in the absence of such habitat, and impoundments are generally managed as sport fisheries (Wall Lake and Snow Lake are) and

often maintain populations of harmful nonnative species that are incompatible with narrow-headed gartersnakes.

The narrow-headed gartersnake is surface-active generally between March and November (Nowak 2006, p. 16). Little information on suitable temperatures for surface activity of the narrow-headed gartersnake exists; however, it is presumed to be rather cold-tolerant based on its natural history and foraging behavior that often involves clear, cold streams at higher elevations. Along Oak Creek in Arizona, Nowak (2006, Appendix 1) found the species to be active in air temperatures ranging from 52 to 89 °F (11 to 32 °C) and water temperatures ranging from 54 to 72 °F (12 to 22 °C). Jennings and Christman (2011, pp. 12–14) found body temperatures of narrow-headed gartersnakes along the Tularosa River averaged approximately 68 °F (20 °C) during the mid-morning hours and 81 °F (27 °C) in the late afternoon during the period from late July and August. Variables that affect their body temperature include the temperature of the microhabitat used and water temperature (most predictive), but slope aspect and the surface area of cover used also influenced body temperatures (Jennings and Christman 2011, p. 13). Narrow-headed gartersnakes have a lower preferred temperature for activity as compared to other species of gartersnakes (Fleharty 1967, p. 228), which may facilitate their highly aquatic nature in cold streams.

Narrow-headed gartersnakes specialize on fish as their primary prey item (Rosen and Schwalbe 1988, p. 38; Degenhardt *et al.* 1996, p. 328; Rossman *et al.* 1996, p. 247; Nowak and Santana-Bendix 2002, pp. 24–25; Nowak 2006, p. 22) and are believed to be mainly visual hunters (Hibbitts and Fitzgerald 2005, p. 364), heavily dependent on visual cues when foraging based on comparative analyses among other species of gartersnakes (de Queiroz 2003, p. 381). Unlike many other species of gartersnakes that are active predators (actively crawl about in search of prey), narrow-headed gartersnakes are considered to be ambush predators (sit-and-wait method) (Brennan and Holycross 2006, p. 122; Pierce *et al.* 2007, p. 8). The specific gravity (ratio of the mass of a solid object to the mass of the same volume of water) of the narrow-headed gartersnake was found to be nearly 1, which means that the snake can maintain its desired position in the water column with ease, an adaptation to facilitate foraging on the bottom of streams (Fleharty 1967, pp. 218–219). Native fish species most often associated as prey items for the narrow-

headed gartersnake include Sonora sucker (*Catostomus insignis*), desert sucker (*C. clarki*), speckled dace (*Rhinichthys osculus*), roundtail chub (*Gila robusta*), Gila chub (*Gila intermedia*), and headwater chub (*Gila nigra*) (Rosen and Schwalbe 1988, p. 39; Degenhardt *et al.* 1996, p. 328). Nonnative species used as prey by narrow-headed gartersnakes are most often salmonid species (trout); most commonly brown (*Salmo trutta*) and rainbow trout (*Oncorhynchus mykiss*), as these species are commonly stocked in, or near, occupied narrow-headed gartersnake habitat (Rosen and Schwalbe 1988, p. 39; Nowak 2006, pp. 22–23). Fleharty (1967, p. 223) reported narrow-headed gartersnakes eating green sunfish, but green sunfish is not considered a suitable prey item.

Several reviews (Stebbins 1985, p. 199; Degenhardt *et al.* 1996, p. 328; Ernst and Ernst 2003, p. 418) state that the narrow-headed gartersnake will also prey upon frogs, tadpoles, and salamanders. Fitzgerald (1986, p. 6) referenced the Stebbins (1985) account as the only substantiated account of the species accepting something other than fish as prey, apparently as the result of finding a small salamander larvae in the stomach of an individual in Durango, Mexico. Formerly recognized as a subspecies of *Thamnophis rufipunctatus*, that individual is now recognized as *T. unilabialis* (Wood *et al.* 2011, p. 3). We found an account of narrow-headed gartersnakes consuming red-spotted toads in captivity (Woodin 1950, p. 40). Despite several studies focusing on the ecology of narrow-headed gartersnakes in recent times, there are no other records of narrow-headed gartersnakes, under current taxonomic recognition, feeding on prey items other than fish. We, along with species experts, do not consider amphibians as ecologically important prey for this species based on our review of the literature.

Native predators of the narrow-headed gartersnake include birds of prey, other snakes such as kingsnakes, whipsnakes, or regal ring-necked snakes, wading birds, mergansers, belted kingfishers, raccoons, skunks, and coyotes (Rosen and Schwalbe 1988, pp. 18, 39; Brennan *et al.* 2009, p. 123). Historically, large, highly predatory native fish species such as Colorado pikeminnow may have preyed upon narrow-headed gartersnakes where the species co-occurred. Native chubs (*Gila* sp.) may also prey on neonatal gartersnakes.

Sexual maturity in narrow-headed gartersnakes occurs at 2.5 years of age in males and at 2 years of age in females

(Degenhardt *et al.* 1996, p. 328). Narrow-headed gartersnakes are viviparous. The reproductive cycle for narrow-headed gartersnakes appears to be longer than other gartersnake species; females begin the development of follicles in early March, and gestation takes longer (Rosen and Schwalbe 1988, pp. 36–37). Female narrow-headed gartersnakes breed annually and give birth to 4 to 17 offspring from late July into early August, perhaps earlier at lower elevations (Rosen and Schwalbe 1988, pp. 35–37). Sex ratios in narrow-headed gartersnake populations can be skewed in favor of females (Fleharty 1967, p. 212).

#### Historical Distribution

The historical distribution of the narrow-headed gartersnake ranged across the Mogollon Rim and along its associated perennial drainages from central and eastern Arizona, southeast to southwestern New Mexico at elevations ranging from 2,300 to 8,000 ft (700 to 2,430 m) (Rosen and Schwalbe 1988, p. 34; Rossman *et al.* 1996, p. 242; Holycross *et al.* 2006, p. 3). The species was historically distributed in headwater streams of the Gila River subbasin that drain the Mogollon Rim and White Mountains in Arizona, and the Gila Wilderness in New Mexico; major subbasins in its historical distribution included the Salt and Verde River subbasins in Arizona, and the San Francisco and Gila River subbasins in New Mexico (Holycross *et al.* 2006, p. 3). Holycross *et al.* (2006, p. 3) suspect the species was likely not historically present in the lowest reaches of the Salt, Verde, and Gila rivers, even where perennial flow persists. Numerous records for the narrow-headed gartersnake (through 1996) in Arizona are maintained in the AGFD's Heritage Database (1996b). The narrow-headed gartersnake as currently recognized does not occur in Mexico.

#### Current Distribution and Population Status

Where narrow-headed gartersnakes are locally abundant, they can usually be detected reliably and with significantly less effort than populations characterized as having low densities. Narrow-headed gartersnakes are well-camouflaged, secretive, and very difficult to detect in structurally complex, dense habitat where they could occur at very low population densities, which characterizes most occupied sites. Water clarity can also affect survey accuracy. We considered factors such as the date of the last known records for narrow-headed gartersnakes in an area, as well as

records of one or more native prey species in making a conclusion on species occupancy. We used all records that were dated 1980 or later because the 1980s marked the first systematic survey efforts for narrow-headed gartersnakes species across their range (see Rosen and Schwalbe (1988, entire) and Fitzgerald (1986, entire)), and the last, previous records were often dated several decades prior and may not accurately represent the likelihood for current occupation. Several areas where narrow-headed gartersnakes were known to occur have received no, or very little, survey effort in the past several decades. Variability in survey design and effort makes it difficult to compare population sizes or trends among sites and between sampling periods. Thus, for each of the sites discussed in Appendix A (available at <http://www.regulations.gov> under Docket No. FWS-R2-ES-2013-0071), we have attempted to translate and quantify search and capture efforts into comparable units (*i.e.*, person-search hours and trap-hours) and have conservatively interpreted those results. Because the presence of suitable prey species in an area may provide evidence that northern Mexican gartersnake may still persist in low density where survey data are sparse, a record of a native prey species was considered in our determination of occupancy of this species.

Population status information, based on our review of the best scientific and commercial data available, suggests that the narrow-headed gartersnake has experienced significant declines in population density and distribution along streams and rivers where it was formerly well-documented and reliably detected. Many areas where the species

may occur likely rely on emigration of individuals from occupied habitat into those areas to maintain the species, provided there are no barriers to movement. Holycross *et al.* (2006) represents the most recent, comprehensive survey effort for narrow-headed gartersnakes in Arizona. Our most current information on the species' status in New Mexico comes from a species expert who is completing a graduate degree focused on the relationship between narrow-headed gartersnake populations and fish communities in the upper Gila and San Francisco river drainages (Helleckson 2012a, pers. comm.). Narrow-headed gartersnakes were detected in only 5 of 16 historical localities in Arizona and New Mexico surveyed by Holycross *et al.* (2006) in 2004 and 2005. Population densities have noticeably declined in many populations, as compared to previous survey efforts (Holycross *et al.* 2006, p. 66). Holycross *et al.* (2006, pp. 66–67) compared narrow-headed gartersnake detections based on results from their effort and that of previous efforts in the same locations and found that significantly more effort is required to detect this species in areas where it was formerly robust, such as along Eagle Creek (AZ), the East Verde River (AZ), the San Francisco River (NM), the Black River (AZ), and the Blue River (AZ).

As of 2011, the only remaining narrow-headed gartersnake populations where the species could reliably be found were located at: (1) Whitewater Creek (New Mexico), (2) Tularosa River (New Mexico), (3) Diamond Creek (New Mexico), (4) Middle Fork Gila River (New Mexico), and (5) Oak Creek Canyon (Arizona). However, populations found in Whitewater Creek and the Middle Fork Gila River were

likely significantly affected by New Mexico's largest wildfire in State history, the Whitewater-Baldy Complex Fire, which occurred in June 2012. In addition, salvage efforts were initiated for these two populations, which included the removal of 25 individuals from Whitewater Creek and 14 individuals from the Middle Fork Gila River before the onset of summer rains in 2012. The status of those populations has likely deteriorated as a result of subsequent declines in resident fish communities due to heavy ash and sediment flows, resulting fish kills, and the removal of snakes, but subsequent survey data have not been collected. If the Whitewater Creek and Middle Fork Gila River populations did decline as a result of these factors, only three remaining populations of this species remain viable today across their entire distribution. Such unnaturally large wildfires have become increasingly common across the Mogollon Rim of Arizona and New Mexico where the narrow-headed gartersnake historically occurred. The status of the narrow-headed gartersnake on tribal land is poorly known, due to limited survey access.

In Table 2 below, we summarize the population status of the narrow-headed gartersnake at all known localities throughout its distribution, as supported by museum records or reliable observations. For a detailed discussion that explains the rationale for site-by-site conclusions on occupancy, please see Appendix A (available at <http://www.regulations.gov> under Docket No. FWS-R2-ES-2013-0071). General rationale is provided in the introductory paragraph to this section, "Current Distribution and Population Status."

TABLE 2—CURRENT POPULATION STATUS OF THE NARROW-HEADED GARTERSNAKE. REFERENCES CITED ARE PROVIDED IN APPENDIX A

Location	Last record	Suitable physical habitat present	Native prey species present	Harmful non-native species present	Population status
West Fork Gila River (NM) .....	2011	Yes .....	Yes .....	Yes .....	Likely not viable.
Middle Fork Gila River (NM) .....	2012	Yes .....	Yes .....	Yes .....	Likely not viable.
East Fork Gila River (NM) .....	2006	Yes .....	Yes .....	Yes .....	Likely not viable.
Gila River (AZ, NM) .....	2009	Yes .....	Yes .....	Yes .....	Likely not viable.
Snow Creek/Snow Lake (NM) .....	2012	Yes .....	No .....	Yes .....	Likely not viable.
Gilita Creek (NM) .....	2009	Yes .....	Yes .....	No .....	Likely not viable.
Iron Creek (NM) .....	2009	Yes .....	Yes .....	No .....	Likely not viable.
Little Creek (NM) .....	2010	Yes .....	Possible .....	Yes .....	Likely not viable.
Turkey Creek (NM) .....	1985	Yes .....	Yes .....	Possible .....	Likely not viable.
Beaver Creek (NM) .....	1949	Yes .....	Possible .....	Yes .....	Likely extirpated.
Black Canyon (NM) .....	2010	Yes .....	Yes .....	No .....	Likely not viable.
Taylor Creek (NM) .....	1960	Yes .....	No .....	Yes .....	Likely extirpated.
Diamond Creek (NM) .....	2011	Yes .....	Yes .....	Yes .....	Likely viable.
Tularosa River (NM) .....	2012	Yes .....	Yes .....	Yes .....	Likely viable.
Whitewater Creek (NM) .....	2012	Yes .....	Yes .....	Yes .....	Likely not viable.
San Francisco River (NM) .....	2011	Yes .....	Yes .....	Yes .....	Likely not viable.
South Fork Negro Creek (NM) .....	2011	Yes .....	Possible .....	Yes .....	Likely not viable.

TABLE 2—CURRENT POPULATION STATUS OF THE NARROW-HEADED GARTERSNAKE. REFERENCES CITED ARE PROVIDED IN APPENDIX A—Continued

Location	Last record	Suitable physical habitat present	Native prey species present	Harmful non-native species present	Population status
Blue River (AZ) .....	2007	Yes .....	Yes .....	Yes .....	Likely not viable.
Dry Blue Creek (AZ, NM) .....	2010	Yes .....	Possible .....	Yes .....	Likely not viable.
Campbell Blue Creek (AZ, NM) .....	2010	Yes .....	Possible .....	Yes .....	Likely not viable.
Saliz Creek (NM) .....	2012	Yes .....	Possible .....	Yes .....	Likely not viable.
Eagle Creek (AZ) .....	1991	Yes .....	Yes .....	Yes .....	Likely not viable.
Black River (AZ) .....	2009	Yes .....	Yes .....	Yes .....	Likely not viable.
White River (AZ) .....	1986	Yes .....	Yes .....	Possible .....	Likely not viable.
Diamond Creek (AZ) .....	1986	Yes .....	Possible .....	Possible .....	Likely not viable.
Tonto Creek (tributary to Big Bonita Creek, AZ) .....	1915	Yes .....	Possible .....	Possible .....	Likely extirpated.
Canyon Creek (AZ) .....	1991	Yes .....	Yes .....	No .....	Likely not viable.
Upper Salt River (AZ) .....	1985	Yes .....	Yes .....	Yes .....	Likely not viable.
Cibique Creek (AZ) .....	1991	Yes .....	Yes .....	Possible .....	Likely not viable.
Carrizo Creek (AZ) .....	1997	Yes .....	Yes .....	Possible .....	Unreliably detected.
Big Bonito Creek (AZ) .....	1957	Yes .....	Yes .....	Yes .....	Likely extirpated.
Haigler Creek (AZ) .....	Early 1990s	Yes .....	Yes .....	Yes .....	Likely not viable.
Houston Creek (AZ) .....	2005	Yes .....	Yes .....	Yes .....	Likely not viable.
Tonto Creek (tributary to Salt River, AZ) .....	2005	Yes .....	Yes .....	Yes .....	Likely not viable.
Deer Creek (AZ) .....	1995	No .....	No .....	No .....	Likely extirpated.
Upper Verde River (AZ) .....	2012	Yes .....	Yes .....	Yes .....	Likely not viable.
Oak Creek (AZ) .....	2012	Yes .....	Yes .....	Yes .....	Likely viable.
East Verde River (AZ) .....	1992	Yes .....	Yes .....	Yes .....	Likely not viable.

“Possible” means there were no conclusive data found.

“Likely extirpated” means the last record for an area pre-dated 1980 and existing threats suggest the species is likely extirpated. “Likely not viable” means there is a post-1980 record for the species, it is not reliably found with minimal to moderate survey effort, and threats exist which suggest the population may be low density or could be extirpated, but there is insufficient evidence to confirm extirpation. “Likely viable” means that the species is reliably found with minimal to moderate survey effort and the population is generally considered viable.

Table 2 lists the 38 known localities for narrow-headed gartersnakes throughout their range. Appendix A (available at <http://www.regulations.gov> under Docket No. FWS-R2-ES-2013-0071) discusses such considerations as the physical condition of habitat, the composition of the aquatic biological community, the existence of significant threats, and the length of time since the last known observation of the species in presenting rationale for determining occupancy status at each locality. We have concluded that in as many as 29 of 38 known localities (76 percent), the narrow-headed gartersnake population is likely not viable and may exist at low population densities that could be threatened with extirpation or may already be extirpated but survey data are lacking in areas where access is restricted. In most localities where the species may occur at low population

densities, existing survey data are insufficient to conclude extirpation. As of 2012, narrow-headed gartersnake populations are considered likely viable in 3 localities (8 percent) where individuals are reliable detected. As displayed in Table 2, harmful nonnative species are a concern for almost every narrow-headed gartersnake population throughout their range. The ramifications of this are significant because of the effect these harmful nonnative species have on the resident native fish communities and the fact that this species is a specialized, fish-only predator. We discuss this and other important factors that have contributed to the decline of narrow-headed gartersnakes throughout their range in our threats analysis below.

#### 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.

In the following threats analysis, we treat both gartersnake species in a combined discussion because of partially overlapping ranges, similar natural histories, similar responses to threats, and the fact that many threats are shared in common throughout their ranges.

#### *The Weakened Status of Native Aquatic Communities*

Riparian and aquatic communities in both the United States and Mexico have been significantly impacted by a shift in species' composition, from one of primarily native fauna, to one being increasingly dominated by an expanding assemblage of nonnative animal species. Many of these nonnative species have been intentionally or accidentally introduced, including crayfish, bullfrogs, and nonnative, spiny-rayed fish. Harmful nonnative species have been introduced or have spread into new areas through a variety of mechanisms, including intentional and accidental releases, sport stocking, aquaculture, aquarium releases, and bait-bucket release.

The occurrence of harmful nonnative species, such as the bullfrog, the northern (virile) crayfish (*Orconectes virilis*), red swamp crayfish (*Procambarus clarkii*), and numerous species of nonnative, spiny-rayed fish,

has contributed to rangewide declines in both species of gartersnake, and continues to be the most significant threat to the northern Mexican and narrow-headed gartersnakes, and to their prey base, as a result of direct predation, competition, and modification of habitat as evidenced in a broad body of literature, the most recent of which extends from 1985 to the present (Meffe 1985, pp. 179–185; Propst *et al.* 1986, pp. 14–31, 82; 1988, p. 64; 2009, pp. 5–17; Minckley 1987, pp. 2, 16; 1993, pp. 7–13; Rosen and Schwalbe 1988, pp. 28, 32; 1997, p. 1; Bestgen and Propst 1989, pp. 409–410; Clarkson and Rorabaugh 1989, pp. 531, 535; Papoulias *et al.* 1989, pp. 77–80; Marsh and Minckley 1990, p. 265; Jakle 1992, pp. 3–5; 1995, pp. 5–7; ASU 1994, multiple reports; 1995, multiple reports; 2008, multiple reports; Stefferud and Stefferud 1994, p. 364; Douglas *et al.* 1994, pp. 9–19; Rosen *et al.* 1995, pp. 257–258; 1996b, pp. 2, 11–13; 2001, p. 2; Springer 1995, pp. 6–10; Degenhardt *et al.* 1996, p. 319; Fernandez and Rosen 1996, pp. 8, 23–27, 71, 96; Richter *et al.* 1997, pp. 1089, 1092; Weedman and Young 1997, pp. 1, Appendices B, C; Inman *et al.* 1998, p. 17; Rinne *et al.* 1998, pp. 4–6; 2004, pp. 1–2; Jahrke and Clark 1999, pp. 2–7; Minckley *et al.* 2002, pp. 696; Nowak and Santana-Bendix 2002, Table 3; Propst 2002, pp. 21–25; DFT 2003, pp. 1–3, 5–6, 19; 2004, pp. 1–2, 4–5, 10, Table 1; 2006, pp. iii, 25; Marsh *et al.* 2003, p. 667; Bonar *et al.* 2004, pp. 13, 16–21; Rinne 2004, pp. 1–2; Clarkson *et al.* 2005, p. 20; 2008, pp. 3–4; Fagan *et al.* 2005, pp. 34, 34–41; Knapp 2005, pp. 273–275; Olden and Poff 2005, pp. 82–87; AGFD 2006, p. 83; Turner 2007, p. 41; Holycross *et al.* 2006, pp. 13–15; Brennan and Holycross 2006, p. 123; Brennan 2007, pp. 5, 7; Turner and List 2007, p. 13; USFWS 2007, pp. 22–23; Burger 2008, p. 4; Caldwell 2008a, 2008b; Duijfhuis Rivera *et al.* 2008, p. 479; Jones 2008b; d'Orgeix 2008; Haney *et al.* 2008, p. 59; Luja and Rodríguez-Estrella 2008, pp. 17–22; Probst *et al.* 2008, pp. 1242–1243; Rorabaugh 2008a, p. 25; USFS 2008; Wallace *et al.* 2008, pp. 243–244; Witte *et al.* 2008, p. 1; Bahm and Robinson 2009a, pp. 2–6; 2009b, pp. 1–4; Brennan and Rosen 2009, pp. 8–9; Karam *et al.* 2009; pp. 2–3; Minckley and Marsh 2009, pp. 50–51; Paroz *et al.* 2009, pp. 12, 18; Robinson and Crowder 2009, pp. 3–5; Pilger *et al.* 2010, pp. 311–312; Stefferud *et al.* 2011, pp. 11–12; C. Akins 2012, pers. comm.; Young and Boyarski 2013, pp. 159–160; Emmons and Nowak 2013, p. 5).

#### The Decline of the Gartersnake Prey Base

The documented decline of the northern Mexican and narrow-headed gartersnakes was typically subsequent to the declines in their prey base (native amphibian and fish populations). These declines in prey base result from predation following the establishment of nonnative bullfrogs, crayfish, and numerous species of nonnative, spiny-rayed fish as supported by an extensive body of literature referenced immediately above.

Northern Mexican and narrow-headed gartersnakes appear to be particularly vulnerable to the loss of native prey species (Rosen and Schwalbe 1988, pp. 20, 44–45). Rosen *et al.* (2001, pp. 10, 13, 19) examined this issue in detail with respect to the northern Mexican gartersnake, and proposed two reasons for its decline following a loss of, or decline in, the native prey base: (1) The species is unlikely to increase foraging efforts at the risk of increased predation; and (2) the species needs adequate food on a regular basis to maintain its weight and health. If forced to forage more often for smaller prey items, a reduction in growth and reproductive rates can result (Rosen *et al.* 2001, pp. 10, 13). Rosen *et al.* (2001, p. 22) concluded that the presence and expansion of nonnative predators (mainly bullfrogs, crayfish, and green sunfish (*Lepomis cyanellus*)) is the primary cause of decline in northern Mexican gartersnakes and their prey in southeastern Arizona. In another example, Drummond and Marcias Garcia (1983, pp. 25, 30) found that Mexican gartersnakes fed primarily on frogs, and functioned as a local specialist in that regard. When frogs became unavailable, the species simply ceased major foraging activities. This led the author to conclude that frog abundance is probably the most important correlate, and main determinant, of foraging behavior in this species. Alternatively, terrestrial prey species were consumed, but the gartersnakes were never documented as having these prey items as a major dietary component, even when the gartersnakes were in dire need (Drummond and Marcias Garcia 1983, p. 37).

With respect to narrow-headed gartersnakes, the relationship between harmful nonnative species, a declining prey base, and gartersnake populations is clearly depicted in one population along Oak Creek. Nowak and Santana-Bendix (2002, Table 3) found a clear partition in the distribution of nonnative, spiny-rayed fish and soft-

rayed fish in the vicinity of Midgely Bridge, where nonnative, spiny-rayed fish increased in abundance in the downstream direction and soft-rayed fish increased in abundance in the upstream direction. These fish community distributions closely parallel that of narrow-headed gartersnakes along Oak Creek, where gartersnake populations increase in density in the upstream direction and decrease notably in the downstream direction (Nowak and Santana-Bendix 2002, p. 23). Numerous historical records for narrow-headed gartersnakes document the species in the lower reach of Oak Creek, but the species is currently rarely detected in this reach of Oak Creek (Nowak and Santana-Bendix 2002, pp. 13–14), providing evidence of the decline of narrow-headed gartersnakes in the presence of nonnative, spiny-rayed fish.

*Fish*—Northern Mexican and narrow-headed gartersnakes can successfully use nonnative, soft-rayed fish species as prey, including mosquitofish, red shiner, and introduced trout (*Salmo* sp.) (Nowak and Santana-Bendix 2002, pp. 24–25; Holycross *et al.* 2006, p. 23). However, all other nonnative species, most notably the spiny-rayed fish, are not considered prey species for northern Mexican or narrow-headed gartersnakes and, in addition, are known to prey on neonatal and juvenile gartersnakes. Nowak and Santana-Bendix (2002, p. 24) propose two hypotheses regarding the reluctance of narrow-headed gartersnakes to prey on nonnative, spiny-rayed fish: (1) The laterally-compressed shape and presence of sharp, spiny dorsal spines present a choking hazard to gartersnakes that has been observed to be fatal; and (2) nonnative, spiny-rayed fish tend to occupy the middle and upper zones in the water column, while narrow-headed gartersnakes typically hunt along the bottom (where native fish tend to occur). As a result, nonnative, spiny-rayed fish may be largely ecologically unavailable as prey. It is likely the shape and presence of sharp, spiny dorsal spines on these nonnative fish species also present a choking hazard to both northern Mexican and narrow-headed gartersnakes.

Nonnative, spiny-rayed fish invasions can indirectly affect the health, maintenance, and reproduction of northern Mexican and narrow-headed gartersnakes by altering their foraging strategy and compromising foraging success. Rosen *et al.* (2001, p. 19), in addressing the northern Mexican gartersnake, proposed that an increase in energy expended in foraging, coupled by the reduced number of small to

medium-sized prey fish available, results in deficiencies in nutrition, affecting growth and reproduction. This occurs because energy is allocated to maintenance and the increased energy costs of intense foraging activity, rather than to growth and reproduction. In contrast, a northern Mexican gartersnake diet that includes both fish and amphibians, such as leopard frogs, reduces the necessity to forage at a higher frequency, allowing metabolic energy gained from larger prey items to be allocated instead to growth and reproductive development. Myer and Kowell (1973, p. 225) experimented with food deprivation in common gartersnakes, and found significant reductions in lengths and weights of juvenile snakes that were deprived of regular feedings versus the control group that were fed regularly at natural frequencies. Reduced foraging success of both northern Mexican and narrow-headed gartersnakes means that individuals are likely to become vulnerable to effects from starvation, which may increase mortality rates of juveniles and, consequently, affect recruitment.

Northern Mexican gartersnakes have a more varied diet than narrow-headed gartersnakes. We are not aware of any studies that have addressed the direct relationship between prey base diversity and northern Mexican gartersnake recruitment and survivorship. However, Krause and Burghardt (2001, pp. 100–123) discuss the benefits and costs that may be associated with diet variability in the common gartersnake (*Thamnophis sirtalis*), an ecologically similar species to the northern Mexican gartersnake. Foraging for mixed-prey species may impede predator learning, as compared to specialization, on a certain prey species, but may also provide long-term benefits (Krause and Burghardt 2001, p. 101). Krause and Burghardt (2001, p. 112) stated that varied predatory experience played an important role in the feeding abilities of gartersnakes through the first 8 months of age. These data suggest that a varied prey base might also be important for neonatal and juvenile northern Mexican gartersnakes (also a species with a varied diet) and that decreases in the diversity of the prey base during the young age classes might adversely affect the ability of individuals to capture prey throughout their lifespan, in addition to the more obvious effects of reduced prey availability.

A wide variety of native fish species, now listed as endangered, threatened, or candidates for listing, were historically primary prey species for northern Mexican and narrow-headed

gartersnakes (Rosen and Schwalbe 1988, pp. 18, 39). Aquatic habitat destruction and modification is often considered a leading cause for the decline in native fish in the southwestern United States. However, Marsh and Pacey (2005, p. 60) predict that despite the significant physical alteration of aquatic habitat in the southwest, native fish species could not only complete all of their life functions but could flourish in these altered environments, but for the presence of (harmful) nonnative fish species, as supported by a “substantial and growing body of evidence derived from case studies.” Northern Mexican and narrow-headed gartersnakes depend on native fish as a principle part of their prey base, although nonnative, soft-rayed fish are also common prey items where they overlap in distribution with these gartersnakes (Nowak and Santana-Bendix 2002, pp. 24–25; Holycross *et al.* 2006, p. 23). Nonnative, spiny-rayed fish compete with northern Mexican and narrow-headed gartersnakes for prey. In their extensive surveys, Rosen and Schwalbe (1988, p. 44) only found narrow-headed gartersnakes in abundance where native fish species predominated, but did not find them abundant in the presence of robust nonnative, spiny-rayed fish populations. Minckley and Marsh (2009, pp. 50–51) found nonnative fishes to be the single-most significant factor in the decline of native fish species and also their primary obstacle to recovery. Of the 48 conterminous States in the United States, Arizona has the highest proportion of nonnative fish species (66 percent) represented by approximately 68 species of nonnative fish (Turner and List 2007, p. 13).

Collier *et al.* (1996, p. 16) note that interactions between native and nonnative fish have significantly contributed to the decline of many native fish species from direct predation and, indirectly, from competition (which has adversely affected the prey base for northern Mexican and narrow-headed gartersnakes). The AGFD considers native fish in Arizona as the most threatened taxa among the State's native species, largely as a result of predation and competition with nonnative species (AGFD 2006, p. 83). Holycross *et al.* (2006, pp. 52–61) documented significantly depressed or extirpated native fish prey bases for northern Mexican and narrow-headed gartersnakes along the Mogollon Rim in Arizona and New Mexico. Rosen *et al.* (2001, Appendix I) documented the decline of several native fish species in several locations visited in southeastern Arizona, further affecting the prey base

of northern Mexican gartersnakes in that area.

Stocked for sport, forage, or biological control, nonnative fishes have been shown to become invasive where released, do not require natural flow regimes, and tend to be more phylogenetically advanced than native species (Kolar *et al.* 2003, p. 9) which contributed to their expansion in the Gila River basin. Harmful nonnative fish species tend to be nest-builders and actively guard their young which may provide them another ecological advantage over native species which are broadcast spawners and provide no parental care to their offspring (Marsh and Pacey 2005, p. 60). It is therefore likely that recruitment and survivorship is greater in nonnative species than native species where they overlap, providing them with an ecological advantage. Table 2–1 in Kolar *et al.* (2003, p. 10) provides a map depicting the high degree of overlap in the distribution of native and nonnative fishes within the Gila River basin of Arizona and New Mexico as well as watersheds thought to be dominated by nonnative fish species. The widespread decline of native fish species from the arid southwestern United States and Mexico has resulted largely from interactions with nonnative species and has been captured in the listing rules of 13 native species listed under the Act, and whose historical ranges overlap with the historical distribution of northern Mexican and narrow-headed gartersnakes. Native fish species that were likely prey species for these gartersnakes and are now listed under the Act, include the bonytail chub (*Gila elegans*, 45 FR 27710, April 23, 1980), Yaqui catfish (*Ictalurus pricei*, 49 FR 34490, August 31, 1984), Yaqui chub (*Gila purpurea*, 49 FR 34490, August 31, 1984), Yaqui topminnow (*Poeciliopsis occidentalis sonoriensis*, 32 FR 4001, March 11, 1967), beautiful shiner (*Cyprinella formosa*, 49 FR 34490, August 31, 1984), humpback chub (*Gila cypha*, 32 FR 4001, March 11, 1967), Gila chub (*Gila intermedia*, 70 FR 66663, November 2, 2005), Colorado pikeminnow (*Ptychocheilus lucius*, 32 FR 4001, March 11, 1967), spikedace (*Meda fulgida*, 77 FR 10810, February 23, 2012), loach minnow (*Tiaroga cobitis*, 77 FR 10810, February 23, 2012), razorback sucker (*Xyrauchen texanus*, 56 FR 54957, October 23, 1991), desert pupfish (*Cyprinodon macularius*, 51 FR 10842, March 31, 1986), and Gila topminnow (*Poeciliopsis occidentalis*, 32 FR 4001, March 11, 1967). In total, within Arizona, 19 of 31 (61 percent) native

fish species are listed under the Act. Arizona ranks the highest of all 50 States in the percentage of native fish species with declining trends (85.7 percent) and New Mexico ranks sixth (48.1 percent) (Stein 2002, p. 21; Warren and Burr 1994, p. 14). Recovery of native fishes in the Southwest has been fraught with complicating factors, both natural and sociopolitical, which have presented significant challenges to the recovery of many imperiled native fish species (Minckley and Marsh 2009, pp. 52–53), including many that are important prey species for the northern Mexican and narrow-headed gartersnakes.

In an evolutionary context, many native fishes co-evolved with very few predatory fish species, whereas most of the nonnative species co-evolved with many predatory species (Clarkson *et al.* 2005, p. 21). A contributing factor to the decline of native fish species cited by Clarkson *et al.* (2005, p. 21) is that most of the nonnative species evolved behaviors, such as nest guarding, to protect their offspring from these many predators, while native species are generally broadcast spawners that provide no parental care. In the presence of nonnative species, the reproductive behaviors of native fish fail to allow them to compete effectively with the nonnative species, and, as a result, the viability of native fish populations is reduced.

Olden and Poff (2005, p. 75) stated that environmental degradation and the proliferation of nonnative fish species threaten the highly localized and unique fish faunas of the American Southwest. The fastest expanding nonnative species are red shiner (*Cyprinella lutrensis*), fathead minnow (*Pimephales promelas*), green sunfish, largemouth bass (*Micropterus salmoides*), western mosquitofish, and channel catfish (*Ictalurus punctatus*). These species are considered to be the most invasive in terms of their negative impacts on native fish communities (Olden and Poff 2005, p. 75). Many nonnative fishes, in addition to those listed immediately above, including yellow and black bullheads (*Ameiurus* sp.), flathead catfish (*Pylodictis olivaris*), and smallmouth bass (*Micropterus dolomieu*), have been introduced into formerly and currently occupied northern Mexican or narrow-headed gartersnake habitat and are predators on these species and their prey (Bestgen and Propst 1989, pp. 409–410; Marsh and Minckley 1990, p. 265; Sublette *et al.* 1990, pp. 112, 243, 246, 304, 313, 318; Abarca and Weedman 1993, pp. 6–12; Stefferud and Stefferud 1994, p. 364; Weedman and Young 1997, pp. 1,

Appendices B, C; Rinne *et al.* 1998, pp. 3–6; Voeltz 2002, p. 88; Bonar *et al.* 2004, pp. 1–108; Fagan *et al.* 2005, pp. 34, 38–39, 41; Probst *et al.* 2008, pp. 1242–1243). Nonnative, spiny-rayed fish species, such as flathead catfish, may be especially dangerous to narrow-headed gartersnake populations through competition and direct predation, because they are primarily piscivorous (fish-eating) (Pilger *et al.* 2010, pp. 311–312), have large mouths, and have a tendency to occur along the stream bottom, where narrow-headed gartersnakes principally forage.

Rosen *et al.* (2001, Appendix I) and Holycross *et al.* (2006, pp. 15–51) conducted large-scale surveys for northern Mexican gartersnakes in southeastern and central Arizona and narrow-headed gartersnakes in central and east-central Arizona, and documented the presence of nonnative fish at many locations. Holycross *et al.* (2006, pp. 14–15) found nonnative fish species in 64 percent of the sample sites in the Agua Fria subbasin, 85 percent of the sample sites in the Verde River subbasin, 75 percent of the sample sites in the Salt River subbasin, and 56 percent of the sample sites in the Gila River subbasin. In total, nonnative fish were observed at 41 of the 57 sites surveyed (72 percent) across the Mogollon Rim (Holycross *et al.* 2006, p. 14). Entirely native fish communities were detected in only 8 of 57 sites surveyed (14 percent) (Holycross *et al.* 2006, p. 14). It is well documented that nonnative fish have now infiltrated the majority of aquatic communities in the southwestern United States as depicted in Tables 1 and 2, above, as well as in Appendix A (available at <http://www.regulations.gov> under Docket No. FWS-R2-ES-2013-0071).

Several authors have identified both the presence of nonnative fish as well as their deleterious effects on native species within Arizona. Many areas have seen a shift from a predominance of native fishes to a predominance of nonnative fishes. On the upper Verde River, native species dominated the total fish community at greater than 80 percent from 1994 to 1996, before dropping to approximately 20 percent in 1997 and 19 percent in 2001. At the same time, three nonnative species increased in abundance between 1994 and 2000 (Rinne *et al.* 2004, pp. 1–2). In an assessment of the Verde River, Bonar *et al.* (2004, p. 57) found that in the Verde River mainstem, nonnative fishes were approximately 2.6 times more dense per unit volume of river than native fishes, and their populations were approximately 2.8 times that of native fishes per unit volume of river.

Haney *et al.* (2008, p. 61) declared the northern Mexican gartersnake as nearly lost from the Verde River but also suggested that diminished river flow may be an important factor. Similar changes in the dominance of nonnative fishes have occurred on the Middle Fork Gila River, with a 65 percent decline of native fishes between 1988 and 2001 (Propst 2002, pp. 21–25). Abarca and Weedman (1993, pp. 6–12) found that the number of nonnative fish species was twice the number of native fish species in Tonto Creek in the early 1990s, with a stronger nonnative species influence in the lower reaches, where the northern Mexican gartersnake is considered to still occur, and Burger (2008, p. 8) confirmed their continued existence there. Surveys in the Salt River above Lake Roosevelt indicate a decline of roundtail chub and other natives with an increase in flathead and channel catfish numbers (Voeltz 2002, p. 49).

In New Mexico, nonnative fish have been identified as the main cause for declines observed in native fish populations (Voeltz 2002, p. 40; Probst *et al.* 2008, pp. 1242–1243). Fish experts from the U.S. Forest Service, U.S. Bureau of Reclamation, U.S. Bureau of Land Management (BLM), University of Arizona, Arizona State University, the Nature Conservancy, and others declared the native fish fauna of the Gila River basin to be critically imperiled, and they cite habitat destruction and nonnative species as the primary factors for the declines. They call for the control and removal of nonnative fish as an overriding need to prevent the decline, and ultimate extinction, of native fish species within the basin (DFT 2003, p. 1). In some areas, nonnative fishes may not dominate the system, but their abundance has increased. This is the case for the Cliff-Gila Valley area of the Gila River, where nonnative fishes increased from 1.1 percent to 8.5 percent, while native fishes declined steadily over a 40-year period (Propst *et al.* 1986, pp. 27–32). At the Redrock and Virden valleys on the Gila River, the relative abundance in nonnative fishes in the same time period increased from 2.4 percent to 17.9 percent (Propst *et al.* 1986, pp. 32–34). Four years later, the relative abundance of nonnative fishes increased to 54.7 percent at these sites (Propst *et al.* 1986, pp. 32–36). The percentage of nonnative fishes increased by almost 12 percent on the Tularosa River between 1988 and 2003, while on the East Fork Gila River, nonnative fishes increased to 80.5 percent relative abundance in 2003 (Propst 2005, pp. 6–7, 23–24).

Nonnative fishes are also considered a management issue in other areas including Eagle Creek, the San Pedro River, West Fork Gila River, and to a lesser extent, the Blue River.

In addition to harmful nonnative species, various parasites may affect native fish species that are prey for northern Mexican and narrow-headed gartersnakes. Asian tapeworm was introduced into the United States with imported grass carp (*Ctenopharyngodon idella*) in the early 1970s. It has since become well established in areas throughout the southwestern United States. The definitive host in the life cycle of Asian tapeworm is a cyprinid fish (carp or minnow), and therefore it is a potential threat to native cyprinids in Arizona and New Mexico. The Asian tapeworm adversely affects fish health by impeding the digestion of food as it passes through the digestive track. Emaciation and starvation of the host can occur when large enough numbers of worms feed off the fish directly. An indirect effect is that weakened fish are more susceptible to infection by other pathogens. Asian tapeworm invaded the Gila River basin and was found during the Central Arizona Project's fall 1998 monitoring in the Gila River at Ashurst-Hayden Dam. It has also been confirmed from Bonita Creek in 2010 (USFWS National Wild Fish Health Survey 2010). This parasite can infect many species of fish and is carried into new areas along with nonnative fishes or native fishes from contaminated areas.

Another parasite (*Ichthyophthirius multifiliis*) (Ich) usually occurs in deep waters with low flow and is a potential threat to native fish. Ich has occurred in some Arizona streams, probably encouraged by high temperatures and crowding as a result of drought. This parasite was observed being transmitted on the Sonora sucker (*Catostomus insignis*), although it does not appear to be host-specific and could be transmitted by other species (Mpoame 1982, p. 46). It has been found on desert and Sonoran suckers, as well as roundtail chub (Robinson *et al.* 1998, p. 603), which are important prey species for the northern Mexican and narrow-headed gartersnakes. This parasite becomes embedded under the skin and within the gill tissues of infected fish. When Ich matures, it leaves the fish, causing fluid loss, physiological stress, and sites that are susceptible to infection by other pathogens. If Ich is present in large enough numbers, it can also impact respiration because of damaged gill tissue.

Anchor worm (*Lernaea cyprinacea*), an external parasite, is unusual in that it has little host specificity, infecting a

wide range of fishes and amphibians. Infection by this parasite has been known to kill large numbers of fish due to tissue damage and secondary infection of the attachment site (Hoffnagle and Cole 1999, p. 24). Presence of this parasite in the Gila River basin is a threat to native fishes. In July 1992, the BLM found anchor worms in Bonita Creek. They have also been documented in the Verde River (Robinson *et al.* 1998, pp. 599, 603–605).

The yellow grub (*Clinostomum marginatum*) is a parasitic, larval flatworm that appears as yellow spots on the body and fins of a fish. Because the intermediate host is a bird and therefore highly mobile, yellow grubs are easily spread. When yellow grubs infect a fish, they penetrate the skin and migrate into its tissues, causing damage and potentially hemorrhaging. Damage from one yellow grub may be minimal, but in greater numbers, yellow grubs can kill fish (Maine Department of Inland Fisheries and Wildlife 2002a, p. 1). Yellow grubs occur in many areas in Arizona and New Mexico, including Oak Creek (Mpoame and Rinne 1983, pp. 400–401), the Salt River (Amin 1969, p. 436; Bryan and Robinson 2000, p. 19), the Verde River (Bryan and Robinson 2000, p. 19), and Bonita Creek (Robinson 2011, pers. comm.).

The black grub (*Neascus* spp.), also called black spot, is a parasitic larval fluke that appears as black spots on the skin, tail base, fins, and musculature of a fish. When an intermediate life stage of black grubs migrates into the tissues of a fish they are called "cercaria." The damage caused by one cercaria is negligible, but in greater numbers they may kill a fish (Lane and Morris 2000, pp. 2–3; Maine Department of Inland Fisheries and Wildlife 2002b, p. 1). Black grubs are present in the Verde River (Robinson *et al.* 1998, p. 603; Bryan and Robinson 2000, p. 21), and are prevalent in the San Francisco River in New Mexico (Paroz 2011, pers. comm.).

To date, we have no information on the effect of parasite infestation in native fish on both gartersnake populations.

*The Decline of Native Fish Communities in Mexico*—The first tabulations of freshwater fish species at risk in Mexico occurred in 1961, when 11 species were identified as being at risk (Contreras-Balderas *et al.* 2003, p. 241). As of 2003, of the 506 species of freshwater fish recorded in Mexico, 185 (37 percent) have been listed by the Mexican Federal Government as either endangered, facing extinction, under special protection, or likely extinct

(Alvarez-Torres *et al.* 2003, p. 323), almost a 17-fold increase in slightly over four decades; 25 species are believed to have gone extinct (Contreras-Balderas *et al.* 2003, p. 241). In the lower elevations of Mexico, within the distribution of the northern Mexican gartersnake, there are approximately 200 species of native freshwater fish documented, with 120 native species under some form of threat and an additional 15 that have gone extinct (Contreras-Balderas and Lozano 1994, pp. 383–384). The Fisheries Law in Mexico empowered the country's National Fisheries Institute to compile and publish the National Fisheries Chart in 2000, which found that Mexico's fish fauna has seriously deteriorated as a result of environmental impacts (pollution), water basin degradation (dewatering, siltation), and the introduction of nonnative species (Alvarez-Torres *et al.* 2003, pp. 320, 323). The National Fisheries Chart is regarded as the first time the Mexican government has openly revealed the status of its freshwater fisheries and described their management policies (Alvarez-Torres *et al.* 2003, pp. 323–324).

Industrial, municipal, and agricultural water pollution, dewatering of aquatic habitat, and the proliferation nonnative species are widely considered to be the greatest threats to freshwater ecosystems in Mexico (Branson *et al.* 1960, p. 218; Conant 1974, pp. 471, 487–489; Miller *et al.* 1989, pp. 25–26, 28–33; 2005, pp. 60–61; DeGregorio 1992, p. 60; Contreras Balderas and Lozano 1994, pp. 379–381; Lyons *et al.* 1995, p. 572; 1998, pp. 10–12; va Landa *et al.* 1997, p. 316; Mercado-Silva *et al.* 2002, p. 180; Contreras-Balderas *et al.* 2003, p. 241; Domínguez-Domínguez *et al.* 2007, Table 3). A shift in land use policies in Mexico to encourage free market principles in rural, small-scale agriculture has been found to promote land use practices that threaten local biodiversity (Ortega-Huerta and Kral 2007, p. 2; Randall 1996, pp. 218–220; Kiernan 2000, pp. 13–23). These threats have been documented throughout the distribution of the northern Mexican gartersnake in Mexico and are best represented in the scientific literature in the context of fisheries studies. Contreras-Balderas *et al.* (2003, pp. 241, 243) named Chihuahua (46 species), Coahuila (35 species), Sonora (19 species), and Durango (18 species) as Mexican states that had some of the most reports of freshwater fish species at risk. These states are all within the distribution of the northern Mexican gartersnake, indicating an overlapping trend of declining prey bases and

threatened ecosystems within the range of the northern Mexican gartersnake in Mexico. Contreras-Balderas *et al.* (2003, Appendix 1) found various threats to be adversely affecting the status of freshwater fish and their habitat in several states in Mexico: (1) Habitat reduction or alteration (Sonora, Chihuahua, Durango, Coahuila, San Luis Potosí, Jalisco, Guanajuato); (2) water depletion (Chihuahua, Durango, Coahuila, Sonora, Guanajuato, Jalisco, San Luis Potosí); (3) harmful nonnative species (Durango, Chihuahua, Coahuila, San Luis Potosí, Sonora, Veracruz); and (4) pollution (México, Jalisco, Chihuahua, Coahuila, Durango). Within the states of Chihuahua, Durango, Coahuila, Sonora, Jalisco, and Guanajuato, water depletion is considered serious, with entire basins having been dewatered, or conditions have been characterized as “highly altered” (Contreras-Balderas *et al.* 2003, Appendix 1). All of the Mexican states with the highest numbers of fish species at risk are considered arid, a condition hastened by increasing desertification (Contreras-Balderas *et al.* 2003, p. 244).

*Aquaculture and Nonnative Fish Proliferation in Mexico*—Nonnative fish compete with and prey upon northern Mexican gartersnakes and their native prey species. The proliferation of nonnative fish species throughout Mexico happened mainly by natural dispersal, intentional stockings, and accidental breaches of artificial or constructed barriers by nonnative fish. Lentic water bodies such as lakes, reservoirs, and ponds are often used for flood control, agricultural purposes, and most commonly to support commercial fisheries. The most recent estimates indicate that Mexico has 13,936 of such water bodies, where approximately 96 percent are between 2.47–247 acres (1–100 hectares) and approximately half are artificial (Sugunan 1997, Table 8.3; Alvarez-Torres *et al.* 2003, pp. 318, 322). Areas where these landscape features are most prevalent occur within the distribution of the northern Mexican gartersnake. For example, Jalisco and Zacatecas are listed as two of four states with the highest number of reservoirs, and Chihuahua is one of two states known for a high concentration of lakes (Sugunan 1997, Section 8.4.2). Based on the data presented in Sugunan (1997, Table 8.5), a total of 422 dammed reservoirs are located within the 16 Mexican states where the northern Mexican gartersnake is thought to occur. Mercado-Silva *et al.* (2006, p. 534) found that within the state of Guanajuato, “Practically all streams and rivers in the [Laja] basin are truncated

by reservoirs or other water extraction and storage structures.” On the Laja River alone, there are two major reservoirs and a water diversion dam; 12 more reservoirs are located on its tributaries (Mercado-Silva *et al.* 2006, p. 534). As a consequence of dam operations, the main channel of the Laja remains dry for extensive periods of time (Mercado-Silva *et al.* 2006, p. 541). The damming and modification of the lower Colorado River in Mexico, where the northern Mexican gartersnake occurred, has facilitated the replacement of the entire native fishery with nonnative species (Miller *et al.* 2005, p. 61). Each reservoir created by a dam is either managed as a nonnative commercial fishery or has become a likely source population of nonnative species, which have naturally or artificially colonized the reservoir, dispersed into connected riverine systems, and damaged native aquatic communities.

Mexico, as with other developing countries, depends in large part on freshwater commercial fisheries as a source of protein for both urbanized and rural human populated areas. Commercial and subsistence fisheries rely heavily on introduced, nonnative species in the largest freshwater lakes (Soto-Galera *et al.* 1999, p. 133) down to rural, small ponds (Tapia and Zambrano 2003, p. 252). At least 87 percent of the species captured or cultivated in inland fisheries of Mexico from 1989–1999 included tilapia, common carp, channel catfish, trout, and black bass (*Micropterus* sp.), all of which are nonnative (Alvarez-Torres *et al.* 2003, pp. 318, 322). In fact, the northern and central plateau region of Mexico (which comprises most of the distribution of the northern Mexican gartersnake’s distribution in Mexico) is considered ideal for the production of harmful, predatory species such as bass and catfish (Sugunan 1997, Section 8.3). Largemouth bass are now produced and stocked in reservoirs and lakes throughout the distribution of the northern Mexican gartersnake (Sugunan 1997, Section 8.8.1). The Secretariat for Environment, Natural Resources and Fisheries, formed in 1995 and known as SEMARNAP, is the Mexican federal agency responsible for management of the country’s environment and natural resources. SEMARNAP dictates the stocking rates of nonnative species into the country’s lakes and reservoirs. For example, the permitted stocking rate for largemouth bass in Mexico is one fish per square meter in large reservoirs (Sugunan 1997, Table 8.8); therefore, a 247-acre (100-ha) reservoir could be

stocked with 1,000,000 largemouth bass. The common carp, the subject of significant aquaculture investment since the 1960s in Mexico, is known for altering aquatic habitat and consuming the eggs and fry of native fish species, and is now established in 95 percent of Mexico’s freshwater systems (Tapia and Zambrano 2003, p. 252).

Basins in northern Mexico, such as the Rio Yaqui, have been found to be significantly compromised by harmful nonnative fish species. Unmack and Fagan (2004, p. 233) compared historical museum collections of nonnative fish species from the Gila River basin in Arizona and the Yaqui River basin in Sonora, Mexico, to gain insight into the trends in distribution, diversity, and abundance of nonnative fishes in each basin over time. They found that nonnative species are slowly, but steadily, increasing in all three parameters in the Yaqui Basin (Unmack and Fagan 2004, p. 233). Unmack and Fagan (2004, p. 233) predicted that, in the absence of aggressive management intervention, significant extirpations or range reductions of native fish species are expected to occur in the Yaqui Basin of Sonora, Mexico, which may have extant populations of the northern Mexican gartersnake, as did much of the Gila Basin before the introduction of nonnative species. Loss of native fishes will impact prey availability for the northern Mexican gartersnake and threaten its persistence in these areas. Black bullheads (*Ameiurus melas*) were reported as abundant, and common carp were detected from the Rio Yaqui in southern Sonora, Mexico (Branson *et al.* 1960, p. 219). Bluegill (*Lepomis macrochirus*) were also reported at this location, representing a significant range expansion that the authors expected was the result of escaping nearby farm ponds or irrigation ditches (Branson *et al.* 1960, p. 220). Largemouth bass, green sunfish, and an undetermined crappie species have also been reported from this area (Branson *et al.* 1960, p. 220). Hendrickson and Varela-Romero (1989, p. 479) conducted fish sampling along the Río Sonoyta of northern Sonora, Mexico, and found over half of the fish collected were nonnative, both predatory species and prey species for the northern Mexican gartersnake.

Domínguez-Domínguez *et al.* (2007, p. 171) sampled 52 localities for a rare freshwater fish, the Picotee goodeid (*Zoogoneticus quitzeoensis*), along the southern portion of the Mesa Central (Mexican Plateau) of Mexico and found 21 localities had significant signs of pollution. Of the 29 localities where the target species was detected, 28 of them also had harmful nonnative species

present, such as largemouth bass, cichlids (*Oreochromis* sp.), bluegill, Pátzcuaro chub (*Algansea lacustris*) (Domínguez-Domínguez *et al.* 2007, pp. 171, Table 3). Other nonnative fish species reported are soft-rayed and small bodied, and may be prey items for younger age classes of northern Mexican gartersnakes. Several examples of significant aquatic habitat degradation or destruction were also observed by Domínguez-Domínguez *et al.* (2007, Table 3) in this region of Mexico, including the draining of natural lakes and cienegas for conversion to agricultural purposes, modification of springs for recreational swimming, diversions, and dam construction. As of 2006, native fish species comprised the most prevalent in species composition and abundance in the Laja Basin; however the basin is trending towards a nonnative fishery based on historical data whereas nonnative species were most recently collected from 16 of 17 sample sites, largemouth bass have significantly expanded their distribution within the headwaters of the basin, and bluegill are now widespread in the Laja River (Mercado-Silva *et al.* 2006, pp. 537, 542, Table 4).

The ecological risk of nonnative, freshwater aquaculture production has only recently been acknowledged by the Mexican government as compared to decades of aquaculture production, mainly because conservation of biodiversity was not valued as highly as the benefits garnered by nonnative fish production, most notably in the country's rural, poorest regions (Tapia and Zambrano 2003, p. 252). In fact, recent amendments to Mexico's fishing regulations allow for relaxation of existing regulations imposed by other government regulations and expansion of opportunities for investment in commercial fishing to promote growth in Mexico's aquaculture sector (Sugunan 1997, Section 8.7.1). Between the broad geographic extent of commercial or sustenance fisheries, the important source of protein they represent, and the many mechanisms introduced nonnative fish have to naturally or artificially expand their distribution, few areas within the range of the northern Mexican gartersnake in Mexico have avoided adverse impacts associated with nonnative species. Harmful nonnative fish species therefore pose a significant threat to the prey base of northern Mexican gartersnakes and to the gartersnakes themselves throughout most of their range in Mexico.

*Amphibian decline*—Matthews *et al.* (2002, p. 16) examined the relationship of gartersnake distributions, amphibian

population declines, and nonnative fish introductions in high-elevation aquatic ecosystems in California. Matthews *et al.* (2002, p. 16) specifically examined the effect of nonnative trout introductions on populations of amphibians and mountain gartersnakes (*Thamnophis elegans elegans*). Their results indicated the probability of observing gartersnakes was 30 times greater in lakes containing amphibians than in lakes where amphibians have been extirpated by nonnative fish. These results supported a prediction by Jennings *et al.* (1992, p. 503) that native amphibian declines will lead directly to gartersnake declines. Matthews *et al.* (2002, p. 20) noted that, in addition to nonnative fish species adversely impacting amphibian populations that are part of the gartersnake's prey base, direct predation on gartersnakes by nonnative fish also occurs. However, Shah *et al.* (2010, pp. 188–190) found that native tadpoles may exhibit anti-predator learning behavior that may assist their persistence in habitat affected by nonnative, spiny-rayed fish.

Declines in the native leopard frog populations in Arizona have contributed to declines in the northern Mexican gartersnake, one of the frog's primary native predators. Native ranid frog species, such as lowland leopard frogs, northern leopard frogs, and federally threatened Chiricahua leopard frogs, have all experienced declines in various degrees throughout their distribution in the Southwest, partially due to predation and competition with nonnative species (Clarkson and Rorabaugh 1989, pp. 531, 535; Hayes and Jennings 1986, p. 490). Rosen *et al.* (1995, pp. 257–258) found that Chiricahua leopard frog distribution in the Chiricahua Mountain region of Arizona was inversely related to nonnative species distribution and, without corrective action, predicted that the Chiricahua leopard frog may be difficult to conserve in this region. Along the Mogollon Rim, Holycross *et al.* (2006, p. 13) found that only 8 sites of 57 surveyed (15 percent) consisted of an entirely native anuran community, and that native frog populations in another 19 sites (33 percent) had been completely displaced by invading bullfrogs. However, such declines in native frog populations are not necessarily irreversible. Ranid frog populations have been shown to rebound strongly when nonnative fish are removed (Knapp *et al.* 2007, pp. 15–18).

Scotia Canyon, in the Huachuca Mountains of southeastern Arizona, is a location where corresponding declines of leopard frog and northern Mexican

gartersnake populations have been documented through repeated survey efforts over time (Holm and Lowe 1995, p. 33). Surveys of Scotia Canyon occurred during the early 1980s, and again during the early 1990s. Leopard frogs in Scotia Canyon were infrequently observed during the early 1980s, and were apparently extirpated by the early 1990s (Holm and Lowe 1995, pp. 45–46). Northern Mexican gartersnakes were observed in decline during the early 1980s, with low capture rates continuing through the early 1990s (Holm and Lowe 1995, pp. 27–35). Surveys documented further decline of leopard frogs and northern Mexican gartersnakes in 2000 (Rosen *et al.* 2001, pp. 15–16).

A former large, local population of northern Mexican gartersnakes at the San Bernardino National Wildlife Refuge (SBNWR) in southeastern Arizona has also experienced a correlative decline of leopard frogs, and northern Mexican gartersnakes are now thought to occur at very low-population densities or may be extirpated there (Rosen and Schwalbe 1988, p. 28; 1995, p. 452; 1996, pp. 1–3; 1997, p. 1; 2002b, pp. 223–227; 2002c, pp. 31, 70; Rosen *et al.* 1996b, pp. 8–9; 2001, pp. 6–10).

Survey data indicate that declines of leopard frog populations, often correlated with nonnative species introductions, the spread of a chytrid fungus (*Batrachochytrium dendrobatidis*, Bd), and habitat modification and destruction, have occurred throughout much of the northern Mexican gartersnake's U.S. distribution (Nickerson and Mays 1970, p. 495; Vitt and Ohmart 1978, p. 44; Ohmart *et al.* 1988, p. 150; Rosen and Schwalbe 1988, Appendix I; 1995, p. 452; 1996, pp. 1–3; 1997, p. 1; 2002b, pp. 232–238; 2002c, pp. 1, 31; Clarkson and Rorabaugh 1989, pp. 531–538; Sredl *et al.* 1995a, pp. 7–8; 1995b, pp. 8–9, 1995c, pp. 7–8; 2000, p. 10; Holm and Lowe 1995, pp. 45–46; Rosen *et al.* 1996b, p. 2; 2001, pp. 2, 22; Degenhardt *et al.* 1996, p. 319; Fernandez and Rosen 1996, pp. 6–20; Drost and Nowak 1997, p. 11; Turner *et al.* 1999, p. 11; Nowak and Spille 2001, p. 32; Holycross *et al.* 2006, pp. 13–14, 52–61). Specifically, Holycross *et al.* (2006, pp. 53–57, 59) documented potential extirpations of the northern Mexican gartersnake's native leopard frog prey base at several currently, historically, or potentially occupied locations, including the Agua Fria River in the vicinity of Table Mesa Road and Little Grand Canyon Ranch, and at Rock Springs, Dry Creek from Dugas Road to Little Ash Creek, Little Ash Creek from Brown Spring to Dry Creek, Sycamore Creek (Agua Fria

subbasin) in the vicinity of the Forest Service Cabin, the Page Springs and Bubbling Ponds fish hatchery along Oak Creek, Sycamore Creek (Verde River subbasin) in the vicinity of the confluence with the Verde River north of Clarkdale, along several reaches of the Verde River mainstem, Cherry Creek on the east side of the Sierra Ancha Mountains, and Tonto Creek from Gisela to "the Box," near its confluence with Rye Creek.

Rosen *et al.* (2001, p. 22) identified the expansion of bullfrogs into the Sonora grasslands, which contain occupied northern Mexican gartersnake habitat, and the introduction of crayfish into Lewis Springs, as being of particular concern in terms of future recovery efforts for the northern Mexican gartersnake. Rosen *et al.* (1995, pp. 252–253) sampled aquatic herpetofauna at 103 sites in the Chiricahua Mountains region, which included the Chiricahua, Dagoon, and Peloncillo mountains, and the Sulphur Springs, San Bernardino, and San Simon valleys. They found that 43 percent of all cold-blooded aquatic and semi-aquatic vertebrate species detected were nonnative. The most commonly encountered nonnative species was the bullfrog (Rosen *et al.* 1995, p. 254). Witte *et al.* (2008, p. 1) found that the disappearance of ranid frog populations in Arizona were 2.6 times more likely in the presence of crayfish. Witte *et al.* (2008, p. 7) emphasized the significant influence of nonnative species on the disappearance of ranid frogs in Arizona.

In addition to harmful nonnative species, disease and nonnative parasites have been implicated in the decline of the prey base of the northern Mexican gartersnake. In particular, the outbreak of chytridiomycosis or "Bd," a skin fungus, has been identified as a chief causative agent in the significant declines of many of the native ranid frogs and other amphibian species. In addition, regional concerns exist for the native fish community due to nonnative parasites, such as the Asian tapeworm (*Bothriocephalus acheilognathi*) in southeastern Arizona (Rosen and Schwalbe 1997, pp. 14–15; 2002c, pp. 1–19; Morell 1999, pp. 728–732; Sredl and Caldwell 2000, p. 1; Hale 2001, pp. 32–37; Bradley *et al.* 2002, p. 206). As indicated, Bd has been implicated in both large-scale declines and local extirpations of many amphibians, chiefly anuran species, around the world (Johnson 2006, p. 3011). Lips *et al.* (2006, pp. 3166–3169) suggest that the high virulence and large number of potential hosts make Bd a serious threat to amphibian diversity. In Arizona, Bd infections have been reported in several

of the native prey species of the northern Mexican gartersnake within the distribution of the snake (Morell 1999, pp. 731–732; Sredl and Caldwell 2000, p. 1; Hale 2001, pp. 32–37; Bradley *et al.* 2002, p. 207; USFWS 2002, pp. 40802–40804; USFWS 2007, pp. 26, 29–32). Declines of native prey species of the northern Mexican gartersnake from Bd infections have contributed to the decline of this species in the United States (Morell 1999, pp. 731–732; Sredl and Caldwell 2000, p. 1; Hale 2001, pp. 32–37; Bradley *et al.* 2002, p. 207; USFWS 2002, pp. 40802–40804; USFWS 2007, pp. 26, 29–32). Evidence of Bd-related amphibian declines has been confirmed in portions of southern Mexico (just outside the range of northern Mexican gartersnakes), and data suggest declines are more prevalent at higher elevations (Lips *et al.* 2004, pp. 560–562). However, much less is known about the role of Bd in amphibian declines across much of Mexico, in particular the mountainous regions of Mexico (including much of the range of northern Mexican gartersnakes in Mexico) as the region is significantly understudied (Young *et al.* 2000, p. 1218). Because narrow-headed gartersnakes feed on fish, Bd has not affected their prey base. Also, research shows that the fungus *Batrachochytrium* can grow on boiled snakeskin (keratin) in the laboratory (Longcore *et al.* 1999, p. 227), indicating the potential for disease outbreaks in wild snake populations if conditions are favorable; however no observations have been made in the field, and we found no other data that propose a direct linkage between Bd and snake mortality.

#### The Effects of Bullfrogs on Native Aquatic Communities

Bullfrogs are generally considered one of the most serious threats to northern Mexican gartersnakes throughout their range (Conant 1974, pp. 471, 487–489; Rosen and Schwalbe 1988, pp. 28–30; Rosen *et al.* 2001, pp. 21–22). Bullfrogs have and do threaten some populations of narrow-headed gartersnakes, but differing habitat preferences between the two temper their effect on narrow-headed gartersnakes. Bullfrogs adversely affect northern Mexican and narrow-headed gartersnakes through direct predation of juveniles and sub-adults. Bullfrogs also compete with northern Mexican gartersnakes. Bullfrogs are not native to the southwestern United States or Mexico, and first appeared in Arizona in 1926, as a result of a systematic introduction effort by the State Game Department (now, the AGFD) for the purposes of sport hunting and as a food

source (Tellman 2002, p. 43). We are not certain when bullfrogs were first reported from New Mexico but presume it was many decades ago. Bullfrogs are extremely prolific, are strong colonizers, and may disperse distances of up to 10 mi (16 km) across uplands, and likely further within drainages (Bautista 2002, p. 131; Rosen and Schwalbe 2002a, p. 7; Casper and Hendricks 2005, p. 582; Suhre 2008, pers. comm.).

Bullfrogs are large-bodied, voracious, opportunistic, even cannibalistic predators that readily attempt to consume any living thing smaller than them. Bullfrogs have a highly varied diet, which has been documented to include vegetation, invertebrates, fish, birds, mammals, amphibians, and reptiles, including numerous species of snakes (eight genera, including six different species of gartersnakes, two species of rattlesnakes, and Sonoran gophersnakes (*Pituophis catenifer affinis*)) (Bury and Whelan 1984, p. 5; Clarkson and DeVos 1986, p. 45; Holm and Lowe 1995, pp. 37–38; Carpenter *et al.* 2002, p. 130; King *et al.* 2002; Hovey and Bergen 2003, pp. 360–361; Casper and Hendricks 2005, pp. 543–544; Combs *et al.* 2005, p. 439; Wilcox 2005, p. 306; DaSilva *et al.* 2007, p. 443; Neils and Bugbee 2007, p. 443; Rowe and Garcia 2012, pp. 633–634). In one study, three different species of gartersnakes (*Thamnophis sirtalis*, *T. elegans*, and *T. ordinoides*) totaling 11 snakes were found inside the stomachs of resident bullfrogs from a single region (Jancowski and Orchard 2013, p. 26). Bullfrogs can significantly reduce or eliminate the native amphibian populations (Moyle 1973, pp. 18–22; Conant 1974, pp. 471, 487–489; Hayes and Jennings 1986, pp. 491–492; Rosen and Schwalbe 1988, pp. 28–30; 2002b, pp. 232–238; Rosen *et al.* 1995, pp. 257–258; 2001, pp. 2, Appendix I; Wu *et al.* 2005, p. 668; Pearl *et al.* 2004, p. 18; Kupferberg 1994, p. 95; Kupferburg 1997, pp. 1736–1751; Lawler *et al.* 1999; Bury and Whelan 1986, pp. 9–10; Hayes and Jennings 1986, pp. 500–501; Jones and Timmons 2010, pp. 473–474), which are vital for northern Mexican gartersnakes. Different age classes of bullfrogs within a community can affect native ranid populations via different mechanisms. Juvenile bullfrogs affect native ranids through competition, male bullfrogs affect native ranids through predation, and female bullfrogs affect native ranids through both mechanisms depending on body size and microhabitat (Wu *et al.* 2005, p. 668). Pearl *et al.* (2004, p. 18) also suggested that the effect of bullfrog introductions on native ranids may be different based

on specific habitat conditions, but also suggested that an individual ranid frog species' physical ability to escape influences the effect of bullfrogs on each native ranid community.

Bullfrogs have been documented throughout the State of Arizona. Holycross *et al.* (2006, pp. 13–14, 52–61) found bullfrogs at 55 percent of sample sites in the Agua Fria subbasin, 62 percent of sites in the Verde River subbasin, 25 percent of sites in the Salt River subbasin, and 22 percent of sites in the Gila River subbasin. In total, bullfrogs were observed at 22 of the 57 sites surveyed (39 percent) across the Mogollon Rim (Holycross *et al.* 2006, p. 13). A number of authors have also documented the presence of bullfrogs through their survey efforts throughout many subbasins in Arizona and New Mexico adjacent to the historical distribution of the northern Mexican or narrow-headed gartersnake, including northern Arizona (Sredl *et al.* 1995a, p. 7; 1995c, p. 7), central Arizona and along the Mogollon Rim of Arizona and New Mexico (Nickerson and Mays 1970, p. 495; Hulse 1973, p. 278; Sredl *et al.* 1995b, p. 9; Drost and Nowak 1997, p. 11; Nowak and Spille 2001, p. 11; Holycross *et al.* 2006, pp. 15–51; Wallace *et al.* 2008; pp. 243–244; Helleckson 2012a, pers. comm.), southern Arizona (Rosen and Schwalbe 1988, Appendix I; 1995, p. 452; 1996, pp. 1–3; 1997, p. 1; 2002b, pp. 223–227; 2002c, pp. 31, 70; Holm and Lowe 1995, pp. 27–35; Rosen *et al.* 1995, p. 254; 1996a, pp. 16–17; 1996b, pp. 8–9; 2001, Appendix I; Turner *et al.* 1999, p. 11; Sredl *et al.* 2000, p. 10; Turner 2007; p. 41), and along the Colorado River (Vitt and Ohmart 1978, p. 44; Clarkson and DeVos 1986, pp. 42–49; Ohmart *et al.* 1988, p. 143). In one of the more conspicuous examples, bullfrogs were identified as the primary cause for collapse of both the northern Mexican gartersnake and its prey base on the SBNWR (Rosen and Schwalbe 1988, p. 28; 1995, p. 452; 1996, pp. 1–3; 1997, p. 1; 2002b, pp. 223–227; 2002c, pp. 31, 70; Rosen *et al.* 1996b, pp. 8–9).

Perhaps one of the most serious consequences of bullfrog introductions is their persistence in an area once they have become established, and the subsequent difficulty in eliminating bullfrog populations. Rosen and Schwalbe (1995, p. 452) experimented with bullfrog removal at various sites on the SBNWR, in addition to a control site with no bullfrog removal in similar habitat on the Buenos Aires National Wildlife Refuge (BANWR). Removal of adult bullfrogs, without removal of eggs and tadpoles, resulted in a substantial increase in younger age-class bullfrogs

where removal efforts were the most intensive (Rosen and Schwalbe 1997, p. 6). Contradictory to the goals of bullfrog eradication, evidence from dissection samples from young adult and sub-adult bullfrogs indicated these age-classes readily prey upon juvenile bullfrogs (up to the average adult leopard frog size) as well as juvenile gartersnakes, which suggests that the selective removal of only the large adult bullfrogs (presumed to be the most dangerous size class to leopard frogs and gartersnakes), favoring the young adult and sub-adult age classes, could indirectly lead to increased predation of leopard frogs and juvenile gartersnakes (Rosen and Schwalbe 1997, p. 6). These findings illustrate that in addition to large adults, subadult bullfrogs also negatively impact northern Mexican gartersnakes and their prey species. It also indicates the importance of including egg mass and tadpole removal during efforts to control bullfrogs and timing removal projects to ensure reproductive bullfrogs are removed prior to breeding. Some success in regional bullfrog eradication has been had in a few cases described below in the section entitled “*Current Conservation of Northern Mexican and Narrow-headed Gartersnakes.*”

Bullfrogs not only compete with the northern Mexican gartersnake for prey items but directly prey upon juvenile and occasionally sub-adult northern Mexican and narrow-headed gartersnakes (Rosen and Schwalbe 1988, pp. 28–31; 1995, p. 452; 2002b, pp. 223–227; Holm and Lowe 1995, pp. 29–29; Rossman *et al.* 1996, p. 177; AGFD *In Prep.*, p. 12; 2001, p. 3; Rosen *et al.* 2001, pp. 10, 21–22; Carpenter *et al.* 2002, p. 130; Wallace 2002, p. 116). A well-circulated photograph of an adult bullfrog in the process of consuming a northern Mexican gartersnake at Parker Canyon Lake, Cochise County, Arizona, taken by John Carr of the Arizona Game and Fish Department in 1964, provides photographic documentation of bullfrog predation (Rosen and Schwalbe 1988, p. 29; 1995, p. 452). The most recent, physical evidence of bullfrog predation of northern Mexican gartersnakes is provided in photographs of a dissected bullfrog at Pasture 9 Tank in the San Rafael Valley of Arizona that had a freshly-eaten neonatal northern Mexican gartersnake in its stomach (Akins 2012, pers. comm.).

A common observation in northern Mexican gartersnake populations that co-occur with bullfrogs is a preponderance of large, mature adult snakes with conspicuously low numbers of individuals in the newborn and juvenile age size classes due to bullfrogs more effectively preying on young small

snakes, which ultimately leads to low reproductive rates and survival of young (Rosen and Schwalbe 1988, p. 18; Holm and Lowe 1995, p. 34). In lotic (flowing water) systems, bullfrogs prefer sites with low or limited flow, such as backwaters, side channels, and pool habitat. These areas are also used frequently by northern Mexican and narrow-headed gartersnakes, which likely results in increased predation rates and likely depressed recruitment of gartersnakes. Potential recruitment problems for northern Mexican gartersnakes due to effects from nonnative species are suspected at Tonto Creek (Wallace *et al.* 2008, pp. 243–244). Rosen and Schwalbe (1988, p. 18) stated that the low recruitment at the SBNWR, a typical characteristic of gartersnake populations affected by harmful nonnative species, is the likely cause of that populations' decline and possibly for declines in populations throughout their range in Arizona. Specific localities within the distribution of northern Mexican and narrow-headed gartersnakes where bullfrogs have been detected are presented in Appendix A (available at <http://www.regulations.gov> under Docket No. FWS–R2–ES–2013–0071).

#### The Effects of Crayfish on Native Aquatic Communities

Crayfish are a nonnative species in Arizona and New Mexico and are a primary threat to many prey species of northern Mexican and narrow-headed gartersnakes, and may also prey upon juvenile gartersnakes themselves (Fernandez and Rosen 1996, p. 25; Voeltz 2002, pp. 87–88; USFWS 2007, p. 22). Fernandez and Rosen (1996, p. 3) studied the effects of crayfish introductions on two stream communities in Arizona, a low-elevation semi-desert stream and a high mountain stream, and concluded that crayfish can noticeably reduce species diversity and destabilize food chains in riparian and aquatic ecosystems through their effect on vegetative structure, stream substrate (stream bottom; *i.e.*, silt, sand, cobble, boulder) composition, and predation on eggs, larval, and adult forms of native invertebrate and vertebrate species. Crayfish fed on embryos, tadpoles, newly metamorphosed frogs, and adult leopard frogs, but they did not feed on egg masses (Fernandez and Rosen 1996, p. 25). However, Gamradt and Kats (1996, p. 1155) found that crayfish readily consumed the egg masses of California newts (*Taricha torosa*). Crayfish are known to also eat fish eggs and larva (Inman *et al.* 1998, p. 17), especially those bound to the substrate (Dorn and

Mittlebach 2004, p. 2135). Fernandez and Rosen (1996, pp. 6–19, 52–56) and Rosen (1987, p. 5) discussed observations of inverse relationships between crayfish abundance and native reptile and amphibian populations, including narrow-headed gartersnakes, northern leopard frogs, and Chiricahua leopard frogs. Crayfish may also affect native fish populations. Carpenter (2005, pp. 338–340) documented that crayfish may reduce the growth rates of native fish through competition for food and noted that the significance of this impact may vary between species.

Crayfish alter the abundance and structure of aquatic vegetation by grazing on aquatic and semiaquatic vegetation, which reduces the cover needed by frogs and gartersnakes, as well as the food supply for prey species such as tadpoles (Fernandez and Rosen 1996, pp. 10–12). Fernandez and Rosen (1996, pp. 10–12) found that crayfish frequently burrow into stream banks, leading to increased bank erosion, stream turbidity, and siltation of stream bottoms. Creed (1994, p. 2098) found that filamentous alga (*Cladophora glomerata*) was at least 10-fold greater in aquatic habitats that lacked crayfish. Filamentous alga is an important component of aquatic vegetation that provides cover for foraging gartersnakes, as well as microhabitat for prey species.

Crayfish have recently been found to also act as a host for the amphibian disease-causing fungus, Bd (McMahon *et al.* (2013, pp. 210–213). This could have serious implications for northern Mexican gartersnakes because crayfish can now be considered a source of disease in habitat that is devoid of amphibians but otherwise potentially suitable habitat for immigrating amphibians, such as leopard frogs, which could serve as a prey base. Because crayfish are so widespread throughout Arizona, New Mexico, and portions of Mexico, this could have broad, negative implications for the recovery of native leopard frogs, and therefore the recovery of northern Mexican gartersnakes.

Inman *et al.* (1998, p. 3) documented crayfish as widely distributed and locally abundant in a broad array of natural and artificial free-flowing and still-water habitats throughout Arizona, many of which overlap the historical and current distribution of northern Mexican and narrow-headed gartersnakes. Hyatt (undated, p. 71) concluded that the majority of waters in Arizona contained at least one species of crayfish. In surveying for northern Mexican and narrow-headed gartersnakes, Holycross *et al.* (2006, p. 14) found crayfish in 64 percent of the

sample sites in the Agua Fria subbasin; in 85 percent of the sites in the Verde River subbasin; in 46 percent of the sites in the Salt River subbasin; and in 67 percent of the sites in the Gila River subbasin. In total, crayfish were observed at 35 (61 percent) of the 57 sites surveyed across the Mogollon Rim (Holycross *et al.* 2006, p. 14), most of which were sites historically or currently occupied by northern Mexican or narrow-headed gartersnakes, or sites the investigators believed possessed suitable habitat and may be occupied by these gartersnakes based upon the their known historical distributions.

A number of authors have documented the presence of crayfish through their survey efforts throughout Arizona and New Mexico in specific regional areas, drainages, and lentic wetlands within or adjacent to the historical distribution of the northern Mexican or narrow-headed gartersnake, including northern Arizona (Sredl *et al.* 1995a, p. 7; 1995c, p. 7), central Arizona and along the Mogollon Rim of Arizona and New Mexico (Sredl *et al.* 1995b, p. 9; Fernandez and Rosen 1996, pp. 54–55, 71; Inman *et al.* 1998, Appendix B; Nowak and Spille 2001, p. 33; Holycross *et al.* 2006, pp. 15–51; Brennan 2007, p. 7; Burger 2008, p. 4; Wallace *et al.* 2008; pp. 243–244; Brennan and Rosen 2009, p. 9; Karam *et al.* 2009; pp. 2–3; Helleckson 2012a, pers. comm.), southern Arizona (Rosen and Schwalbe 1988, Appendix I; Inman *et al.* 1998, Appendix B; Sredl *et al.* 2000, p. 10; Rosen *et al.* 2001, Appendix I), and along the Colorado River (Ohmart *et al.* 1988, p. 150; Inman *et al.* 1998, Appendix B). Specific localities within the distribution of northern Mexican and narrow-headed gartersnakes where crayfish have been detected are presented in Appendix A (available at <http://www.regulations.gov> under Docket No. FWS–R2–ES–2013–0071).

Like bullfrogs, crayfish can be very difficult, if not impossible, to eradicate once they have become established in an area, depending on the complexity of the habitat (Rosen and Schwalbe 1996a, pp. 5–8; 2002a, p. 7; Hyatt undated, pp. 63–71). The use of biological control agents such as bacteria, nematodes, and viruses were explored in addressing the invasion and persistence of crayfish in the southwestern United States, using the organisms' cannibalistic nature as a vector (Davidson *et al.* 2010, pp. 297–310). The use of biological control agents tested found them to be ineffective or infeasible in controlling crayfish, but a number of other biological pathogens have been described in freshwater crayfish that may lend promise to finding an

appropriate control agent in the future (Davidson *et al.* 2010, pp. 307–308). In addition, recent experimentation with ammonia as a piscicide indirectly found that crayfish were also effectively eradicated in field trials; the first successful and most promising control method for this harmful nonnative species in recent times (Ward *et al.* 2013, pp. 402–404). However, it could be potentially several years before ammonia is licensed for such use, if ever.

#### The Effects of Predation-Related Injuries to Gartersnakes

The tails of gartersnakes are often broken off during predation attempts by bullfrogs or crayfish and do not regenerate. The incidence of tail breaks in gartersnakes can often be used to assess predation pressure within gartersnake populations. Attempted predation occurs on both sexes and all ages of gartersnakes within a population, although some general trends have been detected. For example, female gartersnakes may be more susceptible to predation as evidenced by the incidence of tail damage (Willis *et al.* 1982, pp. 100–101; Rosen and Schwalbe 1988, p. 22; Mushinsky and Miller 1993, pp. 662–664; Fitch 2003, p. 212). This can be explained by higher basking rates associated with pregnant females that increase their visibility to predators. Fitch (2003, p. 212) found that tail injuries in the common gartersnake occurred more frequently in adults than in juveniles. Predation on juvenile snakes likely results in complete consumption of the animal, which would limit observations of tail injury in their age class.

Tail injuries can have negative effects on the health, longevity, and overall success of individual gartersnakes from infection, slower swimming and crawling speeds, or impeding reproduction. Mushinsky and Miller (1993, pp. 662–664) commented that, while tail breakage in gartersnakes can save the life of an individual snake, it also leads to permanent handicapping of the snake, resulting in slower swimming and crawling speeds, which could leave the snake more vulnerable to predation or affect its foraging ability. Willis *et al.* (1982, p. 98) discussed the incidence of tail injury in three species in the genus *Thamnophis* (common gartersnake, Butler's gartersnake (*T. butleri*), and the eastern ribbon snake (*T. sauritus*)) and concluded that individuals that suffered nonfatal injuries prior to reaching a length of 12 in (30 cm) are not likely to survive and that physiological stress during post-injury hibernation may play an important role in subsequent

mortality. While northern Mexican or narrow-headed gartersnakes may survive an individual predation attempt from a bullfrog or crayfish with tail damage, secondary effects from infection of the wound may significantly contribute to mortality of individuals. Perry-Richardson *et al.* (1990, p. 77) described the importance of tail-tip alignment in the successful courtship and mating in *Thamnophis* snakes and found that missing or shortened tails adversely affected these activities and, therefore, mating success. In researching the role of tail length in mating success in the red-sided gartersnake (*Thamnophis sirtalis parietalis*), Shine *et al.* (1999, p. 2150) found that males that experienced injuries or the partial or whole loss of the tail experienced a three-fold decrease in mating success.

The frequency of tail injuries can be quite high in a given gartersnake population; for example at the SBNWR (Rosen and Schwalbe 1988, pp. 28–31), 78 percent of northern Mexican gartersnakes had broken tails with a “soft and club-like” terminus, which suggests repeated injury from multiple predation attempts by bullfrogs. While medically examining pregnant female northern Mexican gartersnakes, Rosen and Schwalbe (1988, p. 28) noted bleeding from the posterior region, which suggested to the investigators the snakes suffered from “squeeze-type” injuries inflicted by adult bullfrogs. In another example, Holm and Lowe (1995, pp. 33–34) observed tail injuries in 89 percent of northern Mexican gartersnakes during the early 1990s in Scotia Canyon in the Huachuca Mountains, as well as a skewed age class ratio that favored adults over subadults, which is consistent with data collected by Willis *et al.* (1982, pp. 100–101) on other gartersnake species. Bullfrogs are largely thought to be responsible for the significant decline of northern Mexican gartersnake and its prey base at this locality, although the latter has improved through recovery actions. In the Black River, crayfish are very abundant and have been identified as the likely cause for a high-frequency of tail injuries to narrow-headed gartersnakes (Brennan 2007, p. 7; Brennan and Rosen 2009, p. 9). Brennan (2007, p. 5) found that in the Black River, 14 of 15 narrow-headed gartersnakes captured showed evidence of damaged or missing tails (Brennan 2007, p. 5). In 2009, 16 of 19 narrow-headed gartersnakes captured in the Black River showed evidence of damaged or missing tails (Brennan and Rosen 2009, p. 8). In the upper Verde

River region, Emmons and Nowak (2013, p. 5) reported that 18 of 49 (37 percent) northern Mexican gartersnakes captured had scars (n = 17) and/or missing tails tips (n = 7).

Vegetation or other forms of protective cover may be particularly important for gartersnakes to reduce the effects of harmful nonnative species on populations. For example, the population of northern Mexican gartersnakes at the Page Springs and Bubbling Ponds State Fish Hatcheries occurs with harmful nonnative species (Boyarski 2008b, pp. 3–4, 8). Yet, only 11 percent of northern Mexican gartersnakes captured in 2007 were observed as having some level of tail damage (Boyarski 2008b, pp. 5, 8). The relatively low occurrence of tail damage, as compared to 78 percent of snakes with tail damage found by Rosen and Schwalbe (1988, pp. 28–31), may indicate: (1) Adequate vegetation density was used by gartersnakes to avoid harmful nonnative species predation attempts; (2) a relatively small population of harmful nonnative species may be at a comparatively lower density than sites sampled by previous studies (harmful nonnative species population density data were not collected by Boyarski (2008b)); (3) gartersnakes may not have needed to move significant distances at this locality to achieve foraging success, which might reduce the potential for encounters with harmful nonnative species; or (4) gartersnakes infrequently escaped predation attempts by harmful nonnative species, were removed from the population, and were consequently not detected by surveys.

#### The Expansion of the American Bullfrog and Crayfish in Mexico

Bullfrogs have recently been documented as a significant threat to native aquatic and riparian species throughout Mexico. Luja and Rodríguez-Estrella (2008, pp. 17–22) examined the invasion of the bullfrog in Mexico. The earliest records of bullfrogs in Mexico were Nuevo Leon (1853), Tamaulipas (1898), Morelos (1968), and Sinaloa (1969) (Luja and Rodríguez-Estrella 2008, p. 20). By 1976, the bullfrog was documented in seven more states: Aguascalientes, Baja California Sur, Chihuahua, Distrito Federal, Puebla, San Luis Potosi, and Sonora (Luja and Rodríguez-Estrella 2008, p. 20). The bullfrog was recently verified from the state of Hidalgo, Mexico, at an elevation of 8,970 feet (2,734 m), which indicates the species continues to spread in that country and can exist even at the uppermost elevations inhabited by northern Mexican gartersnakes

(Duifhuis Rivera *et al.* 2008, p. 479). As of 2008, Luja and Rodríguez-Estrella (2008, p. 20) have recorded bullfrogs in 20 of the 31 Mexican States (65 percent of the states in Mexico) and suspect that they have invaded other States, but were unable to find documentation.

Sponsored by the then Mexican Secretary of Aquaculture Support, bullfrogs have been commercially produced for food in Mexico in Yucatan, Nayarit, Morelos, Estado de Mexico, Michoacán, Guadalajara, San Luis Potosi, Tamaulipas, and Sonora (Luja and Rodríguez-Estrella 2008, p. 20). However, frog legs ultimately never gained popularity in Mexican culinary culture (Conant 1974, pp. 487–489), and Luja and Rodríguez-Estrella (2008, p. 22) point out that only 10 percent of these farms remain in production. Luja and Rodríguez-Estrella (2008, pp. 20, 22) document instances where bullfrogs have escaped production farms and suspect the majority of the frogs that were produced commercially in farms that have since ceased operation have assimilated into surrounding habitat.

Luja and Rodríguez-Estrella (2008, p. 20) also state that Mexican people deliberately introduce bullfrogs for ornamental purposes, or “for the simple pleasure of having them in ponds.” The act of deliberately releasing bullfrogs into the wild in Mexico was cited by Luja and Rodríguez-Estrella (2008, p. 21) as being “more common than we can imagine.” Bullfrogs are available for purchase at some Mexican pet stores (Luja and Rodríguez-Estrella 2008, p. 22). Luja and Rodríguez-Estrella (2008, p. 21) state that bullfrog eradication efforts in Mexico are often thwarted by their popularity in rural communities (presumably as a food source). Currently, no regulation exists in Mexico to address the threat of bullfrog invasions or prevent their release into the wild (Luja and Rodríguez-Estrella 2008, p. 22).

Rosen and Melendez (2006, p. 54) report bullfrog invasions to be prevalent in northwestern Chihuahua and northwestern Sonora, where the northern Mexican gartersnake is thought to occur. In many areas, native leopard frogs were completely displaced where bullfrogs were observed. Rosen and Melendez (2006, p. 54) also demonstrated the relationship between fish and amphibian communities in Sonora and western Chihuahua. Native leopard frogs, a primary prey item for the northern Mexican gartersnake, only occurred in the absence of nonnative fish, and were absent from waters containing nonnative species, which included several major waters. In Sonora, Rorabaugh (2008a, p. 25) also

considers the bullfrog to be a significant threat to the northern Mexican gartersnake and its prey base, substantiated by field observations made during surveys conducted in Chihuahua and Sonora in 2006 (Rorabaugh 2008b, p. 1).

Few data were found on the presence or distribution of nonnative crayfish species in Mexico. However, in a 2-week gartersnake survey effort in 2006 in northern Mexico, crayfish were observed as “widely distributed” in the valleys of western Chihuahua (Rorabaugh 2008b, p. 1). Based on the invasive nature of crayfish ecology and their distribution in the United States along the Border region, it is reasonable to assume that, at a minimum, crayfish are likely distributed along the entire Border region of northern Mexico, adjacent to where they occur in the United States.

#### Risks to Gartersnakes From Fisheries Management Activities

The decline in native fish communities from the effects of harmful nonnative fish species has spurred resource managers to take action to help recover native fish species. While we fully support activities designed to help recover native fish, recovery actions for native fish, in the absence of thorough planning, can have significant adverse effects on resident gartersnake populations.

**Piscicides**—Piscicide is a term that refers to a “fish poison.” The use of piscicides, such as rotenone or antimycin A, for the removal of harmful nonnative fish species has widely been considered invaluable for the conservation and recovery of imperiled native fish species throughout the United States, and in particular the Gila River basin of Arizona and New Mexico (Dawson and Kolar 2003, entire). Antimycin A is rarely used anymore, and has been largely replaced by rotenone in field applications. Experimentation with ammonia as a piscicide has shown promising results and may ultimately replace rotenone in the future as a desired control method if legally registered for such use (Ward *et al.* 2013, pp. 402–404). Currently, rotenone is the most commonly used piscicide. The active ingredient in rotenone is a natural chemical compound extracted from the stems and roots of tropical plants in the family Leguminosae that interrupts oxygen absorption in gill-breathing animals (Fontenot *et al.* 1994, pp. 150–151). In the greater Gila River subbasin alone, 57 streams or water bodies have been treated with piscicide, some on several occasions spanning many years

(Carpenter and Terrell 2005; Table 6). However, this practice has been the source of recent controversy due to a perceived link between rotenone and Parkinson’s disease in humans, as well as potential effects to livestock. Speculation of the potential role of rotenone in Parkinson’s disease was fueled by Tanner *et al.* (2011, entire) which correlated the incidence of the disease with lifetime exposure to certain pesticides, including rotenone. As a result, in 2012, the Arizona State Legislature proposed two bills that called for the development of an environmental impact statement prior to the application of rotenone or antimycin A (S.B. 1453, see State of Arizona Senate (2012b)) and urged the U.S. Environmental Protection Agency to deregister rotenone from use in the United States (S.B. 1009, see State of Arizona Senate (2012b)). Public safety considerations were fully evaluated by a multi-disciplined technical team of specialists that found no correlation between rotenone applications performed, according to product label instructions, and Parkinson’s disease (Rotenone Review Advisory Committee 2012, pp. 24–25). Nonetheless, continued anxiety regarding the use of piscicides for conservation and management of fish communities leaves an uncertain future for this invaluable management tool. Should circumstances result in the discontinued practice of using piscicides for fish recovery and management, the likelihood of recovery for listed or sensitive aquatic vertebrates in Arizona, such as northern Mexican and narrow-headed gartersnakes, would be substantially reduced, if not eliminated outright.

We are supportive of the use of piscicides and consider the practice a vital and scientifically sound tool, the only tool in most circumstances, for reestablishing native fish communities and removing threats related to nonnative aquatic species in occupied northern Mexican and narrow-headed gartersnake habitat. However, it is equally important that effects of such treatments to these gartersnakes be evaluated during the project planning phase, specifically the amount of time a treated water body remains fishless post-treatment. The time period between rotenone applications and the subsequent restocking of native fish is contingent on two basic variables, the time it takes for piscicide levels to reach nontoxic levels and the level of certainty required to ensure that renovation goals and objectives have been met prior to restocking. Implementation of the latter

consideration may vary from weeks, to months, to a year or longer, depending on the level of certainty required by project proponents. Carpenter and Terrell (2005, p. 14) reported that standard protocols, used by the Arizona Game and Fish Department for Apache trout renovations, required two applications of piscicide before repatriating native fish to a stream, waiting a season to see if the renovation was successful, and then continuing to renovate if necessary. Another recommendation of past protocols included a goal for the renovated water body to remain fishless an entire year before restocking (Carpenter and Terrell 2005, p. 14). At a minimum and according to our files, reaches of Big Bonito Creek, the West Fork Black River, West Fork Gila River, Iron Creek, Little Creek, Black Canyon, and O’Donnell Creek have all been subject to fish renovations using these or similarly accepted protocols (Carpenter and Terrell 2005; Table 6; Paroz and Probst 2009, p. 4; Hellekson 2012a, pers. comm.). Therefore, northern Mexican or narrow-headed gartersnake populations in these streams have likely been adversely affected, due to the eradication of a portion of, or their entire, prey base in these systems for varying periods of time. Big Bonito Creek was restocked with salvaged native fish shortly after renovation occurred. However, we are uncertain how long other stream reaches remained fishless post-treatment, but presume a minimum of weeks in each instance, and possibly a year or longer in some instances.

Future planning in fisheries management has identified several streams within the distribution of narrow-headed gartersnakes in New Mexico for potential fish barrier construction, for which piscicide applications are likely necessary. These streams include Little Creek, West Fork Gila River, Middle Fork Gila River, Turkey Creek, Saliz Creek, Dry Blue Creek, and the San Francisco River (Riley and Clarkson 2005, pp. 4–5, 7, 9, 12; Clarkson and Marsh 2012, p. 8; 2013, pp. 1, 4, 6). Of these, the Middle Fork Gila River and Turkey Creek appear to the most likely-chosen for renovation (Clarkson and Marsh 2013, p. 8). Mule Creek and Cienega Creek, both occupied by northern Mexican gartersnakes, as well as Whitewater Creek (occupied by narrow-headed gartersnakes) are under consideration but ultimately may not be chosen for renovation for undisclosed reasons (Clarkson and Marsh 2013, pp. 8–9).

In addition to fish, rotenone is toxic to amphibians in their gill-breathing,

larval life stages; adult forms tend to avoid treated water (Fontenot *et al.* 1994, pp. 151–152). Rotenone has not been found to be directly toxic to aquatic snakes, but Fontenot *et al.* (1994, p. 152) suggested that effects from ingesting affected fish, frogs, or tadpoles may occur, but have not been adequately researched. The current standard operating procedures for piscicide application, as adopted nationally and provided in Finlayson *et al.* (2010, p. 23), provide guidance for assuring that non-target, baseline environmental conditions (the biotic community) are accounted for in assessing whether mitigation measures are necessary. This procedural protocol states, “Survival and recovery of the aquatic community may be demonstrated by sampling plankton, macroinvertebrates (aquatic insects, crustacea, leeches, and mollusks), and amphibians (frogs, tadpoles, and larval and adult salamanders)” (Finlayson *et al.* 2010, p. 23). This protocol, adopted by the Arizona Game and Fish Department (see AGFD 2012), does not consider the effects of leaving a treated water body without a prey base for a sensitive species, such as the narrow-headed gartersnake, for extended periods of time. In fact, considerations for non-target aquatic reptiles, in general, are not mentioned anywhere in this broadly applied piscicide application protocol. Consequently, we have no reason to assume that effects to either northern Mexican or narrow-headed gartersnake populations from the partial or whole-scale removal of their prey base have been historically considered in piscicide applications, at least through 2006.

The potentially significant effects to northern Mexican or narrow-headed gartersnakes described above pertaining to piscicide application are largely historical in nature in Arizona, and new methodologies have been developed in Arizona to prevent adverse effects to gartersnake populations. As of 2012, a new policy was finalized by the Arizona Game and Fish Department that includes an early and widespread public notification and planning process that involves the approval of several decision-makers within four major stages: (1) Piscicide project internal review and approval; (2) preliminary planning and public involvement; (3) intermediate planning and public involvement; and (4) project implementation and evaluation (AGFD 2012, p. 3). Within the Internal Review and Approval stage of the process, sensitive, endemic, and listed species potentially impacted by the project must

be identified (AGFD 2012, p. 13), such as northern Mexican or narrow-headed gartersnakes. In addition, the Arizona Game and Fish Department, through their Conservation and Mitigation Program developed as part of their sport fish stocking program through 2021, has committed to quickly restocking renovated streams that are occupied by either northern Mexican or narrow-headed gartersnakes (USFWS 2011, Appendix C).

Although significant efforts are generally made to salvage as many native fish as possible prior to treatment, logistics of holding fish for several weeks prior to restocking limit the number of individuals that can be held safely. Therefore, not every individual fish is salvaged, and native fish remaining in the stream are subsequently lost during the treatment. The number of fish subsequently restocked is, therefore, smaller than the number of fish that were present prior to the treatment. The full restoration of native fish populations to pre-treatment levels may take several years, depending on the size of the treated area and the size and maturity of the founding populations. Restocking salvaged fish in the fall may allow natural spawning and recruitment to begin in the spring, which would provide a more immediate benefit to resident gartersnake populations. With regard to New Mexico and Mexico, we are uncertain what measures have been considered in the past, or implemented currently, to prevent significant adverse impacts to northern Mexican or narrow-headed gartersnakes from piscicide applications.

*Mechanical Methods*—In addition to chemical renovation techniques, mechanical methods using electroshocking equipment are often used in fisheries management, both for nonnative aquatic species removal and fisheries survey and monitoring activities that often occur in conjunction with piscicide treatments. Northern Mexican and narrow-headed gartersnakes often flee into the water as a first line of defense when startled. In occupied habitat, gartersnakes present within the water are often temporarily paralyzed from electrical impulses intended for fish, and are, therefore, readily detected by surveyors (Hellekson 2012a, pers. comm.). We are not aware of any research that has investigated potential short- or long-term consequences of such electrocutions to gartersnakes. In addition to the occupied streams noted above that have received piscicide applications (and therefore received electroshock surveys), Hellekson (2012,

pers. comm.) reported narrow-headed gartersnakes being detected via electroshocking in the mainstem Gila River from Cliff Dwellings to Little Creek, the East Fork Gila River, Little Creek, Black Canyon, the Tularosa River, and Dry Blue Creek. Pettinger and Yori (2011, p. 11) reported detecting two narrow-headed gartersnakes as a result of electroshocking in the West Fork Gila River. Thus, electroshock surveys may be a source of additional data related to the occurrence and distribution of both northern Mexican and narrow-headed gartersnakes.

Trapping methods are also used in fisheries surveys, for other applications in aquatic species management, and for the collection of live baitfish in recreational fishing. One such common method to study aquatic or semi-aquatic wildlife (including populations of aquatic snakes such as gartersnakes) is through the use of self-baiting wire minnow traps. When used to monitor gartersnake populations, wire minnow traps are anchored to vegetation, logs, etc., along the shoreline (in most applications) and positioned so that half to one-third of the trap, along its lateral line, is above water surface to allow snakes to surface for air. These traps are then checked according to a predetermined schedule. Because the wire, twine, etc., used to anchor these traps is fixed in length, these traps may become fully submerged if there is a sudden, unanticipated rise in water levels (e.g., storm event). During the monsoon in Arizona and New Mexico, these types of storm events are common and river hydrographs respond accordingly with rapid and dynamic increases in flow. We are aware of examples where northern Mexican gartersnakes, intentionally captured in minnow traps, have drowned as a direct result of a rapid, unexpected rise in water levels. Some examples include an adult female northern Mexican gartersnake along lower Tonto Creek in 2004, and an adult and two neonates at the Bubbling Springs Hatchery in 2009 and 2010, respectively (Holycross *et al.* 2006, p. 41, Boyarski 2011, pp. 2–3). In another example, involving an underwater funnel trap used to survey for lowland leopard frogs, a large adult female northern Mexican gartersnake was discovered deceased in the trap (T. Jones 2012a, pers. comm.). Death of that individual was likely due to drowning or predation by numerous crayfish that were also confined in the funnel trap with the gartersnake (T. Jones 2012a, pers. comm.). There are likely additional cases where northern Mexican or narrow-headed gartersnake

mortality from trapping have not been reported, where trapping has occurred in occupied habitat prone to flash flooding.

Minnow traps are often deployed for monitoring fully aquatic species, such as fish, and are, therefore, intentionally positioned in the water column where they are fully under water. Traps used for this purpose may be checked less frequently, because risks to fully aquatic species are less if held in the trap for longer periods of time. As fish collectively become trapped, the trap becomes incidentally self-baited for gartersnakes and, if deployed in habitat occupied by either northern Mexican or narrow-headed gartersnakes, these traps may accidentally attract, capture, and drown gartersnakes that are actively foraging under water and are lured to the traps because of captured prey species. Neonatal northern Mexican and narrow-headed gartersnakes can also wriggle through the mesh of some wire minnow traps and become lodged halfway through, depending on the pore size of the wire mesh (Jaeger 2012, pers. comm.). If not found in time, this situation would likely result in their death from drowning, predation, or exposure.

The use of minnow traps is also allowed in recreational fishing in Arizona and New Mexico (AGFD 2013, p. 57; NMDGF 2013, p. 17). In Arizona and New Mexico, it is lawful to set minnow traps for the collection of live baitfish (AGFD 2013, pp. 56–57; NMDGF 2013, p. 17). In Arizona, minnow traps used for collecting live baitfish must be checked once daily (AGFD 2013, pp. 56–57); in New Mexico, there is no stipulation on time intervals in the regulations to check minnow traps (NMDGF 2013, p. 17). In either scenario in either state, these minnow traps are likely to be fully submerged when in use and pose a drowning hazard to resident gartersnakes while foraging underwater, as they can be lured into the traps by fish already caught.

The extent to which trapping-related mortality can affect northern Mexican or narrow-headed gartersnake populations is uncertain, but there is reason for concern if adult females are lost from populations where recruitment appears low or nonexistent, especially in low-density populations. While we are less certain about northern Mexican or narrow-headed gartersnake mortality from trapping efforts intended for other species, we assume such events have historically been unreported, but also acknowledge that the percentage of snakes intentionally caught in minnow traps that actually drown is likely to be

comparatively low. We also note that the aquatic community data generated from field research using these traps are critical to our understanding of northern Mexican and narrow-headed gartersnake ecology, population trends, and responses to threats on the landscape, and we believe that better communication and coordination among programs with regard to gartersnake concerns can help.

*Intentional Dewatering*—Lastly, dewatering or water fluctuation techniques are sometimes considered for eliminating undesirable fish species from water bodies (Finlayson *et al.* 2010, p. 4). Dewatering of occupied northern Mexican or narrow-headed gartersnake habitat would have obvious deleterious effects to affected populations by removing a primary habitat feature and eliminating the prey base. Depending on the availability of suitable habitat regionally and the length of time water is absent, these activities may ultimately cause local extirpations of gartersnake populations. Because northern Mexican gartersnakes often occupy lentic water bodies or intermittently watered canyon bottoms, where this practice is most feasible, effects of dewatering activities may disproportionately affect that species. This technique is being considered by the AGFD for pools within Redrock Canyon where northern Mexican gartersnakes could be adversely affected; however it is expected that northern Mexican gartersnakes are being considered by the AGFD in their implementation planning process.

#### Summary

In our review of the scientific and commercial literature, we have found that over time, native aquatic communities, specifically the native prey bases for northern Mexican and narrow-headed gartersnakes, have been significantly weakened to the point of near collapse as a result of the cumulative effects of disease and harmful nonnative species such as bullfrogs, crayfish, and spiny-rayed fish. Harmful nonnative species have been intentionally introduced or have naturally moved into virtually every subbasin throughout the distribution of northern Mexican and narrow-headed gartersnakes in the United States and Mexico. According to Geographic Information System GIS analyses, nonnative, spiny-rayed fish are known to occur in 90 percent of the historical distribution of the northern Mexican gartersnake and 85 percent of the historical distribution of the narrow-headed gartersnake in the United States. Bullfrogs are known to occur in 85

percent of the historical distribution of the northern Mexican gartersnake and 53 percent of the historical distribution of the narrow-headed gartersnake in the United States. Crayfish are known to occur in 77 percent of the historical distribution of the northern Mexican gartersnake and 75 percent of the historical distribution of the narrow-headed gartersnake in the United States. Nonnative, spiny-rayed fish, bullfrogs, and crayfish are known to occur simultaneously in 65 percent of the historical distribution of the northern Mexican gartersnake and 44 percent of the historical distribution of the narrow-headed gartersnake in the United States.

Native fish are important prey for northern Mexican gartersnakes but much more so for narrow-headed gartersnakes. Predation by and competition with primarily nonnative, spiny-rayed fish species, and secondarily with crayfish, are widely considered to be the primary reason for major declines in native fish communities throughout the range of both gartersnakes. This fundamental premise is captured by the fact that in Arizona, 19 of 31 (61 percent) of all native fish species are listed under the Act. Consequently, Arizona ranks the highest of all 50 States in the percentage of native fish species with declining trends (85.7 percent). Similar trends in the loss of native fish biodiversity have been described in New Mexico and Mexico. Native amphibians such as the Chiricahua leopard frog, an important component of the northern Mexican gartersnake prey base, have declined significantly and may face future declines as a result of Bd and harmful nonnative species. We cite numerous examples where historical native frog populations have been wholly replaced by harmful nonnative species, both on local and regional scales. These declines have directly contributed to subsequent northern Mexican gartersnake population declines or extirpations in these areas. Collectively, the literature confirms that an adequate native prey base is essential to the conservation and recovery of northern Mexican gartersnakes, and that this native ranid frog prey base may face an uncertain future if harmful nonnative species continue to persist and expand their distributions in occupied habitat.

We have found that the best available commercial and scientific information supports the fact that harmful nonnative species are the single most important threat to northern Mexican and narrow-headed gartersnakes and their prey bases, and therefore have had a profound role in their decline. A large body of literature documents that

northern Mexican and narrow-headed gartersnakes are uniquely susceptible to the influence of harmful nonnative species in their biotic communities. This sensitivity is largely the result of complex ecological interactions that result in direct predation on gartersnakes; shifts in biotic community structure from largely native to largely nonnative; and competition for a diminished prey base that can ultimately result in the injury, starvation, or death of northern Mexican or narrow-headed gartersnakes followed by reduced recruitment, population declines, and extirpations.

Lastly, we found that fisheries management activities can have significant negative effects on resident gartersnake populations when gartersnakes are not considered in project planning and implementation. We fully support the continued use of rotenone and other fisheries management techniques in the conservation and recovery of native fish. However, we also acknowledge the potential and significant threat rotenone use may pose to these gartersnakes if their habitat is left with a fish community that is dangerously depleted or entirely removed for extended periods of time. New policies and mitigation measures have been developed in Arizona that will reduce the likelihood of these activities having significant effects on either northern Mexican or narrow-headed gartersnake populations. However, some level of effect should still be expected, based on logistical complications and complexities of restoring fish populations to pre-treatment levels. We expect to coordinate with resource managers in New Mexico as we do in Arizona, to ensure gartersnake populations are not significantly affected by these activities. Other mechanisms or activities used in fisheries management, such as electroshocking, trapping, or dewatering, can result in the injury or death of northern Mexican or narrow-headed gartersnakes, where these activities coincide with extant populations, and if they have not been considered in the planning or implementation processes. The significance of these losses depends on the status of the gartersnake population affected. We found no evidence to conclude that fisheries management techniques threaten the northern Mexican gartersnake in Mexico.

On the most basic level, the presence of harmful nonnative species ultimately affects where northern Mexican and narrow-headed gartersnakes can live as viable populations. Collectively, the

ubiquitous presence of harmful nonnative species across the landscape has appreciably reduced the quantity of suitable gartersnake habitat and changed its spatial orientation on the landscape. Most northern Mexican and narrow-headed gartersnake populations, even some considered viable today, live in the presence of harmful nonnative species. While they continue to persist, they do so under constant stress from unnatural levels of predation and competition associated with harmful nonnative species. This weakens their resistance to other threats, including those that affect the physical suitability of their habitat (discussed below). This ultimately renders populations much less resilient to stochastic, natural, or anthropogenic stressors that could otherwise be withstood. Over time and space, subsequent population declines have threatened the genetic representation of each species because many populations have become disconnected and isolated from neighboring populations. Expanding distances between extant populations coupled with increasing populations of harmful nonnative species prevents normal colonizing mechanisms that would otherwise reestablish populations where they have become extirpated. This subsequently leads to a reduction in species redundancy when isolated, small populations are at increased vulnerability to the effects of stochastic events, without a means for natural recolonization. Ultimately, the effect of scattered, small, and disjunct populations, without the means to naturally recolonize, is weakened species resiliency as a whole, which ultimately enhances the risk of either or both species becoming endangered. Therefore, based on the best available scientific and commercial information, we conclude that harmful nonnative species are the most significant threat to both the northern Mexican and narrow-headed gartersnake, rangewide, now and in the foreseeable future.

#### *Main Factors That Destroy or Modify the Physical Habitat of Northern Mexican and Narrow-Headed Gartersnakes*

##### *The Relationship Between Harmful Nonnative Species and Adverse Effects to Physical Habitat*

As discussed at length above, we found harmful nonnative species to be a significant and widespread factor that continues to drive further declines in and extirpations of gartersnake populations. Also in our review of the literature, we found various threats have affected, and continue to affect, primary components of the physical habitat

required by northern Mexican and narrow-headed gartersnakes. These activities result in the loss of stream flow, and include examples such as dams, water diversions, groundwater pumping, and development. Researchers agree that the period from 1850 to 1940 marked the greatest loss and degradation of riparian and aquatic communities in Arizona, many of which were caused by anthropogenic (human-caused) land uses and the primary and secondary effects of those uses (Stromberg *et al.* 1996, p. 114; Webb and Leake 2005, pp. 305–310). An estimated one-third of Arizona's pre-settlement wetlands has dried or been rendered ecologically dysfunctional (Yuhus 1996, entire). However, not all aquatic and riparian habitats in the United States that support northern Mexican or narrow-headed gartersnakes have been significantly degraded or lost. Despite the loss or modification of aquatic and riparian habitat we describe below, large reaches of the Verde, Salt, San Pedro, and Gila Rivers, as well as several of their tributaries, remain functionally suitable as physical habitat for either gartersnake species. When we use the term "physical habitat," we refer to the structural integrity of aquatic and terrestrial components to habitat, such as plant species richness, density, available water, and any feature of habitat that does not pertain to the animal community. The animal community (the prey and predator species that co-occur within habitat) is not considered in our usage of "physical habitat," for reasons described immediately below.

Our treatment of how various threats may affect the northern Mexican or narrow-headed gartersnake is based, in part, on recent observations made in Mexico that illustrate the relationship of gartersnakes' physical habitat suitability to the presence of native prey species and the lack of harmful nonnative species (predators on or competitors with the northern Mexican gartersnake and narrow-headed gartersnake), and the presence, or lack thereof, of attributes associated with these gartersnakes' physical habitat. In 2007, two groups consisting of agency biologists (including U.S. Fish and Wildlife Service staff), species experts, and field technicians conducted numerous gartersnake surveys in Durango and Chihuahua, Mexico (Burger 2007, p. 1). In the state of Durango, 19 survey sites provided observation records for 144 gartersnakes, representing five different species, including the northern Mexican gartersnake (Burger *et al.* 2010, p. 13). In

the state of Chihuahua, 12 survey sites provided observation records for 50 gartersnakes, representing two species, including the northern Mexican gartersnake (Burger *et al.* 2010, p. 13). A main reason for this survey trip was to collect genetic samples from the subspecies described, at that time, under *Thamnophis rufipunctatus*, chiefly *T. r. unilabialis* and *T. r. nigronuchalis*. The genetic samples collected ultimately provided the evidence for the current taxonomic status of the narrow-headed gartersnake proposed by Wood *et al.* (2011, entire).

While considerable gartersnake habitat in Mexico is affected by the presence of harmful nonnative species (Conant 1974, pp. 471, 487–489; Contreras Balderas and Lozano 1994, pp. 383–384; Unmack and Fagan 2004, p. 233; Miller *et al.* 2005, pp. 60–61; Rosen and Melendez 2006, p. 54; Luja and Rodríguez-Estrella 2008, pp. 17–22), Burger (2007, pp. 1–72) surveyed several sites in remote areas that appeared to be free of nonnative species. In some sites, the physical habitat for northern Mexican gartersnakes and similar species of gartersnakes appeared to be in largely good condition, but few or no gartersnakes were detected. At other sites, the physical habitat was drastically affected by overgrazing, rural development, or road crossings; however, gartersnakes were relatively easily detected, which indicated that population densities were adequate. It should be noted that we do not have the necessary data to calculate population trends at sampled localities. Riparian and aquatic habitats in Arizona and New Mexico are in relatively better physical condition compared to observations of these habitats made in Durango and Chihuahua, Mexico. However, nonnative species are also ubiquitous in these same habitats across the landscape in the southwestern United States, based on our literature review and GIS modeling. Several sites visited by Burger (2007, pp. 1–72) in Durango and Chihuahua, Mexico, had physical habitat in poor to very poor condition, but were largely free of nonnative species. These situations are rarely encountered in Arizona and New Mexico and, therefore, provided Burger (2007, pp. 1–72) a unique opportunity to examine differences in gartersnake population densities based on condition of the physical habitat, without the confounding effect of nonnative species on resident gartersnake populations.

Burger (2007, pp. 6, 12, 36, 41, 58, 63) detected moderate to high densities of gartersnakes at six sites where their physical habitat was moderately to highly impacted by land uses, but were

largely free of nonnatives. Burger (2007, pp. 18, 26, 32, 61, 64, 66, 67, 69, 72) also detected either low densities or no gartersnakes at nine sites where the physical habitat was in moderate to good condition, but where nonnative species were detected. Eight streams surveyed by Burger (2007, pp. 15, 22, 46, 49, 51–52, 54, 62) were largely dewatered and without fish, and had few to no gartersnake observations. One site presented an anomaly, 19 northern Mexican gartersnakes and two *T. unilabialis* were observed at Rio Papigochic at Temosachic, where crayfish were noted as abundant, but no other nonnatives were detected (Burger 2007, p. 67). The disproportionate number of northern Mexican gartersnakes detected, as compared to the more aquatic *T. unilabialis*, may be due to differences in habitat preference, or the potential disproportionate effect of crayfish on *T. unilabialis* because of their more aquatic behavior. Similar data were not collected from the remaining seven sites, which prevents further evaluation of these sites in these contexts.

Our observations of gartersnake populations in Mexico provide evidence for the relative importance of native prey species and the lack of nonnative species in comparison to the physical attributes of gartersnake habitat. As a result, we have formulated three general hypotheses: (1) Northern Mexican and narrow-headed gartersnakes may be more resilient to adverse effects to physical habitat in the absence of harmful nonnative species, and therefore, more sensitive to adverse effects to physical habitat in the presence of harmful nonnative species; (2) the presence of an adequate prey base is important for persistence of gartersnake populations regardless of whether or not harmful nonnative species are present; and (3) detections and effects from harmful nonnative species appear to decrease from north to south in the Mexican states of Chihuahua and Durango (from the United States–Mexico International Border), as discussed in Unmack and Fagan (2004, pp. 233–243).

Based on field data collected by Burger (2007, entire) and on the above hypotheses, we evaluated the significance of effects to physical habitat in the context of the presence or absence of nonnative species. Effects to the physical habitat of gartersnakes can have varying effects on the gartersnakes themselves depending on the composition of their biotic community. In the presence of harmful nonnative species, effects to physical habitat that negatively affect the prey base for

northern Mexican or narrow-headed gartersnakes are believed to be comparatively more significant than those that do not. As previously discussed, harmful nonnative species are largely ubiquitous throughout the range of northern Mexican and narrow-headed gartersnakes and therefore exacerbate the effects from threats to their physical habitat.

#### Altering or Dewatering Aquatic Habitat

*Dams and Diversions*—The presence of water is critical for northern Mexican and narrow-headed gartersnakes, as well as their prey base. Of all the activities that may threaten their physical habitat, none are more serious than those that reduce flows or dewater habitat, such as dams, diversions, flood-control projects, and groundwater pumping. Such activities are widespread in Arizona. For example, municipal water use in central Arizona increased by 39 percent from 1998 to 2006 (American Rivers 2006), and at least 35 percent of Arizona's perennial rivers have been dewatered, assisted by approximately 95 dams that are in operation in Arizona today (Turner and List 2007, pp. 3, 9). Larger dams may prevent movement of fish between populations (which affects prey availability for northern Mexican and narrow-headed gartersnakes) and dramatically alter the flow regime of streams through the impoundment of water (Ligon *et al.* 1995, pp. 184–189). These diversions also require periodic maintenance and reconstruction, resulting in potential habitat damages and inputs of sediment into the active stream.

Flow regimes within stream systems are a primary factor that shape fish community assemblages. The timing, duration, intensity, and frequency of flood events has been altered to varying degrees by the presence of dams, which has an effect on fish communities. Specifically, Haney *et al.* (2008, p. 61) suggested that flood pulses may help to reduce populations of nonnative species and efforts to increase the baseflows may assist in sustaining native prey species for northern Mexican and narrow-headed gartersnakes. However, the investigators in this study also suggest that, because the northern Mexican gartersnake preys on both fish and frogs, it may be less affected by reductions in baseflow of streams (Haney *et al.* 2008, pp. 82, 93). Collier *et al.* (1996, p. 16) mentions that water development projects are one of two main causes of the decline of native fish in the Salt and Gila rivers of Arizona. Unregulated flows with elevated discharge events favor native species, and regulated flows, absent significant

discharge events, favor nonnative species (Probst *et al.* 2008, p. 1246). Interactions among native fish, nonnative fish, and flow regimes were observed in the upper reaches of the East Fork of the Gila River. Prior to the 1983 and 1984 floods in the Gila River system, native fish occurrence was limited, while nonnative fish were moderately common. Following the 1983 flood event, adult nonnative predators were generally absent, and native fish were subsequently collected in moderate numbers in 1985 (Propst *et al.* 1986, p. 83). These relationships are most readily observed in canyon-bound streams, where shelter sought by nonnative species during large-scale floods is minimal (Probst *et al.* 2008, p. 1249). Probst *et al.* (2008, p. 1246) also suggested the effect of nonnative fish species on native fish communities may be most significant during periods of natural drought (simulated by artificial dewatering).

Effects from flood control projects threaten riparian and aquatic habitat, as well as threaten the northern Mexican gartersnake directly in lower Tonto Creek. Kimmell (2008, pers. comm.), Gila County Board of Supervisors (2008, pers. comm.), Trammell (2008, pers. comm.), and Sanchez (2008, pers. comm.) all discuss a growing concern of residents that live within or adjacent to the floodplain of Tonto Creek in Gila County, Arizona, both upstream and downstream of the town of Gisela, Arizona. Specifically, there is growing concern to address threats to private property and associated infrastructure posed by flooding of Tonto Creek (Sanchez 2008, pers. comm.). An important remaining population of northern Mexican gartersnakes within the large Salt River subbasin occurs on Tonto Creek. In Resolution No. 08–06–02, the Gila County Board of Supervisors proactively declared a state of emergency within Gila County as a result of the expectation for heavy rain and snowfall causing repetitive flooding conditions (Gila County Board of Supervisors 2008, pers. comm.). In response, the Arizona Division of Emergency Management called meetings and initiated discussions among stakeholders in an attempt to mitigate these flooding concerns (Kimmell 2008, pers. comm., Trammell 2008, pers. comm.).

Mitigation measures that have been discussed include removal of riparian vegetation, removal of debris piles, potential channelization of Tonto Creek, improvements to existing flood control structures or addition of new structures, and the construction of new bridges. Adverse effects from these types of

activities to aquatic and riparian habitat, and to the northern Mexican gartersnake or its prey species, will result from the physical alteration or destruction of habitat, significant increases to flow velocity, and removal of key foraging habitat and areas to hibernate, such as debris jams. Specifically, flood control projects permanently alter stream flow characteristics and have the potential to make the stream unsuitable as habitat for the northern Mexican gartersnake by reducing or eliminating stream sinuosity and associated pool and backwater habitats that are critical to northern Mexican gartersnakes and their prey species. Threats presented by these flood control planning efforts are considered imminent.

Many streams in New Mexico, currently or formerly occupied by northern Mexican or narrow-headed gartersnakes, have been or could be affected by water withdrawals. Approximately 9.5 river mi (15.3 km) of the Gila River mainstem in New Mexico, from Little Creek to the Gila Bird Area, are in private ownership and have been channelized, and the water is largely used for agricultural purposes (Hellekson 2012a, pers. comm.). In addition, the Hooker Dam has been proposed in the reach above Mogollon Creek and below Turkey Creek as part of the Central Arizona Project, but remains in deferment status (Hellekson 2012a, pers. comm.). If constructed, Hooker Dam would significantly alter or reduce stream flow; favor nonnative, spiny-rayed fish species; and likely render the affected reach unsuitable for narrow-headed gartersnakes. Below the Gila Bird Area, but above the Middle Box of the mainstem Gila River, several water diversions have reduced stream flow (Hellekson 2012a, pers. comm.). Channelization has also affected a privately owned reach of Whitewater Creek from the Catwalk downstream to Glenwood, New Mexico (Hellekson 2012a, pers. comm.). The Gila River downstream of the town of Cliff, New Mexico, flows through a broad valley where irrigated agriculture and livestock grazing are the predominant uses. Human settlement has increased since 1988 (Propst *et al.* 2008, pp. 1237–1238). Agricultural practices have led to dewatering of the river in the Cliff-Gila valley at times during the dry season (Soles 2003, p. 71). For those portions of the Gila River downstream of the Arizona-New Mexico border, agricultural diversions and groundwater pumping have caused declines in the water table, and surface flows in the central portion of the river basin are diverted for agriculture (Leopold 1997,

pp. 63–64; Tellman *et al.* 1997, pp. 101–104).

The San Francisco River in New Mexico has undergone sedimentation, riparian habitat degradation, and extensive water diversion, and at present has an undependable water supply throughout portions of its length. The San Francisco River is seasonally dry in the Alma Valley, and two diversion structures fragment habitat in the upper Alma Valley and at Pleasanton (NMDGF 2006, p. 302). An approximate 2-stream-mi (3.2-km) reach of the lower San Francisco River between the Glenwood Diversion and Alma Bridge, which would otherwise be good narrow-headed gartersnake habitat, has been completely dewatered by upstream diversions (Hellekson 2012a, pers. comm.).

Additional withdrawals of water from the Gila and San Francisco Rivers may occur in the future (McKinnon 2006d). Implementation of Title II of the Arizona Water Settlements Act (AWSA) (Pub. L. 108–451) would facilitate the exchange of Central Arizona Project water within and between southwestern river basins in Arizona and New Mexico, and may result in the construction of new water development projects. Section 212 of the AWSA pertains to the New Mexico Unit of the Central Arizona Project. The AWSA provides for New Mexico water users to deplete 140,000 acre-feet of additional water from the Gila Basin in any 10-year period. The settlement also provides the ability to divert that water without complaint from downstream pre-1968 water rights in Arizona. New Mexico will receive \$66 million to \$128 million in non-reimbursable federal funding. The Interstate Stream Commission (ISC) funds may be used to cover costs of an actual water supply project, planning, environmental mitigation, or restoration activities associated with or necessary for the project, and may be used on one or more of 21 alternative projects ranging from Gila National Forest San Francisco River Diversion/Ditch improvements to a regional water supply project (the Deming Diversion Project). At this time, it is not known how the funds will be spent, or which potential alternative(s) may be chosen. While multiple potential project proposals have been accepted by the New Mexico Office of the State Engineer (NMOSE) (NMOSE 2011a, p. 1), implementation of the AWSA is still in the planning stages on these streams, and final notice is expected by the end of 2014. Should water be diverted from the Gila or San Francisco Rivers, flows would be diminished and direct and indirect losses and degradation of

habitat for the narrow-headed gartersnake and its prey species would result.

In addition to affecting the natural behavior of streams and rivers through changes in timing, intensity, and duration of flood events, dams create reservoirs that alter resident fish communities. Water level fluctuation can affect the degree of benefit to harmful nonnative fish species. Reservoirs that experience limited or slow fluctuations in water levels are especially beneficial to harmful nonnative species whereas reservoirs that experience greater fluctuations in water levels provide less benefit for harmful nonnative species. The timing of fluctuating water levels contributes to their effect; a precipitous drop in water levels during harmful nonnative fish reproduction is most deleterious to their recruitment. A drop in water levels outside of the reproductive season of harmful nonnative species has less effect on overall population dynamics.

The cross-sectional profile of any given reservoir also contributes to its benefit for harmful nonnative fish species. Shallow reservoir profiles generally provide maximum space and elevated water temperatures favorable to reproduction of harmful nonnative species, and deep reservoir profiles with limited shallow areas provide commensurately less benefit. Examples of reservoirs that benefit harmful nonnative species, and therefore adversely affect northern Mexican and narrow-headed gartersnakes (presently or historically), include Horseshoe and Bartlett Reservoirs on the Verde River, the San Carlos Reservoir on the Gila River, and Roosevelt, Saguaro, Canyon, and Apache Lakes on the Salt River. The Salt River Project (SRP) operates the previously mentioned reservoirs on the Verde and Salt Rivers and, in the case of Horseshoe and Bartlett Reservoirs, received section 10(a)(1)(B) take authorization under the Act for adverse effects to several avian and aquatic species (including northern Mexican and narrow-headed gartersnakes) through a comprehensive threat minimization and mitigation program found in SRP's habitat conservation plan (SRP 2008, entire). There is no such minimization and mitigation program developed for the operation Lake Roosevelt, where limited fluctuation in reservoir levels benefit harmful nonnative species and negatively affect northern Mexican or narrow-headed gartersnakes and their prey bases in Tonto Creek and the upper Salt River. A detailed analysis of the effects of reservoir operations on aquatic communities is provided in our intra-

Service biological and conference opinion provided in USFWS (2008, pp. 112–131).

*The Effect of Population Growth and Development on Water Demands and Gartersnake Habitat*—Arizona's population is expected to double from 5 million to 10 million people by the year 2030, which will put increasing pressure on water demands (Overpeck 2008). Arizona increased its population by 474 percent from 1960 to 2006 (Gammage 2008, p. 15), and is second only to Nevada as the fastest growing State in terms of human population (Social Science Data Analysis Network (SSDAR) 2000, p.1). Over approximately the same time period, population growth rates in Arizona counties where northern Mexican or narrow-headed gartersnake habitat exists have varied by county but are no less remarkable, and all are increasing: Maricopa (463 percent); Pima (318 percent); Santa Cruz (355 percent); Cochise (214 percent); Yavapai (579 percent); Gila (199 percent); Graham (238 percent); Apache (228 percent); Navajo (257 percent); Yuma (346 percent); LaPaz (142 percent); and Mohave (2,004 percent) (SSDAR 2000). From 1960 to 2006, the Phoenix metropolitan area alone grew by 608 percent, and the Tucson metropolitan area grew by 356 percent (Gammage 2008, p. 15). Population growth in Arizona is expected to be focused along wide swaths of land from the international border in Nogales, through Tucson, Phoenix, and north into Yavapai County (called the Sun Corridor "Megapolitan"), and is predicted to have 8 million people by 2030, an 82.5 percent increase from 2000 (Gammage *et al.* 2008, pp. 15, 22–23). If build-out occurs as expected, it could indirectly affect (through increased recreation pressure and demand for water) currently occupied habitat for the northern Mexican or narrow-headed gartersnake, particularly regional populations in Red Rock Canyon in extreme south-central Arizona, lower Cienega Creek near Vail, Arizona, and the Verde Valley.

The effect of the increased water withdrawals may be exacerbated by the current, long-term drought facing the arid southwestern United States. Philips and Thomas (2005, pp. 1–4) provided stream flow records that indicate that the drought Arizona experienced between 1999 and 2004 was the worst drought since the early 1940s and possibly earlier. The Arizona Drought Preparedness Plan Monitoring Technical Committee (ADPPMTC) (2012) determined the drought status within the Arizona distributions of northern Mexican and narrow-headed

gartersnakes, through June 2012, to be in "severe drought." Ongoing drought conditions have depleted recharge of aquifers and decreased base flows in the region. While drought periods have been relatively numerous in the arid Southwest from the mid-1800s to the present, the effects of human-caused impacts on riparian and aquatic communities have compromised the ability of these communities to function under the additional stress of prolonged drought conditions. We further discuss the effect of climate change-induced drought below.

The Arizona Department of Water Resources (ADWR) manages water supplies in Arizona and has established five Active Management Areas (AMAs) across the State (ADWR 2006, entire). An AMA is established by ADWR when an area's water demand has exceeded the groundwater supply and an overdraft has occurred. In these areas, groundwater use has exceeded the rate where precipitation can recharge the aquifer. Geographically, these five AMAs overlap the historical distribution of the northern Mexican or narrow-headed gartersnake, or both, in Arizona. The establishment of these AMAs further illustrates the condition of and future threats to riparian habitat in these areas and are a cause of concern for the long-term maintenance of northern Mexican and narrow-headed gartersnake habitat. Such overdrafts reduce surface water flow of streams that are hydrologically connected to the aquifer, and these overdrafts can be further exacerbated by surface water diversions, placing further stress on the aquifer. The presence of water is a primary habitat component for northern Mexican and narrow-headed gartersnakes. Existing water laws in Arizona and New Mexico are inadequate to protect gartersnake habitat from the dewatering effects of groundwater withdrawals. New Mexico water law does not include provisions for instream water rights to protect fish and wildlife and their habitats. Arizona water law does recognize such provisions; however, because this change is relatively recent, instream water rights have low priority, and are often never fulfilled because more senior diversion rights have priority. Gelt (2008, pp. 1–12) highlighted the fact that existing water laws are outdated and reflect a legislative interpretation of the resource that is not consistent with current scientific understanding, such as the important connection between groundwater and surface water.

Water for development and urbanization is often supplied by

groundwater pumping and surface water diversions from sources that include reservoirs and Central Arizona Project's allocations from the Colorado River. The hydrologic connection between groundwater and surface flow of intermittent and perennial streams is becoming better understood. Groundwater pumping creates a cone of depression within the affected aquifer that slowly radiates outward from the well site. When the cone of depression intersects the hyporheic zone of a stream (the active transition zone between two adjacent ecological communities under or beside a stream channel or floodplain between the surface water and groundwater that contributes water to the stream itself), the surface water flow may decrease, and the subsequent drying of riparian and wetland vegetative communities can follow. Continued groundwater pumping at such levels draws down the aquifer sufficiently to create a water-level gradient away from the stream and floodplain (Webb and Leake 2005, p. 309). Finally, complete disconnection of the aquifer and the stream results in strong negative effects to riparian vegetation (Webb and Leake 2005, p. 309). The hyporheic zone can promote "hot spots" of productivity where groundwater upwelling produces nitrates that can enhance the growth of vegetation, but its significance is contingent upon its activity and extent of connection with the groundwater (Boulton *et al.* 1998, p. 67; Boulton and Hancock 2006, pp. 135, 138). If complete disconnection occurs, the hyporheic zone could be adversely affected. Such "hot spots" can enhance the quality of northern Mexican and narrow-headed gartersnake habitat. Conversely, changes to the duration and timing of upwelling can potentially lead to localized extinctions in biota (Boulton and Hancock 2006, p. 139), reducing or eliminating gartersnake habitat suitability.

The arid southwestern United States is characterized by limited annual precipitation, which means limited annual recharge of groundwater aquifers; even modest changes in groundwater levels from groundwater pumping can affect above-ground stream flow as evidenced by depleted flows in the Santa Cruz, Verde, San Pedro, Blue, and lower Gila rivers as a result of regional groundwater demands (Fernandez and Rosen 1996, p. 70; Stromberg *et al.* 1996, pp. 113, 124–128; Rinne *et al.* 1998, p. 9; Voeltz 2002, pp. 45–47, 69–71; Haney *et al.* 2009 p. 1). Demands are expected to exceed flows in Arivaca Creek, Babocomari River,

lower Cienega Creek, San Pedro River, upper Verde River, and Agua Fria River (Haney *et al.* 2009 p. 3, Table 2), which historically or currently support northern Mexican or narrow-headed gartersnake populations. The complete loss of surface flow would result in local or regional extirpations of both species, or limit the species' recovery in these areas.

Water depletion is a concern for the Verde River (American Rivers 2006; McKinnon 2006a). Barnett and Hawkins (2002, Table 4) reported population census data from 1970, as well as projections for 2030, for communities situated along the middle Verde River or within the Verde River subbasin as a whole, such as Clarkdale, Cottonwood, Jerome, and Sedona. From 1970–2000, population growth was recorded as Clarkdale (384 percent), Cottonwood (352 percent), Jerome (113 percent), and Sedona (504 percent) (Barnett and Hawkins 2002, Table 4). Projected growth in these same communities from 1970–2030 was tabulated at Clarkdale (620 percent), Cottonwood (730 percent), Jerome (292 percent), and Sedona (818 percent) (Barnett and Hawkins 2002, Table 4). These examples of documented and projected population growth within the Verde River subbasin indicate ever-increasing water demands that have impacted base flow in the Verde River and are expected to continue. The middle and lower Verde River has limited or no flow during portions of the year due to agricultural diversion and upstream impoundments, and has several impoundments in its middle reaches, which could expand the area of impacted northern Mexican and narrow-headed gartersnake habitat. Blasch *et al.* (2006, p. 2) suggests that groundwater storage in the Verde River subbasin has already declined due to groundwater pumping and reductions in natural channel recharge resulting from stream flow diversions.

Also impacting water in the Verde River, the City of Prescott, Arizona, experienced a 22 percent increase in population between 2000 and 2005 (U.S. Census Bureau 2010, p. 1), averaging around 4 percent growth per year (City of Prescott 2010, p. 1). In addition, the towns of Prescott Valley and Chino Valley experienced growth rates of 66 and 67 percent, respectively (Arizona Department of Commerce 2009a, p. 1; 2009b, p. 1). This growth is facilitated by groundwater pumping in the Verde River basin. In 2004, the cities of Prescott and Prescott Valley purchased a ranch in the Big Chino basin in the headwaters of the Verde River, with the intent of drilling new

wells to supply up to approximately 4,933,927 cubic meters (4,000 acre-feet (AF)) of groundwater per year. If such drilling occurs, it could have serious adverse effects on the mainstem and tributaries of the Verde River.

Scientific studies have shown a link between the Big Chino aquifer and spring flows that form the headwaters of the Verde River. It is estimated that 80 to 86 percent of baseflow in the upper Verde River comes from the Big Chino aquifer (Wirt 2005, p. G8). However, while these withdrawals could potentially dewater the upper 26 mi (42 km) of the Verde River (Wirt and Hjalmarson 2000, p. 4; Marder 2009, pp. 188–189), it is uncertain that this project will occur given the legal and administrative challenges it faces; however, an agreement in principle was signed between various factions associated with water rights and interests on the Verde River (Citizens Water Advocacy Group 2010; Verde Independent 2010, p. 1). An in-depth discussion of the effects to Verde River from pumping of the Big Chino Aquifer is available in Marder (2009, pp. 183–189). Within the Verde River subbasin, and particularly within the Verde Valley, where the northern Mexican and narrow-headed gartersnakes could occur, several other activities continue to threaten surface flows (Rinne *et al.* 1998, p. 9; Paradzick *et al.* 2006, pp. 104–110). Many tributaries of the Verde River are permanently or seasonally dewatered by water diversions for agriculture (Paradzick *et al.* 2006, pp. 104–110). The demands for surface water allocations from rapidly growing communities and agricultural and mining interests have altered flows or dewatered significant reaches during the spring and summer months in some of the Verde River's larger, formerly perennial tributaries such as Wet Beaver Creek, West Clear Creek, and the East Verde River (Girmendonk and Young 1993, pp. 45–47; Sullivan and Richardson 1993, pp. 38–39; Paradzick *et al.* 2006, pp. 104–110), which may have supported either the northern Mexican or narrow-headed gartersnake, or both. Groundwater pumping in the Tonto Creek drainage regularly eliminates surface flows during parts of the year (Abarca and Weedman 1993, p. 2).

Further south in Arizona, portions of the San Pedro River are now classified as formerly perennial (The Nature Conservancy 2006), and water withdrawals are a concern for the San Pedro River. The Cananea Mine in Sonora, Mexico, owns the land surrounding the headwaters of the San Pedro. There is disagreement on the

exact amount of water withdrawn by the mine, Mexicana de Cananea, which is one of the largest open-pit copper mines in the world. However, there is agreement that it is the largest water user in the basin (Harris *et al.* 2001; Varady *et al.* 2000, p. 232). Along the upper San Pedro River, Stromberg *et al.* (1996, pp. 124–127) found that wetland herbaceous species, important as cover for northern Mexican gartersnakes, are the most sensitive to the effects of a declining groundwater level. Webb and Leake (2005, pp. 302, 318–320) described a correlative trend regarding vegetation along southwestern streams from historically being dominated by marshy grasslands preferable to northern Mexican gartersnakes, to currently being dominated by woody species that are more tolerant of declining water tables due to their deeper rooting depths.

Another primary groundwater user in the San Pedro subbasin is Fort Huachuca. Fort Huachuca is a U.S. Army installation located near Sierra Vista, Arizona. Initially established in 1877 as a camp for the military, the water rights of the Fort are predated only by those of local Indian tribes (Varady *et al.* 2000, p. 230). Fort Huachuca has pursued a rigorous water use reduction plan, working over the past decade to reduce groundwater consumption in the Sierra Vista subbasin. Their efforts have focused primarily on reductions in groundwater demand both on-post and off-post and increased artificial and enhanced recharge of the groundwater system. Annual pumping from Fort Huachuca production wells has decreased from a high of approximately 3,200 acre-feet (AF) in 1989, to a low of approximately 1,400 AF in 2005. In addition, Fort Huachuca and the City of Sierra Vista have increased the amount of water recharged to the regional aquifer through construction of effluent recharge facilities and detention basins that not only increase stormwater recharge, but mitigate the negative effects of increased runoff from urbanization. The amount of effluent that was recharged by Fort Huachuca and the City of Sierra Vista in 2005 was 426 AF and 1,868 AF, respectively. During this same year, enhanced stormwater recharge at detention basins was estimated to be 129 AF. The total net effect of all the combined efforts initiated by Fort Huachuca has been to reduce the net groundwater consumption by approximately 2,272 AF (71 percent) since 1989 (USFWS 2007, pp. 41–42).

Groundwater withdrawal in Eagle Creek, primarily for water supplying the

large open-pit copper mine at Morenci, Arizona, dries portions of the stream (Sublette *et al.* 1990, p. 19; USFWS 2005; Propst *et al.* 1986, p. 7) that otherwise supports habitat for narrow-headed gartersnakes. Mining is the largest industrial water user in southeastern Arizona. The Morenci mine on Eagle Creek is North America's largest producer of copper, covering approximately 24,281 hectares (ha) (60,000 acres (ac)). Water for the mine is imported from the Black River, diverted from Eagle Creek as surface flows, or withdrawn from the Upper Eagle Creek Well Field (Arizona Department of Water Resources 2009, p. 1).

The Rosemont Copper Mine proposed to be constructed in the north-eastern area of the Santa Rita Mountains in Santa Cruz County, Arizona, will include a mine pit that will be excavated to a depth greater than that of the regional aquifer. Water will thus drain from storage in the aquifer into the pit. The need to dewater the pit during mining operations will thus result in ongoing removal of aquifer water storage. Upon cessation of mining, a pit lake will form, and evaporation from this water body will continue to remove water from storage in the regional aquifer. This aquifer also supplies baseflow to Cienega Creek, immediately east of the proposed project site. Several groundwater models have been developed to analyze potential effects of expected groundwater withdrawals. However, the latest independent models did not indicate that significant effects to baseflows in Cienega Creek are expected from the Rosemont Copper Mine into the foreseeable future.

The best available scientific and commercial information indicates that, regardless of the scenario, any reduction in the presence or availability of water is a significant threat to northern Mexican and narrow-headed gartersnakes, their prey base, and their habitat. This is because water is a fundamental need that supports the necessary aquatic and riparian habitats and prey species needed by both species of gartersnake. Through GIS analyses, we found that approximately 32 percent of formerly perennial streams have been dewatered within the historical distribution of the northern Mexican gartersnake. Within the historical distribution of the narrow-headed gartersnake, approximately 13 percent of formerly perennial streams have been dewatered.

*Climate Change and Drought*—Our analyses under the 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 and their predicted effects on northern Mexican and narrow-headed gartersnakes.

The ecology and natural histories of northern Mexican and narrow-headed gartersnakes are strongly linked to water. As discussed above, the northern Mexican gartersnake is a highly aquatic species and relies largely upon other aquatic species, such as ranid frogs and native and nonnative, soft-rayed fish as prey. The narrow-headed gartersnake is the most aquatic of the southwestern gartersnakes and is a specialized predator on native and nonnative, soft-rayed fish found primarily in clear, rocky, higher elevation streams. Because of their aquatic nature, Wood *et al.* (2011, p. 3) predict they may be uniquely susceptible to environmental change, especially factors associated with climate change. Together, these factors are likely to make northern Mexican and narrow-headed gartersnakes vulnerable to effects of climate change and drought discussed below.

Several climate-related trends have been detected since the 1970s in the southwestern United States including increases in surface temperatures, rainfall intensity, drought, heat waves, extreme high temperatures, average low temperatures (Overpeck 2008, entire). Annual precipitation amounts in the southwestern United States may decrease by 10 percent by the year 2100 (Overpeck 2008, entire). Seager *et al.* (2007, pp. 1181–1184) analyzed 19

different computer models of differing variables to estimate the future climatology of the southwestern United States and northern Mexico in response to predictions of changing climatic patterns. All but 1 of the 19 models predicted a drying trend within the Southwest; one predicted a trend toward a wetter climate (Seager *et al.* 2007, p. 1181). A total of 49 projections were created using the 19 models, and all but 3 predicted a shift to increasing aridity (dryness) in the Southwest as early as 2021–2040 (Seager *et al.* 2007, p. 1181). Northern Mexican and particularly narrow-headed gartersnakes, and their prey bases, depend on permanent or nearly permanent water for survival. A large percentage of habitats within the current distribution of northern Mexican and narrow-headed gartersnakes are predicted to be at risk of becoming more arid with reductions in snow pack levels (Seager *et al.* 2007, pp. 1183–1184). This has severe implications for the integrity of aquatic and riparian ecosystems and the water that supports them. In assessing potential effects of predicted climate change to river systems in New Mexico, Molles (2007) found that: (1) Variation in stream flow will likely be higher than variation in precipitation; (2) predicted effects such as warming and drying are expected to result in higher variability in stream flows; and (3) high-elevation fish and non-flying invertebrates (which are prey for gartersnake prey species) are at greatest risk from effects of predicted climate change. Enquist and Gori (2008, p. iii) found that most of New Mexico's mid- to high-elevation forests and woodlands have experienced either consistently warmer and drier conditions or greater variability in temperature and precipitation from 1991 to 2005. However, Enquist *et al.* (2008, p. v) found the upper Gila and San Francisco subbasins, which support narrow-headed gartersnake populations, have experienced very little change in moisture stress during the same period.

Cavazos and Arriaga (2010, entire) found that average temperatures along the Mexican Plateau in Mexico could rise by as much as 1.8 °F (1 °C) in the next 20 years and by as much as 9 °F (5 °C) in the next 20 years, according to their models. Cavazos and Arriaga (2010, entire) also found that precipitation may decrease up to 12 percent over the next 20 years in the same region, with pronounced decreases in winter and spring precipitation.

Potential drought associated with changing climatic patterns may adversely affect the amphibian prey base for the northern Mexican

gartersnake. Amphibians may be among the first vertebrates to exhibit broad-scale changes in response to changes in global climatic patterns due to their sensitivity to changes in moisture and temperature (Reaser and Blaustein 2005, p. 61). Changes in temperature and moisture, combined with the ongoing threat to amphibians from the persistence of disease causing bacteria such as *Batrachochytrium dendrobatidis* (Bd) may cause prey species to experience increased physiological stress and decreased immune system function, possibly leading to disease outbreaks (Carey and Alexander 2003, pp. 111–121; Pounds *et al.* 2006, pp. 161–167). Of the 30 different vertebrate species in the Sky Island region of southeastern Arizona, the northern Mexican gartersnake was found to be the fifth-most vulnerable (total combined score) to predicted climate change; one of its primary prey species, the Chiricahua leopard frog, was determined to be the fourth most vulnerable (Coe *et al.* 2012, p. 16). Both the northern Mexican gartersnake and the Chiricahua leopard frog ranked the highest of all species assessed for vulnerability of their habitat to predicted climate change, and the Chiricahua leopard frog was also found to be the most vulnerable in terms of its physiology (Coe *et al.* 2012, p. 18). Relative uncertainty for the vulnerability assessment provided by Coe *et al.* (2012, Table 2.2) ranged from 0 to 8 (higher score means greater uncertainty), and the northern Mexican gartersnake score was 3, meaning that the vulnerability assessment was more certain than not. Coe *et al.* (2012, entire) focused their assessment of species vulnerability to climate change on those occurring on the Coronado National Forest in southeastern Arizona. However, it is not unreasonable to hypothesize that results might be applicable in a larger, regional context as applied in most climate models.

The bullfrog, also assessed by Coe *et al.* (2012, pp. 16, 18, Table 2.2), was shown to be significantly less vulnerable to predicted climate change than either northern Mexican gartersnakes or Chiricahua leopard frogs with an uncertainty score of 1 (very certain). We suspect bullfrogs were found to be less vulnerable by Coe *et al.* (2012) to predicted climate change in southeastern Arizona due to their dispersal and colonization capabilities, capacity for self-sustaining cannibalistic populations, and ecological dominance where they occur. Based upon climate change models, nonnative species biology, and ecological observations,

Rahel *et al.* (2008, p. 551) concluded that climate change could foster the expansion of nonnative aquatic species into new areas, magnify the effects of existing aquatic nonnative species where they currently occur, increase nonnative predation rates, and heighten the virulence of disease outbreaks in North America.

Rahel and Olden (2008, p. 526) expect that increases in water temperatures in drier climates such as the southwestern United States will result in periods of prolonged low flows and stream drying. These effects from changing climatic conditions may have profound effects on the amount, permanency, and quality of habitat for northern Mexican and narrow-headed gartersnakes as well as their prey base. Changes in amount or type of winter precipitation may affect snowpack levels as well as the timing of their discharge into high-elevation streams. Low or no snowpack levels would jeopardize the amount and reliability of stream flow during the arid spring and early summer months, which would increase water temperatures to unsuitable levels or eliminate flow altogether. Harmful nonnative species such as largemouth bass are expected to benefit from prolonged periods of low flow (Rahel and Olden 2008, p. 527). These nonnative predatory species evolved in river systems with hydrographs that were largely stable, not punctuated by flood pulses in which native species evolved and benefit from. Probst *et al.* (2008, p. 1246) also suggested that nonnative fish species may benefit from drought.

Changes to climatic patterns may warm water temperatures, alter stream flow events, and increase demand for water storage and conveyance systems (Rahel and Olden 2008, pp. 521–522). Warmer water temperatures across temperate regions are predicted to expand the distribution of existing harmful nonnative species, which evolved in warmer water temperatures, by providing 31 percent more suitable habitat. This conclusion is based upon studies that compared the thermal tolerances of 57 fish species with predictions made from climate change temperature models (Mohseni *et al.* 2003, p. 389). Eaton and Scheller (1996, p. 1,111) reported that while several cold-water fish species (such as trout, a prey species for narrow-headed gartersnakes) in North America are expected to have reductions in their distribution from effects of climate change, several harmful nonnative species are expected to increase their distribution. In the southwestern United States, this situation may occur where the quantity of water is sufficient to

sustain effects of potential prolonged drought conditions but where water temperature may warm to a level found suitable to harmful nonnative species that were previously physiologically precluded from occupation of these areas. Species that are particularly harmful to northern Mexican and narrow-headed gartersnake populations such as the green sunfish, channel catfish, largemouth bass, and bluegill are expected to increase their distribution by 7.4 percent, 25.2 percent, 30.4 percent, and 33.3 percent, respectively (Eaton and Scheller 1996, p. 1,111).

*Vanishing Cienegas*—Cienegas are particularly important habitat for the northern Mexican gartersnake and are considered ideal for the species because these areas present ideal habitat characteristics for the species and its prey base and have been shown to support robust populations of both (Rosen and Schwalbe 1988, p. 14). Hendrickson and Minckley (1984, p. 131) defined cienegas as “mid-elevation (3,281–6,562 ft (1,000–2000 m)) wetlands characterized by permanently saturated, highly organic, reducing [lowering of oxygen level] soils.” Many of these unique communities of the southwestern United States, Arizona in particular, and Mexico have been lost in the past century to streambed modification, intensive livestock grazing, woodcutting, artificial drainage structures, stream flow stabilization by upstream dams, channelization, and stream flow reduction from groundwater pumping and water diversions (Hendrickson and Minckley 1984, p. 161). Stromberg *et al.* (1996, p. 114) state that cienegas were formerly extensive along streams of the Southwest; however, most were destroyed during the late 1800s, when groundwater tables declined several meters and stream channels became incised.

Many sub-basins, where cienegas have been severely modified or lost entirely, wholly or partially overlap the historical distribution of the northern Mexican gartersnake, including the San Simon, Sulphur Springs, San Pedro, and Santa Cruz valleys of southeastern and south-central Arizona. The San Simon Valley in Arizona possessed several natural cienegas with abundant vegetation prior to 1885, and was used as a watering stop for pioneers, military, and surveying expeditions (Hendrickson and Minckley 1984, pp. 139–140). In the subsequent decades, the disappearance of grasses and commencement of severe erosion were the result of historical grazing pressure by large herds of cattle, as well as the effects from wagon trails

that paralleled arroyos, occasionally crossed them, and often required stream bank modification (Hendrickson and Minckley 1984, p. 140). Today, only the artificially maintained San Simon Cienega exists in this valley. Similar accounts of past conditions, adverse effects from historical anthropogenic activities, and subsequent reduction in the extent and quality of cienega habitats in the remaining valleys are also provided in Hendrickson and Minckley (1984, pp. 138–160).

*Development and Recreation within Riparian Corridors*—Development within and adjacent to riparian areas has proven to be a significant threat to riparian biological communities and their suitability for native species (Medina 1990, p. 351). Riparian communities are sensitive to even low levels (less than 10 percent) of urban development within a subbasin (Wheeler *et al.* 2005, p. 142). Development along or within proximity to riparian zones can alter the nature of stream flow dramatically, changing once-perennial streams into ephemeral streams, which has direct consequences on the riparian community (Medina 1990, pp. 358–359). Medina (1990, pp. 358–359) correlated tree density and age class representation to stream flow, finding that decreased flow reduced tree densities and generally resulted in few to no small-diameter trees. Small-diameter trees assist northern Mexican and narrow-headed gartersnakes by providing additional habitat complexity, thermoregulatory opportunities, and cover needed to reduce predation risk and enhance the usefulness of areas for maintaining optimal body temperature. The presence of small shrubs and trees may be particularly important for the narrow-headed gartersnake (Deganhardt *et al.* 1996, p. 327). Development within occupied riparian habitat also likely increases the number of human-gartersnake encounters and therefore the frequency of adverse human interaction, described below.

Obvious examples of the influence of urbanization and development can be observed within the areas of greater Tucson and Phoenix, Arizona, where impacts have modified riparian vegetation, structurally altered stream channels, facilitated nonnative species introductions, and dewatered large reaches of formerly perennial rivers where the northern Mexican gartersnake historically occurred (Santa Cruz, lower Gila, and lower Salt Rivers, respectively). Urbanization and development of these areas, along with the introduction of nonnative species, are largely responsible for the likely

extirpation of the northern Mexican gartersnake from these regions.

Development near riparian areas usually leads to increased recreation. Riparian areas located near urban areas are vulnerable to the effects of increased recreation. An example of such an area within the existing distribution of both the northern Mexican and narrow-headed gartersnake is the Verde Valley. The reach of the Verde River that winds through the Verde Valley receives a high amount of recreational use from people living in central Arizona (Paradzick *et al.* 2006, pp. 107–108). Increased human use results in the trampling of near-shore vegetation, which reduces cover for gartersnakes, especially newborns. Increased human visitation in occupied habitat also increases the potential for adverse human interactions with gartersnakes, which frequently leads to the capture, injury, or death of the snake (Rosen and Schwalbe 1988, p. 43; Ernst and Zug 1996, p. 75; Green 1997, pp. 285–286; Nowak and Santana-Bendix 2002, pp. 37–39).

Oak Creek Canyon, which represents an important source population for narrow-headed gartersnakes, is also a well-known example of an area with very high recreation levels. Recreational activities in the Southwest are often heavily tied to water bodies and riparian areas, due to the general lack of surface water on the landscape. Increased recreational impacts on the quantity and quality of water, as well as the adjacent vegetation, negatively affect northern Mexican and narrow-headed gartersnakes. The impacts to riparian habitat from recreation can include movement of people or livestock, such as horses or mules, along stream banks, trampling, loss of vegetation, and increased danger of fire starts (Northern Arizona University 2005, p. 136; Monz *et al.* 2010, pp. 553–554). In the arid Gila River Basin, recreational impacts are disproportionately distributed along streams as a primary focus for recreation (Briggs 1996, p. 36). Within the range of the northern Mexican and narrow-headed gartersnakes in the United States, the majority of the occupied areas occur on Federal lands, which are managed for recreation and other purposes. On the Gila National Forest, heavy recreation use within occupied narrow-headed gartersnake habitat is thought to impact populations along the Middle Fork Gila River, the mainstem Gila River between Cliff Dwellings and Little Creek, and Whitewater Creek from the Catwalk to Glenwood (Hellekson 2012a, pers. comm.).

Urbanization on smaller scales can also impact habitat suitability and the prey base for the northern Mexican or

narrow-headed gartersnakes, such as along Tonto Creek, within the Verde Valley, and the vicinity of Rock Springs along the Agua Fria River (Girmendonk and Young 1997, pp. 45–52; Voeltz 2002, pp. 58–59, 69–71; Holycross *et al.* 2006, pp. 53, 56; Paradzick *et al.* 2006, pp. 89–90). One of the most stable populations of the northern Mexican gartersnake in the United States, at the Page Springs and Bubbling Ponds fish hatcheries along Oak Creek, is threatened by ongoing small-scale development projects that may adversely affect the northern Mexican gartersnake directly through physical harm or injury or indirectly from effects to its habitat or prey base (AGFD 1997a, p. 8; AGFD 1997b, p. 4). Current and future management and maintenance of Bubbling Ponds include a variety of activities that would potentially affect snake habitat, such as the maintenance of roads, buildings, fences, and equipment, as well as development (residences, storage facilities, asphalt, resurfacing, etc.) and both human- and habitat-based enhancement projects (AGFD 1997b, pp. 8–9; Wilson and Company 1991, pp. 1–40; 1992, pp. 1–99). However, we expect adaptive management in relation to activities at the hatcheries, as informed by population studies that have occurred there, will help reduce the overall effects to this critical northern Mexican gartersnake population and avoid extirpation of this important population.

*Diminishing Water Quantity and Quality in Mexico*—While effects to riparian and aquatic communities affect both the northern Mexican gartersnake and the narrow-headed gartersnake in the United States, Mexico provides habitat only for the northern Mexican gartersnake. Threats to northern Mexican gartersnake habitat in Mexico include intensive livestock grazing, urbanization and development, water diversions and groundwater pumping, loss of vegetation cover and deforestation, and erosion, as well as impoundments and dams that have modified or destroyed riparian and aquatic communities in areas of Mexico where the species occurred historically. Rorabaugh (2008, pp. 25–26) noted threats to northern Mexican gartersnakes and their native amphibian prey base in Sonora, which included disease, pollution, intensive livestock grazing, conversion of land for agriculture, nonnative plant invasions, and logging. Ramirez Bautista and Arizmendi (2004, p. 3) stated that the principal threats to northern Mexican gartersnake habitat in Mexico include the drying of wetlands, intensive

livestock grazing, deforestation, wildfires, and urbanization. In addition, nonnative species, such as bullfrogs and nonnative, spiny-rayed fish, have been introduced throughout Mexico and continue to disperse naturally, broadening their distributions (Conant 1974, pp. 487–489; Miller *et al.* 2005, pp. 60–61; Luja and Rodríguez-Estrella 2008, pp. 17–22).

Mexico's water needs for urban and agricultural development, as well impacts to aquatic habitat from these uses, are linked to significant human population growth over the past century in Mexico. Mexico's human population grew 700 percent from 1910 to 2000 (Miller *et al.* 2005, p. 60). Mexico's population increased by 245 percent from 1950 to 2002, and is projected to grow by another 28 percent by 2025 (EarthTrends 2005). Growth is concentrated in Mexico's northern states (Stoleson *et al.* 2005, Table 3.1) and is now skewed towards urban areas (Miller *et al.* 2005, p. 60). The human population of Sonora, Mexico, doubled in size from 1970 (1.1 million) to 2000 (2.2 million) (Stoleson *et al.* 2005, p. 54). The population of Sonora is expected to increase by 23 percent, to 2.7 million people, in 2020 (Stoleson *et al.* 2005, p. 54). Increasing trends in Mexico's human population will continue to place additional stress on the country's freshwater resources and continue to be the catalyst for the elimination of northern Mexican gartersnake habitat and prey species.

Much knowledge of the status of aquatic ecosystems in Mexico has come from fisheries research, which is particularly applicable to assessing the status of northern Mexican gartersnakes because of the gartersnakes' dependency on a functioning prey base. Fisheries research is also particularly applicable because of the role fishes serve as indicators of the status of the aquatic community as a whole. Miller *et al.* (2005) reported information on threats to freshwater fishes, and riparian and aquatic communities in specific water bodies from several regions throughout Mexico within the range of the northern Mexican gartersnake: the Río Grande (dam construction, p. 78 and extirpations of freshwater fish species, pp. 82, 112); headwaters of the Río Lerma (extirpation of freshwater fish species, nonnative species, pollution, dewatering, pp. 60, 105, 197); Lago de Chapala and its outlet to the Río Grande de Santiago (major declines in freshwater fish species, p. 106); medium-sized streams throughout the Sierra Madre Occidental (localized extirpations, logging, dewatering, pp. 109, 177, 247); the Río Conchos

(extirpations of freshwater fish species, p. 112); the ríos Casas Grandes, Santa María, del Carmen, and Laguna Bustillos (water diversions, groundwater pumping, channelization, flood control practices, pollution, and introduction of nonnative species, pp. 124, 197); the Río Santa Cruz (extirpations, p. 140); the Río Yaqui (nonnative species, pp. 148, Plate 61); the Río Colorado (nonnative species, p. 153); the ríos Fuerte and Culiacán (logging, p. 177); canals, ponds, lakes in the Valle de México (nonnative species, extirpations, pollution, pp. 197, 281); the Río Verde Basin (dewatering, nonnative species, extirpations, Plate 88); the Río Mayo (dewatering, nonnative species, p. 247); the Río Papaloapan (pollution, p. 252); lagos de Zacapu and Yuriria (habitat destruction, p. 282); and the Río Pánuco Basin (nonnative species, p. 295).

Excessive sedimentation also appears to be a significant problem for aquatic habitat in Mexico. Recent estimates indicate that 80 percent of Mexico is affected by soil erosion caused by vegetation removal related to grazing, fires, agriculture, deforestation, etc. The most serious erosion is occurring in the states of Guanajuato (43 percent of the state's land area), Jalisco (25 percent of the state's land area), and México (25 percent of the state's land area) (va Landa *et al.* 1997, p. 317), all of which occur within the distribution of the northern Mexican gartersnake. Miller *et al.* (2005, p. 60) stated that “During the time we have collectively studied fishes in México and southwestern United States, the entire biotas of long reaches of major streams such as the Río Grande de Santiago below Guadalajara (Jalisco) and Río Colorado (lower Colorado River in Mexico) downstream of Hoover (Boulder) Dam (in the United States), have simply been destroyed by pollution and river alteration.” These streams are within the distribution of the northern Mexican gartersnake. The geographic extent of threats reported by Miller *et al.* (2005) across the distribution of the northern Mexican gartersnake in Mexico is evidence that they are widespread through the country, and encompass a large proportion of the distribution of the northern Mexican gartersnake in Mexico.

In northern Mexico, effects of development, such as agriculture and irrigation practices on streams and rivers in Sonora have been documented at least as far back as the 1960s. Branson *et al.* (1960, p. 218) found that the perennial rivers that drain the Sierra Madre are “silt-laden and extremely turbid, mainly because of irrigation practices.” Smaller mountain streams,

such as the Rio Nacozari in Sonora were found to be “biological deserts” from the effects of numerous local mining practices (Branson *et al.* 1960, p. 218). These perennial rivers and their mountain tributaries were historically occupied by northern Mexican gartersnakes and their prey species whose populations have since been adversely affected and may be extirpated.

Minckley *et al.* (2002, pp. 687–705) provided a summary of threats (p. 696) to three newly described (at the time) species of pupfish and their habitat in Chihuahua, Mexico, within the distribution of the northern Mexican gartersnake. Initial settlement and agricultural development of the area resulted in significant channel cutting through soil layers protecting the alluvial plain above them, which resulted in reductions in the base level of each basin in succession (Minckley *et al.* 2002, pp. 696). Related to these activities, the building of dams and diversion structures dried entire reaches of some regional streams and altered flow patterns of others (Minckley *et al.* 2002, pp. 696). This was followed by groundwater pumping (enhanced by the invention of the electric pump), which lowered groundwater levels and dried up springs and small channels and reduced the reliability of baseflow in “essentially all systems” (Minckley *et al.* 2002, pp. 696). Subsequently, the introduction and expansion of nonnative species in the area successfully displaced or extirpated many native species (Minckley *et al.* 2002, pp. 696). Conant (1974, pp. 486–489) described significant threats to northern Mexican gartersnake habitat within its distribution in western Chihuahua, Mexico, and within the Rio Concho system where it occurs. These threats included impoundments, water diversions, and purposeful introductions of largemouth bass, common carp, and bullfrogs.

In the central portions of the northern Mexican gartersnakes’ range in Mexico, such as in Durango, Mexico, population growth since the 1960s has led to regional effects such as reduced stream flow, increased water pollution, and largemouth bass introductions, which “have seriously affected native biota” (Miller *et al.* 1989, p. 26). McCranie and Wilson (1987, p. 2) discuss threats to the pine-oak communities of higher elevation habitats within the distribution of the northern Mexican gartersnake in the Sierra Madre Occidental in Mexico, specifically noting that “. . . the relative pristine character of the pine-oak woodlands is threatened . . . every time a new road

is bulldozed up the slopes in search of new madera or pasturage. Once the road is built, further development follows; pueblos begin to pop up along its length. . . .” Several drainages that possess suitable habitat for the northern Mexican gartersnake occur in the area referenced above by McCranie and Wilson (1987, p. 2) including the Rio de la Cuidad, Rio Quebrada El Salto, Rio Chico, Rio Las Bayas, Rio El Cigarrero, Rio Galindo, Rio Santa Barbara, and the Rio Chavaria.

In the southern portion of the northern Mexican gartersnakes’ range in Mexico, growth and development around Mexico City resulted in agricultural practices and groundwater demands that dewatered aquatic habitat and led to declines, and in some cases, extinctions of local native fish species (Miller *et al.* 1989, p. 25). In the region of southern Coahuila, Mexico, habitat modification and the loss of springs, water pollution, and irrigation practices has adversely affected native fish populations and led to the extinction of several native fish species (Miller *et al.* 1989, pp. 28–33). Considerable research has been focused in the central and west-central regions of Mexico, within the southern portion of the northern Mexican gartersnake’s range, where native fish endemism (unique, narrowly distributed Suite of species) is high, as are threats to their populations and habitat. Since the 1970s in central Mexico, significant human population growth has resulted in the overexploitation of local fisheries and water pollution; these factors have accelerated the degradation of stream and riverine habitats and led to fish communities becoming reduced or undergoing significant changes in structure and composition (Mercado-Silva *et al.* 2002, p. 180). These shifts in fish community composition, population density, and shrinking distributions have adversely affected the northern Mexican gartersnake prey base in the southern portion of its range in Mexico. The Lerma River basin is the largest in west-central Mexico and is within the distribution of the northern Mexican gartersnake in the states of Jalisco, Guanajuato, and Querétaro in the southern portion of its range. Lyons *et al.* (1995, p. 572) reported that many fish communities in large perennial rivers, isolated spring-fed streams, or spring sources themselves of this region have been “radically restructured” and are now dominated by a few nonnative, generalist species. Lowland streams and rivers in this region are used heavily for irrigation and are polluted by industrial, municipal, and agricultural discharges

(Lyons and Navarro-Perez 1990, p. 37; Lyons *et al.* 1995, p. 572).

Native fish communities of west-central Mexico have been found to be in serious decline as a result of habitat degradation at an “unprecedented” rate due to water withdrawals (diversions for irrigation), as well as untreated municipal, industrial, and agricultural discharges (Lyons *et al.* 1998, pp. 10–11). Numerous dams have been built along the Lerma River and along its major tributaries to support one of Mexico’s most densely populated regions during the annual dry period; the water is used for irrigation, industry, and human consumption (Lyons *et al.* 1998, p. 11). From 1985 to 1993, Lyons *et al.* (1998, p. 12) found that 29 of 116 (25 percent) fish sampling locations visited within the Lerma River watershed were completely dry and another 30 were too polluted to support a fish community. These figures indicate that over half of the localities visited by Lyons *et al.* (1998, p. 12) that maintained fish populations prior to 1985 no longer support fish, which has likely led to local northern Mexican gartersnake population declines or extirpations. Soto-Galera *et al.* (1999, p. 137) reported fish and water quality sampling results from 20 locations within the Rio Grande de Morelia-Lago de Cuitzeo Basin of Michoacán and Guanajuato, Mexico, and found that over the past several decades, diminishing water quantity and worsening water quality have resulted in the elimination of 26 percent of native fish species from the basin, the extinction of two species of native fish, and declining distributions of the remaining 14 species. These figures provide evidence for widespread concern of native aquatic communities of this region, in particular for habitat and prey species of northern Mexican gartersnakes. Some conservation value, however, is realized when headwaters, springs, and small streams are protected as parks or municipal water supplies (Lyons *et al.* 1998, p. 15), but these efforts do little to protect larger perennial rivers that represent valuable habitat for northern Mexican gartersnakes.

Mercado-Silva *et al.* (2002, Appendix 2) reported results from fish community sampling and habitat assessments along 63 sites across central Mexico, the eastern-most of which include most of the northern Mexican gartersnakes’ southern range. Specifically, sampling locations in the Balsas, Lerma, Morelia, Pánuco Moctezuma, and Pánuco Tambaón basins each occurred within the range of the northern Mexican gartersnake in the states of Guanajuato,

Queretaro, Mexico, and Puebla; approximately 30 locations in total. The purpose of this sampling effort was to score each site in terms of its index of biotic integrity (IBI) and environmental quality (EQ), with a score of 100 representing the optimum score for each category. The IBI scoring method has been verified as a valid means to quantitatively assess ecosystem integrity at each site (Lyons *et al.* 1995, pp. 576–581; Mercado-Silva *et al.* 2002, p. 184). The range in IBI scores in these sampling locations was 85 to 35, and the range in EQ scores was 90 to 50 (Mercado-Silva *et al.* 2002, Appendix 2). The average IBI score was 57, and the average EQ score was 74, across all 30 sites and all four basins (Mercado-Silva *et al.* 2002, Appendix 2). According to the qualitative equivalencies assigned to scores (Mercado-Silva *et al.* 2002, p. 184), these values indicate that the environmental quality score averaged across all 30 sites was “good” and the biotic integrity scores were “fair.” It should be noted that 14 of the 30 sites sampled had IBI scores equal to or less than 50, and five of those ranked as “poor.” Of all the basins throughout central Mexico that were scored in this exercise, the two Pánuco basins represented 20 of the 30 sites sampled and scored the worst of all basins (Mercado-Silva *et al.* 2002, p. 186). This indicates that threats to the northern Mexican gartersnake, its prey base, and its habitat pose the greatest risk in this portion of its range in Mexico.

Near Torreón, Coahuila, where the northern Mexican gartersnake occurs, groundwater pumping has resulted in flow reversal, which has dried up many local springs, drawn arsenic-laden water to the surface, and resulted in adverse human health effects in that area (Miller *et al.* 2005, p. 61). Severe water pollution from untreated domestic waste is evident downstream of large Mexican cities, such as Mexico City, and inorganic pollution from nearby industrialized areas and agricultural irrigation return flow has dramatically affected aquatic communities through contamination (Miller *et al.* 2005, p. 60). Miller *et al.* (2005, p. 61) provide an excerpt from Soto Galera *et al.* (1999) addressing the threats to the Río Lerma, Mexico’s longest river, which is occupied by the northern Mexican gartersnake: “The basin has experienced a staggering amount of degradation during the 20th Century. By 1985–1993, over half of our study sites had disappeared or become so polluted that they could no longer support fishes. Only 15 percent of the sites were still capable of supporting sensitive species.

Forty percent (17 different species) of the native fishes of the basin had suffered major declines in distribution, and three species may be extinct. The extent and magnitude of degradation in the Río Lerma basin matches or exceeds the worst cases reported for comparably sized basins elsewhere in the world.”

In the Transvolcanic Belt Region of the states of Jalisco, Mexico, and Veracruz in southern Mexico, Conant (2003, p. 4) noted that water diversions, pollution (e.g., discharge of raw sewage), sedimentation of aquatic habitats, and increased dissolved nutrients were resulting in decreased dissolved oxygen in suitable northern Mexican gartersnake habitat. Conant (2003, p. 4) stated that many of these threats were evident during his field work in the 1960s, and that they are “continuing with increased velocity.”

#### High-Intensity Wildfires and Sedimentation of Aquatic Habitat

Low-intensity fire has been a natural disturbance factor in forested landscapes for centuries, and low-intensity fires were common in southwestern forests prior to European settlement (Rinne and Neary 1996, pp. 135–136). Rinne and Neary (1996, p. 143) discuss effects of recent fire management policies on aquatic communities in Madrean Oak Woodland biotic communities in the southwestern United States. They concluded that existing wildfire suppression policies intended to protect the expanding number of human structures on forested public lands have altered the fuel loads in these ecosystems and increased the probability of high-intensity wildfires. The effects of these high-intensity wildfires include the removal of vegetation, the degradation of subbasin condition, altered stream behavior, and increased sedimentation of streams.

These effects can harm fish communities, as observed in the 1990 Dude Fire, when corresponding ash flows resulted in fish kills in Dude Creek and the East Verde River (Voeltz 2002, p. 77). Fish kills, also discussed below, can drastically affect the suitability of habitat for northern Mexican and narrow-headed gartersnakes due to the removal of a portion or the entire prey base. The Chiricahua leopard frog recovery plan cites altered fire regimes as a serious threat to Chiricahua leopard frogs, a prey species for northern Mexican gartersnakes (USFWS 2007, pp. 38–39).

The nature and occurrence of wildfires in the Southwest is expected to also be affected by climate change and ongoing drought. Current

predictions of drought and/or higher winter low temperatures may stress ponderosa pine forests in which the narrow-headed gartersnake principally occurs, and may increase the frequency and magnitude of wildfire. Ganey and Vojta (2010, entire) studied tree mortality in mixed conifer and ponderosa pine forests in Arizona from 1997–2007, a period of extreme drought. They found the mortality of trees to be severe; the number of trees dying over a 5-year period increased by over 200 percent in mixed-conifer forest and by 74 percent in ponderosa pine forest during this time frame. Ganey and Vojta (2010) attributed drought and subsequent insect (bark beetle) infestation to the die-offs in trees. Drought stress and a subsequent high degree of tree mortality from bark beetles make high-elevation forests more susceptible to high-intensity wildfires. Climate is a top-down factor that synchronizes with fuel loads, a bottom-up factor. Combined with a predicted reduction in snowpack and an earlier snowmelt, these factors suggest wildfires will be larger, more frequent, and more severe in the southwestern United States (Fulé 2010). Wildfires are expected to reduce vegetative cover and result in greater soil erosion, subsequently resulting in increased sediment flows in streams (Fulé 2010, entire). Increased sedimentation in streams reduces the visibility of gartersnakes in the water column, hampering their hunting ability as well as resulting in fish kills (which is also caused by the disruption in the nitrogen cycle post-wildfire), which reduce the amount of prey available to gartersnake populations. Additionally, unnaturally high amounts of sediment fill in pools in intermittent streams, which reduces the amount and availability of habitat for fish and amphibian prey.

In the last 2 years, both Arizona (2011 Wallow Fire) and New Mexico (2012 Whitewater-Baldy Complex Fire) have experienced the largest wildfires in their respective State histories; indicative of the last decade that has been punctuated by wildfires of massive proportion. The 2011 Wallow Fire consumed approximately 540,000 acres (218,530 ha) of Apache-Sitgreaves National Forest, White Mountain Apache Indian Tribe, and San Carlos Apache Indian Reservation lands in Apache, Navajo, Graham, and Greenlee counties in Arizona as well as Catron County, New Mexico (InciWeb 2011). The 2011 Wallow Fire impacted 97 percent of perennial streams in the Black River subbasin, 70 percent of perennial streams in the Gila River subbasin, and

78 percent of the San Francisco River subbasin and resulted in confirmed fish kills in each subbasin (Meyer 2011; p. 3, Table 2); each of these streams is known to support populations of either northern Mexican or narrow-headed gartersnakes.

Although the Black River drainage received no moderate or high-severity burns as a result of the 2011 Wallow Fire, the Fish and Snake Creek subbasins (tributaries to the Black River) were severely burned (Coleman 2011, p. 2). Post-fire fisheries surveys above Wildcat Point in the Black River found no fish in a reach extending up to the confluence with the West Fork of Black River. This was likely due to subsequent ash and sediment flows that had occurred there (Coleman 2011, p. 2). Post-fire fisheries surveys at "the Box," in the Blue River, detected only a single native fish. This was also likely due to ash and sediment flows and the associated subsequent fish kills that had occurred there, extending down to the Gila River Box in Safford, Arizona (Coleman 2011, pp. 2–3). The East Fork Black River subbasin experienced moderate to high-severity burns in 23 percent of its total acreage that resulted in declines in Apache trout and native sucker populations, but speckled dace and brown trout remained prevalent as of 2011 (Coleman 2011, p. 3). These fire data suggest that the persistence of the prey base for northern Mexican and narrow-headed gartersnakes in the Black River, and narrow-headed gartersnakes in the lower Blue River, will be precarious into the near- to midterm future, as will likely be the stability of gartersnake populations there.

Several large wildfires, which have resulted in excessive sedimentation of streams and affected resident fish populations that serve as prey for narrow-headed gartersnakes, have occurred historically on the Gila National Forest. From 1989–2004, numerous wildfires cumulatively burned much of the uplands within the Gila National Forest, which resulted in most perennial streams in the area experiencing ash flows and elevated sedimentation (Paroz *et al.* 2006, p. 55). More recently, the 2012 Whitewater-Baldy Complex Fire in the Gila National Forest in New Mexico is the largest wildfire in that State's history. This wildfire was active for more than 5 weeks and consumed approximately 300,000 acres (121,406 ha) of ponderosa, mixed conifer, pinyon-juniper, and grassland habitat (InciWeb 2012). Over 25 percent of the burn area experienced high-moderate burn severity (InciWeb 2012) and included several subbasins occupied by narrow-headed

gartersnakes such as the Middle Fork Gila River, West Fork Gila River, Iron Creek, the San Francisco River, Whitewater Creek, and Mineral Creek (Brooks 2012, Table 1). Other extant populations of the narrow-headed gartersnake in Gilita and South Fork Negrito Creeks are also expected to be impacted from the 2012 Whitewater-Baldy Complex Fire. Narrow-headed gartersnake populations in the Middle Fork Gila River and Whitewater Creek formerly represented two of the four most robust populations known from New Mexico, and two of the five known rangewide, and are expected to have been severely jeopardized by post-fire effects to their prey base. Thus, we now consider them currently as likely not viable, at least in the short to medium term. In reference to Gila trout populations, Brooks (2012, p. 3) stated that fish populations are expected to be severely impacted in the West Fork Gila River and Whitewater Creek. The loss of fish communities in affected streams is likely to lead to associated declines, or potential extirpations, in affected narrow-headed gartersnake populations as a result of the collapse in their prey base.

Since 2000, several wildfires have affected occupied narrow-headed gartersnake habitat on the Gila National Forest. The West Fork Gila subbasin was affected by the 2002 Cub Fire, the 2003 Dry Lakes Fire, and the 2011 Miller Fire; each resulted in post-fire ash and sediment flows, which adversely affected fish populations used by narrow-headed gartersnakes (Hellekson 2012a, pers. comm.). In 2011, the Miller Fire significantly affected the Little Creek subbasin and has resulted in substantive declines in abundance of the fish community (Hellekson 2012a, pers. comm.). Dry Blue and Campbell Blue creeks were affected by the 2011 Wallow Fire (Hellekson 2012a, pers. comm.). Saliz Creek was highly affected by the 2006 Martinez Fire (Hellekson 2012a, pers. comm.). Turkey Creek was heavily impacted by the Dry Lakes Fire in 2002, which resulted in a complete fish kill, but the fish community has since rebounded (Hellekson 2012a, pers. comm.). It is not certain how long the fish community was sparse or absent from Turkey Creek, but it is suspected that the narrow-headed gartersnake population there suffered significant declines from the loss of their prey base, as evidenced by the current low population numbers. Prior to the 2002 Dry Lakes Fire, Turkey Creek was largely populated by nonnative, spiny-rayed fish species, but has since been recolonized by native fish species

almost exclusively (Hellekson 2012a, pers. comm.), and may provide high-quality habitat for narrow-headed gartersnakes, once the subbasin has adequately stabilized.

Effects to northern Mexican and narrow-headed gartersnake habitat from wildfire should be considered in light of effects to the structural habitat and effects to the prey base. Post-fire effects vary with burn severity, percent of area burned within each severity category, and the intensity and duration of precipitation events that follow (Coleman 2011, p. 4). Low-severity burns within riparian habitat can actually have a rejuvenating effect by removing decadent ground cover and providing nutrients to remaining vegetation. As a result, riparian vegetative communities may be more resilient to wildfire, given that water is present (Coleman 2011, p. 4). Willows, an important component to narrow-headed gartersnake habitat, can be positively affected by low-severity burns, as long as the root crowns are not damaged (Coleman 2011, p. 4). High severity burns that occur within the floodplain of occupied habitat are expected to have some level of shorter-term effect on resident gartersnake populations through effects to the vegetative structure and abundance, which may include a reduction of basking sites and a loss of cover, which could increase the risk of predation. These potential effects need further study. Post-fire ash flows, flooding, and impacts to native prey populations are longer term effects and can occur for many years after a large wildfire (Coleman 2011, p. 2).

Post-fire flooding with significant ash and sediment loads can result in significant declines, or even the collapse, of resident fish communities, which poses significant concern for the persistence of resident gartersnake populations in affected areas. Sedimentation can adversely affect fish populations used as prey by northern Mexican or narrow-headed gartersnakes by: (1) Interfering with respiration; (2) reducing the effectiveness of fish's visually based hunting behaviors; and (3) filling in interstitial (spaces between cobbles, etc., on the stream floor) spaces of the substrate, which reduces reproduction and foraging success of fish (Wheeler *et al.* 2005, p. 145). Excessive sediment also fills in intermittent pools required for amphibian prey reproduction and foraging. Siltation of the rocky interstitial spaces along stream bottoms decreases the dissolved oxygen content where fish lay their eggs, resulting in depressed recruitment of fish and a

subsequent reduction in prey abundance for northern Mexican and narrow-headed gartersnakes through the loss of prey microhabitat (Nowak and Santana-Bendix 2002, pp. 37–38). As stated above, sediment can lead to several effects in resident fish species used by northern Mexican or narrow-headed gartersnakes as prey, which can ultimately cause increased direct mortality, reduced reproductive success, lower overall abundance, and reductions in prey species composition as documented by Wheeler *et al.* (2005, p. 145). The underwater foraging ability of narrow-headed gartersnakes (de Queiroz 2003, p. 381) and likely northern Mexican gartersnakes is largely based on vision and is also directly compromised by excessive turbidity caused by sedimentation of water bodies. Suspended sediment in the water column may reduce the narrow-headed gartersnake's visual hunting efficiency from effects to water clarity, based on research conducted by de Queiroz (2003, p. 381) that concluded the species relied heavily on visual cues during underwater striking behaviors.

The presence of adequate interstitial spaces along stream floors may be particularly important for narrow-headed gartersnakes. Hibbitts and Fitzgerald (2009, p. 464) reported the precipitous decline of narrow-headed gartersnakes in a formerly robust population in the San Francisco River at San Francisco Hot Springs from 1996 to 2004. The exact cause for this significant decline is uncertain, but the investigators suspected that a reduction in interstitial spaces along the stream floor from an apparent conglomerate, cementation process may have affected the narrow-headed gartersnake's ability to successfully anchor themselves to the stream bottom when seeking refuge or foraging for fish (Hibbitts and Fitzgerald 2009, p. 464). These circumstances would likely result in low predation success and eventually starvation. Other areas where sedimentation has affected either northern Mexican or narrow-headed gartersnake habitat are Cibecue Creek in Arizona, and the San Francisco River and South Fork Negrito Creek in New Mexico (Rosen and Schwalbe 1988, p. 46; Arizona Department of Water Resources 2011, p. 1; Hellekson 2012a, pers. comm.). The San Francisco River in Arizona was classified as impaired due to excessive sediment from its headwaters downstream to the Arizona–New Mexico border (Arizona Department of Water Resources 2011, p. 1). South Fork Negrito Creek is also listed as impaired due to excessive

turbidity (Hellekson 2012a, pers. comm.).

*Summary*—The presence of water is critical to both northern Mexican and narrow-headed gartersnakes and their primary prey species because their ecology and natural histories are strongly linked to water. Several factors, both natural and manmade, contribute to the continued degradation and dewatering of aquatic habitat throughout the range of northern Mexican and narrow-headed gartersnakes. Increasing human population growth is driving higher and higher demands for water in both the United States and Mexico. Water is subsequently secured through dams, diversions, flood-control projects, and groundwater pumping, which affects gartersnake habitat through reductions in flow and complete dewatering of stream reaches. Entire reaches of the Gila, Salt, Santa Cruz, and San Francisco Rivers, as well as numerous other rivers throughout the Mexican Plateau in Mexico which were historically occupied by either or both northern Mexican or narrow-headed gartersnakes, are now completely dry due to diversions, dams, and groundwater pumping. Several groundwater basins within the range of northern Mexican and narrow-headed gartersnakes in the United States are considered active management areas where pumping exceeds recharge, which is a constant threat to surface flow in streams and rivers connected to these aquifers. Reduced flows concentrate northern Mexican and narrow-headed gartersnakes and their prey with harmful nonnative species, which accelerate and amplify adverse effects of native-nonnative community interactions. Where surface water persists, increasing land development and recreation use adjacent to and within riparian habitat has led to further reductions in stream flow, removal or alteration of vegetation, and increased frequency of adverse human interactions with gartersnakes.

Exacerbating the effects of increasing human populations and higher water demands, climate change predictions include increased aridity, lower annual precipitation totals, lower snow pack levels, higher variability in flows (lower low-flows and higher high-flows), and enhanced stress on ponderosa pine communities in the southwestern United States and northern Mexico. Increased stress to ponderosa pine forests places them at higher risk of high-intensity wildfires, the effects of which are discussed below. Climate change has also been predicted to enhance the abundance and distribution

of harmful nonnative species, which adversely affect northern Mexican and narrow-headed gartersnakes.

Cienegas, a unique and important habitat for northern Mexican gartersnakes, have been adversely affected or eliminated by a variety of historical and current land uses in the United States and Mexico, including streambed modification, intensive livestock grazing, woodcutting, artificial drainage structures, stream flow stabilization by upstream dams, channelization, and stream flow reduction from groundwater pumping and water diversions. The historical loss of the cienega habitat of the northern Mexican gartersnake has resulted in local population declines or extirpations, negatively affecting its status and contributing to its decline rangewide.

Wildfire has historically been a natural and important disturbance factor within the range of northern Mexican and narrow-headed gartersnakes. However, in recent decades, forest management policies in the United States have favored fire suppression, the result of which has led to wildfires of unusual proportions, particularly along the Mogollon Rim of Arizona and New Mexico. These policies are generally not in place in Mexico, and consequently, wildfire is not viewed as a significant threat to the northern Mexican gartersnake in Mexico. However, in the last 2 years, both Arizona (2011 Wallow Fire) and New Mexico (2012 Whitewater-Baldy Complex Fire) have experienced the largest wildfires in their respective State histories, which is indicative of the last decade having been punctuated by wildfires of significant magnitude. High-intensity wildfire has been shown to result in significant ash and sediment flows into habitat occupied by northern Mexican or narrow-headed gartersnakes, resulting in significant reductions of their fish prey base and, in some instances, total fish kills. The interstitial spaces between rocks located along the stream floor are important habitat for the narrow-headed gartersnake as a result of its specialized foraging strategy and specialized diet. They are also important for several fish species relied upon as prey. When these spaces fill in with sediment, the narrow-headed gartersnake may be unable to forage successfully and may succumb to stress created by a depressed prey base. A significant reduction or absence of a prey base results in stress of resident gartersnake populations and can result in local population extirpations. Also, narrow-headed gartersnakes are believed to rely heavily on visual cues

while foraging underwater; increased turbidity from suspended fine sediment in the water column is likely to impede their ability to use visual cues at some level. Factors that result in depressed foraging ability from excessive sedimentation are likely to be enhanced when effects from harmful nonnative species are also acting on resident northern Mexican and narrow-headed gartersnake populations. We consider the narrow-headed gartersnake to be particularly threatened by the effects of wildfires as described because they occur throughout its range, the species is a fish-eating specialist that is unusually vulnerable to localized fish kills, and wildfire has already significantly affected two of the last remaining five populations that were formerly considered viable, pre-fire. We have demonstrated that high-intensity wildfires have the potential to eliminate gartersnake populations through a reduction or loss of their prey base. Since 1970, wildfires have adversely impacted the native fish prey base in 6 percent of the historical distribution of northern Mexican gartersnakes in the United States and 21 percent of that for narrow-headed gartersnakes rangewide, according to GIS analysis.

All of these conditions affect the primary drivers of gartersnake habitat suitability (the presence of water and prey) and exist in various degrees throughout the range of both gartersnake species. Collectively, they reduce the amount and arrangement of physically suitable habitat for northern Mexican and narrow-headed gartersnakes over their regional landscapes. The genetic representation of each species is threatened when populations become disconnected and isolated from neighboring populations because the length or area of dewatered zones is too great for dispersing individuals to overcome. Therefore, normal colonizing mechanisms that would otherwise reestablish populations where they have become extirpated are no longer viable. This subsequently leads to a reduction in species redundancy when isolated, small populations are at increased vulnerability to the effects of stochastic events, without a means for natural recolonization. Ultimately, the effects of scattered, small, and disjunct populations, without the means to naturally recolonize, is weakened species resiliency as a whole, which ultimately enhances the risk of either or both species becoming endangered or going extinct. Therefore, based on the best available scientific and commercial information, we conclude that land uses or conditions described above that alter

or dewater northern Mexican and narrow-headed gartersnake habitat are threats rangewide, now and in the foreseeable future.

*The Cumulative and Synergistic Effect of Threats on Low-Density Northern Mexican and Narrow-Headed Gartersnake Populations*

In most locations where northern Mexican or narrow-headed gartersnakes historically occurred or still occur currently, two or more threats are likely acting in combination with regard to their influence on the suitability of those habitats or on the species themselves. Many threats could be considered minor in isolation, but when they affect gartersnake populations in combination with other threats, become more serious. We have concluded that in as many as 24 of 29 known localities in the United States (83 percent), the northern Mexican gartersnake population is likely not viable and may exist at low population densities that could be threatened with extirpation or may already be extirpated. We also determined that in as many as 29 of 38 known localities (76 percent), the narrow-headed gartersnake population is likely not viable and may exist at low population densities that could be threatened with extirpation or may already be extirpated but survey data are lacking in areas where access is restricted. We have also discussed how harmful nonnative species have affected recruitment of gartersnakes across their range. In viable populations, gartersnakes are resilient to the loss of individuals through ongoing recruitment into the reproductive age class. However, when northern Mexican or narrow-headed gartersnakes occur at low population densities in the absence of appropriate recruitment, the loss of even a few adults, or even a single adult female, could drive a local population to extirpation. Below, we discuss threats that, when considered in combination, can appreciably threaten low-density populations with extirpation.

*Historical and Unmanaged Livestock Grazing and Agricultural Land Uses*

Currently in the United States, livestock grazing is a largely managed activity, but in Mexico, livestock grazing is much less managed or unmanaged altogether. The effect of livestock grazing on resident gartersnake populations must be examined as a comparison between historical and current management, and in the presence of harmful nonnative species, or not. Historical livestock grazing has damaged approximately 80 percent of stream, cienega, and riparian

ecosystems in the western United States (Kauffman and Krueger 1984, pp. 433–435; Weltz and Wood 1986, pp. 367–368; Cheney *et al.* 1990, pp. 5, 10; Waters 1995, pp. 22–24; Pearce *et al.* 1998, p. 307; Belsky *et al.* 1999, p. 1). Fleischner (1994, p. 629) found that “Because livestock congregate in riparian ecosystems, which are among the most biologically rich habitats in arid and semiarid regions, the ecological costs of grazing are magnified at these sites.” Stromberg and Chew (2002, p. 198) and Trimble and Mendel (1995, p. 243) also discussed the propensity for cattle to remain within or adjacent to riparian communities. Expectedly, this behavior is more pronounced in more arid regions (Trimble and Mendel 1995, p. 243). Effects from historical or unmanaged grazing include: (1) Declines in the structural richness of the vegetative community; (2) losses or reductions of the prey base; (3) increased aridity of habitat; (4) loss of thermal cover and protection from predators; (5) a rise in water temperatures to levels lethal to larval stages of amphibian and fish development; and (6) desertification (Szaro *et al.* 1985, p. 362; Schulz and Leininger 1990, p. 295; Schlesinger *et al.* 1990, p. 1043; Belsky *et al.* 1999, pp. 8–11; Zwartjes *et al.* 2008, pp. 21–23). In one rangeland study, it was concluded that 81 percent of the vegetation that was consumed, trampled, or otherwise removed was from a riparian area, which amounted to only 2 percent of the total grazing space, and that these actions were 5 to 30 times higher in riparian areas than on the uplands (Trimble and Mendel 1995, pp. 243–244). However, according to one study along the Agua Fria River, herbaceous ground cover can recover quickly from heavy grazing pressure (Szaro and Pase 1983, p. 384). Additional information on the effects of historical livestock grazing can be found in Sartz and Tolsted (1974, p. 354); Rosen and Schwalbe (1988, pp. 32–33, 47); Clary and Webster (1989, p. 1); Clary and Medin (1990, p. 1); Orodho *et al.* (1990, p. 9); and Krueper *et al.* (2003, pp. 607, 613–614).

Szaro *et al.* (1985, p. 360) assessed the effects of historical livestock management on a sister taxon and found that western (terrestrial) gartersnake (*Thamnophis elegans vagrans*) populations were significantly higher (versus controls) in terms of abundance and biomass in areas that were excluded from grazing, where the streamside vegetation remained lush, than where uncontrolled access to grazing was permitted. This effect was

complemented by higher amounts of cover from organic debris from ungrazed shrubs that accumulate as the debris moves downstream during flood events. Specifically, results indicated that snake abundance and biomass were significantly higher in ungrazed habitat, with a five-fold difference in number of snakes captured, despite the difficulty of making observations in areas of increased habitat complexity (Szaro *et al.* 1985, p. 360). Szaro *et al.* (1985, p. 362) also noted the importance of riparian vegetation for the maintenance of an adequate prey base and as cover in thermoregulation and predation avoidance behaviors, as well as for foraging success. Direct mortality of amphibian species, in all life stages, from being trampled by livestock has been documented in the literature (Bartelt 1998, p. 96; Ross *et al.* 1999, p. 163). Gartersnakes may, on occasion, be trampled by livestock. A black-necked gartersnake (*Thamnophis cyrtopsis cyrtopsis*) had apparently been killed by livestock trampling along the shore of a stock tank in the Apache-Sitgreaves National Forest, within an actively grazed allotment (Chapman 2005).

Subbasins where historical grazing has been documented as a suspected contributing factor for either northern Mexican or narrow-headed gartersnake declines include the Verde, Salt, Agua Fria, San Pedro, Gila, and Santa Cruz (Hendrickson and Minckley 1984, pp. 140, 152, 160–162; Rosen and Schwalbe 1988, pp. 32–33; Girmendonk and Young 1997, p. 47; Hale 2001, pp. 32–34, 50, 56; Voeltz 2002, pp. 45–81; Krueper *et al.* 2003, pp. 607, 613–614; Forest Guardians 2004, pp. 8–10; Holycross *et al.* 2006, pp. 52–61; McKinnon 2006d, 2006e; Paradzick *et al.* 2006, pp. 90–92; USFS 2008). Livestock grazing still occurs in these subbasins but is a largely managed land use and is not likely to pose significant threats to either northern Mexican or narrow-headed gartersnakes where closely managed. In cases where poor livestock management results in fence lines in persistent disrepair, providing unmanaged livestock access to occupied habitat, adverse effects from loss of vegetative cover may result, most likely in the presence of harmful nonnative species. As we described above, however, we strongly suspect that northern Mexican and narrow-headed gartersnakes are somewhat resilient to physical habitat disturbance where harmful nonnative species are absent.

The creation and maintenance of stock tanks is an important component to livestock grazing in the southwestern United States. Stock tanks associated with livestock grazing may facilitate the

spread of harmful nonnative species when they are intentionally or unintentionally stocked by anglers and private landowners (Rosen *et al.* 2001, p. 24). The management of stock tanks is an important consideration for northern Mexican gartersnakes in particular. Stock tanks associated with livestock grazing can be intermediary “stepping stones” in the dispersal of nonnative species from larger source populations to new areas (Rosen *et al.* 2001, p. 24). The effects of livestock grazing at stock tanks on northern Mexican gartersnakes depend on how they are managed. Dense bank and aquatic vegetation is an important habitat characteristic for the northern Mexican gartersnake in the presence of harmful nonnative species. This vegetation can be affected if the impoundment is poorly managed. When harmful nonnative species are absent, the presence of bank line vegetation is less important. Well-managed stock tanks provide important habitat for northern Mexican gartersnakes and their prey base, especially when the tank: (1) Remains devoid of harmful nonnative species while supporting native prey species; (2) provides adequate vegetation cover; and (3) provides reliable water sources in periods of prolonged drought. Given these benefits of well-managed stock tanks, we believe well-managed stock tanks are an important, even vital, component to northern Mexican gartersnake conservation and recovery.

#### Road Construction, Use, and Maintenance

Roads can pose unique threats to herpetofauna, and specifically to species like the northern Mexican gartersnake, its prey base, and the habitat where it occurs. The narrow-headed gartersnake, alternatively, is probably less affected by roads due to its more aquatic nature. Roads fragment occupied habitat and can result in diminished genetic viability in populations from increased mortality from vehicle strikes and adverse human encounters as supported by current research on eastern indigo snakes (Breininger *et al.* 2012, pp. 364–366). Roads often track along streams and present a mortality risk to gartersnakes seeking more upland, terrestrial habitat for brumation and gestation. Roads may cumulatively impact both species through the following mechanisms: (1) Fragmentation, modification, and destruction of habitat; (2) increase in genetic isolation; (3) alteration of movement patterns and behaviors; (4) facilitation of the spread of nonnative species via human vectors; (5) an

increase in recreational access and the likelihood of subsequent, decentralized urbanization; (6) interference with or inhibition of reproduction; (7) contributions of pollutants to riparian and aquatic communities; (8) reduction of prey communities; (9) effects to gartersnake reproduction; and (10) acting as population sinks (when population death rates exceed birth rates in a given area) (Rosen and Lowe 1994, pp. 146–148; Waters 1995, p. 42; Foreman and Alexander 1998, p. 220; Trombulak and Frissell 2000, pp. 19–26; Carr and Fahrig 2001, pp. 1074–1076; Hels and Buchwald 2001, p. 331; Smith and Dodd 2003, pp. 134–138; Angermeier *et al.* 2004, pp. 19–24; Shine *et al.* 2004, pp. 9, 17–19; Andrews and Gibbons 2005, pp. 777–781; Wheeler *et al.* 2005, pp. 145, 148–149; Roe *et al.* 2006, p. 161; Sacco 2007, pers. comm.; Ouren *et al.* 2007, pp. 6–7, 11, 16, 20–21; Jones *et al.* 2011, pp. 65–66; Hellekson 2012a, pers. comm.).

Perhaps the most common factor in road mortality of snakes is the propensity for drivers to unintentionally and intentionally run them over, both because people tend to dislike snakes (Rosen and Schwalbe 1988, p. 43; Ernst and Zug 1996, p. 75; Green 1997, pp. 285–286; Nowak and Santana-Bendix 2002, p. 39) and because they make easy targets crossing roads at perpendicular angles (Klauber 1956, p. 1026; Langley *et al.* 1989, p. 47; Shine *et al.* 2004, p. 11). Mortality data for northern Mexican gartersnakes have been collected at the Bubbling Ponds Hatchery since 2006. Of the 15 dead specimens, eight were struck by vehicles on roads within or adjacent to the hatchery ponds, perhaps while crossing between ponds to forage (Boyarski 2011, pp. 1–3). Van Devender and Lowe (1977, p. 47), however, observed several northern Mexican gartersnakes crossing the road at night after the commencement of the summer monsoon (rainy season), which highlights the seasonal variability in surface activity of this snake. Wallace *et al.* (2008, pp. 243–244) documented a vehicle-related mortality of a northern Mexican gartersnake on Arizona State Route 188 near Tonto Creek that occurred in 1995.

#### Adverse Human Interactions With Gartersnakes

A fear of snakes is generally and universally embedded in modern culture, and is prevalent in the United States (Rosen and Schwalbe 1988, p. 43; Ernst and Zug 1996, p. 75; Green 1997, pp. 285–286; Nowak and Santana-Bendix 2002, p. 39). We use the phrase “adverse human interaction” to refer to the act of humans directly injuring or

killing snakes out of a sense of fear or anxiety (ophidiophobia), or for no apparent purpose. One reason the narrow-headed gartersnake is vulnerable to adverse human interactions is because of its appearance. The narrow-headed gartersnake is often confused for a venomous water moccasin (cottonmouth, *Agkistrodon piscivorus*), because of its triangular-shaped head and propensity to be found in or near water (Nowak and Santana-Bendix 2002, p. 38). Although the nearest water moccasin populations are located over 700 miles (1,127 km) to the east in central Texas, these misidentifications prove fatal for narrow-headed gartersnakes (Nowak and Santana-Bendix 2002, p. 38).

Adverse human interaction may be largely responsible for highly localized extirpations in narrow-headed gartersnakes based on the collection history of the species at Slide Rock State Park along Oak Creek, where high recreation use is strongly suspected to result in direct mortality of snakes by humans (Nowak and Santana-Bendix 2002, pp. 21, 38). Rosen and Schwalbe (1988, p. 42–43) suggested that approximately 44 percent of the estimated annual mortality of narrow-headed gartersnakes in the larger size classes along Oak Creek may be human-caused. Declines in narrow-headed gartersnake populations in the North and East Forks of the White River have also been attributed to humans killing snakes (Rosen and Schwalbe 1988, pp. 43–44). Locations in New Mexico where this unnatural form of mortality is believed to have historically affected or currently affect narrow-headed gartersnakes include Wall Lake (Fleharty 1967, p. 219), Middle Fork of the Gila River, the mainstem Gila River from Cliff Dwellings to Little Creek, in Whitewater Creek from the Catwalk to Glenwood (L. Hellekson 2012a, pers. comm.), and near San Francisco Hot Springs along the San Francisco River (Hibbitts and Fitzgerald 2009, p. 466).

#### Environmental Contaminants

Environmental contaminants, such as heavy metals, may be common at low background levels in soils and, as a result, concentrations are known to bioaccumulate in food chains. A bioaccumulative substance increases in concentration in an organism or in the food chain over time. A mid- to higher-order predator, such as a gartersnake, may, therefore, accumulate these types of contaminants over time in their fatty tissues, which may lead to adverse health effects (Wylie *et al.* 2009, p. 583, Table 5). Campbell *et al.* (2005, pp. 241–243) found that metal concentrations

accumulated in the northern watersnake (*Nerodia sipedon*) at levels six times that of their primary prey item, the central stoneroller (a fish, *Campostoma anomalum*). Metals, in trace amounts, can be sequestered in the skin of snakes (Burger 1999, p. 212), interfere with metabolic rates of snakes (Hopkins *et al.* 1999, p. 1261), affect the structure and function of their liver and kidneys, and may also act as neurotoxins, affecting nervous system function (Rainwater *et al.* 2005, p. 670). Based on data collected in 2002–2010, mercury appears to be bioaccumulating in fish found in the lower reaches of Tonto Creek, where northern Mexican gartersnakes also occur (Rector 2010, pers. comm.). In fact, the State record for the highest mercury concentrations in fish tissue was reported in Tonto Creek from this investigation by Rector (2010, pers. comm.). Mercury levels were found to be the highest in the piscivorous smallmouth bass and, secondly, in desert suckers (a common prey item for northern Mexican and narrow-headed gartersnakes). Because gartersnakes eat fish, mercury may be bioaccumulating in resident populations, although no testing has occurred.

Specific land uses such as mining and smelting, as well as road construction and use, can be significant sources of contaminants in air, water, or soil through point-source and non-point source mechanisms. Copper mining has occurred in Arizona (Pima, Pinal, Yavapai, and Gila Counties) and adjacent Mexico for centuries, and many of these sites have smelters (now decommissioned), which are former sources of airborne contaminants. The mining industry in Mexico is largely concentrated in the northern tier of that country, with the State of Sonora being the leading producer of copper, gold, graphite, molybdenum, and wollastonite, as well as the leader among Mexican States with regard to the amount of surface area dedicated to mining (Stoleson *et al.* 2005, p. 56). The three largest mines in Mexico (all copper) are found in Sonora (Stoleson *et al.* 2005, p. 57). The sizes of mines in Sonora vary considerably, as do the known environmental effects from mining-related activities (from exploration to long after closure), which include contamination and drawdown of groundwater aquifers, erosion, acid mine drainage, fugitive dust, pollution from smelter emissions, and landscape clearing (Stoleson *et al.* 2005, p. 57). We are aware of no specific research on potential effects of mining or environmental contaminants acting on

northern Mexican gartersnakes in Mexico, but presume, based on the best available scientific and commercial information, that where this land use is prevalent, contaminants may be a contributing threat to resident gartersnakes or their prey.

#### Northern Mexican Gartersnake Competition With Marcy's Checkered Gartersnake

Preliminary research suggests that Marcy's checkered gartersnake (*Thamnophis marcianus marcianus*) may impact the future conservation of the northern Mexican gartersnake in southern Arizona, although supporting data are limited. Rosen and Schwalbe (1988, p. 31) hypothesized that bullfrogs are more likely to eliminate northern Mexican gartersnakes when Marcy's checkered gartersnakes are also present. Marcy's checkered gartersnake is a semi-terrestrial species that is able to co-exist to some degree with harmful nonnative predators. This might be due to its apparent ability to forage in more terrestrial habitats, specifically during the vulnerable juvenile size classes (Rosen and Schwalbe 1988, p. 31; Rosen *et al.* 2001, pp. 9–10). In every age class, the northern Mexican gartersnake forages in aquatic habitats where nonnative spiny-rayed fish, bullfrogs, and crayfish are present, which increases not only the encounter rate between predator and prey, but also the juvenile mortality rate of the northern Mexican gartersnake, which negatively affects recruitment. As northern Mexican gartersnake numbers decline within a population, space becomes available for occupation by Marcy's checkered gartersnakes. One hypothesis suggests that the Marcy's checkered gartersnake might affect the maximum number of northern Mexican gartersnakes that an area can maintain based upon available resources, and could potentially accelerate the decline of, or preclude re-occupancy by, the northern Mexican gartersnake (Rosen and Schwalbe 1988, p. 31). Rosen *et al.* (2001, pp. 9–10) documented the occurrence of Marcy's checkered gartersnakes replacing northern Mexican gartersnakes at the San Bernardino National Wildlife Refuge and surrounding habitats of the Black Draw. Rosen and Schwalbe (1988, p. 31) report the same at the mouth of Potrero Canyon near its confluence with the lower Santa Cruz River. They suspected that drought, extending from the late 1980s through the late 1990s, played a role in the degree of competition for aquatic resources, provided an advantage to the more versatile Marcy's checkered gartersnake, and expedited

the decline of the northern Mexican gartersnake. More research is needed to confirm these relationships.

#### Mortality From Entanglement Hazards

In addressing the effects of soil erosion associated with road construction projects or post-fire remedial subbasin management, erosion control materials placed on the ground surface are often used. Erosion control is considered a best management practice for most soil-disturbing activities, and is broadly required as mitigation across the United States, in particular to avoid excess sedimentation of streams and rivers. Rolled erosion control products, such as temporary erosion control blankets and permanent turf reinforcement mats, are two methods commonly used for these purposes (Barton and Kinkead 2005, p. 34). These products use stitching or net-like mesh products to hold absorbent media together. At a restoration site in South Carolina, 19 snakes (15 dead) representing five different species were found entangled in the netting and had received severe lacerations in the process of attempting to escape their entanglement (Barton and Kinkead 2005, p. 34). Stuart *et al.* (2001, pp. 162–164) also reported the threats of net-like debris to snake species. Kapfer and Paloski (2011, p. 4) reported at least 31 instances involving six different species of snake (including the common gartersnake) in Wisconsin that had become entangled in the netting used for either erosion control or as a wildlife exclusion product. In their review, Kapfer and Paloski (2011, p. 6) noted that 0.5 in. by 0.5 in. mesh has the greatest likelihood of entangling snakes.

Similar snake mortalities have not been documented in Arizona or New Mexico, according to our files. However, given the broad usage of these materials across the distribution of the northern Mexican and narrow-headed gartersnakes, it is not unlikely that mortality occurs but goes unreported. The likelihood of either gartersnake species becoming entangled depends on the distance these erosion control materials are used from water in occupied habitat and the density of potentially affected populations. Because erosion control products are usually used to prevent sedimentation of streams, there is a higher likelihood for gartersnakes to become entangled. This potential threat will require public education and additional monitoring and research, with emphasis in regions with occupied habitat.

Finally, discarded fishing nets have also been documented as a source of mortality for northern Mexican

gartersnakes in the area of Lake Chapala, Jalisco, Mexico (Barragán-Ramírez and Ascencio-Arrayga 2013, p. 159). Netting or seining is not an authorized form of recreational fishing for sport fish in Arizona or New Mexico, but the practice is allowed in either state for the collection of live baitfish (AGFD 2013, p. 57; NMDGF 2013, p. 17). We are not certain of the frequency in which these techniques are used for such purposes in either state, but do not suspect that discarded nets or seines are commonly left on-site where they could ensnare resident gartersnakes. However, this practice is used in Mexico as a primary means of obtaining freshwater fish as a food source and may be a significant threat to local northern Mexican gartersnake populations where this practice occurs.

#### Disease

Our review of the scientific literature did not find evidence that disease is a current factor contributing to the decline in northern Mexican or narrow-headed gartersnakes. However, a recent wildlife health bulletin announced the emergence of snake fungal disease (SFD) within the eastern and Midwestern portions of the United States (Sleemen 2013, p. 1). SFD has now been diagnosed in several terrestrial and aquatic snake genera including *Nerodia*, *Coluber*, *Pantherophis*, *Crotalus*, *Sistrurus*, and *Lampropeltis*. Clinical signs of SFD include scabs or crusty scales, subcutaneous nodules, abnormal molting, white opaque cloudiness of the eyes, localized thickening or crusting of the skin, skin ulcers, swelling of the face, or nodules in the deeper tissues (Sleemen 2013, p. 1). While mortality has been documented as a result of SFD, population-level impacts have not, due to the cryptic and solitary nature of snakes and the lack of long-term monitoring data (Sleemen 2013, p. 1). So far, no evidence of SFD has been found in the genus *Thamnophis* but the documented occurrence of SFD in ecologically similar, aquatic colubrids such as *Nerodia* is cause for concern. We recommend resource managers remain diligent in looking for signs of SFD in wild gartersnake populations.

#### Summary

We found numerous effects of livestock grazing that have resulted in the historical degradation of riparian and aquatic communities that have likely affected northern Mexican and narrow-headed gartersnakes. The literature concluded that mismanaged or unmanaged grazing can have disproportionate effects to riparian communities in arid ecosystems due to

the attraction of livestock to water, forage, and shade. We found current livestock grazing activities to be more of a concern in Mexico. The literature is clear that the most profound impacts from livestock grazing in the southwestern United States occurred nearly 100 years ago, were significant, and may still be affecting some areas that have yet to fully recover. Unmanaged or poorly managed livestock operations likely have more pronounced effects in areas significantly impacted by harmful nonnative species through a reduction in cover. However, land managers in Arizona and New Mexico currently emphasize the protection of riparian and aquatic habitat in allotment management planning, usually through fencing, rotation, monitoring, and range improvements such as developing remote water sources. Collectively, these measures have reduced the likelihood of significant adverse impacts on northern Mexican or narrow-headed gartersnakes, their habitat, and their prey base. We also recognize that while the presence of stock tanks on the landscape can benefit nonnative species, well-managed stock tanks are an invaluable tool in the conservation and recovery of northern Mexican gartersnakes and their prey.

Other activities, factors, or conditions that act in combination, such as road construction, use, and management, adverse human interactions, environmental contaminants, entanglement hazards, and competitive pressures from sympatric species, occur within the distribution of these gartersnakes and have the propensity to contribute to further population declines or extirpations where gartersnakes occur at low population densities. An emerging skin disease, SFD, has not yet been documented in gartersnakes but has affected snakes of many genera within the United States, including ecologically similar species, and may pose a future threat to northern Mexican and narrow-headed gartersnakes. Where low density populations are affected these types of threats described above, even the loss of a few reproductive adults, especially females, from a population can have significant population-level effects, most notably in the presence of harmful nonnative species. Continued population declines and extirpations threaten the genetic representation of each species because many populations have become disconnected and isolated from neighboring populations. This subsequently leads to a reduction in species redundancy and resiliency

when isolated, small populations are at increased vulnerability to the effects of stochastic events, without a means for natural recolonization. Based on the best available scientific and commercial information, we conclude these threats have the tendency to act synergistically and disproportionately on low-density gartersnake populations rangewide, now and in the foreseeable future.

#### *The Inadequacy of Existing Regulatory Mechanisms*

Below, we examine whether existing regulatory mechanisms are inadequate to address the threats to the northern Mexican and narrow-headed gartersnakes discussed under other factors. Section 4(b)(1)(A) of the Endangered Species Act requires the Service to take into account “those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species.” We interpret this language to require us to consider relevant Federal, State, and Tribal laws, regulations, and other such mechanisms that may minimize any of the threats we describe in the threats analysis under the other four factors, or otherwise influence conservation of the species. We give strongest weight to statutes and their implementing regulations, and management direction that stems from those laws and regulations. They are nondiscretionary and enforceable, and are considered a regulatory mechanism under this analysis. Having evaluated the significance of the threat as mitigated by any such conservation efforts, we analyze under Factor D the extent to which existing regulatory mechanisms are inadequate to address the specific threats to the species. Regulatory mechanisms, if they exist, may reduce or eliminate the impacts from one or more identified threats. In this section, we review existing State and Federal regulatory mechanisms to determine whether they effectively reduce or remove threats to the species.

A number of Federal statutes potentially afford protection to northern Mexican and narrow-headed gartersnakes or their prey species. These include section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*), Federal Land Policy and Management Act (43 U.S.C. 1701 *et seq.*), National Forest Management Act (16 U.S.C. 1600 *et seq.*), National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), and the Act. However, in practice, these statutes have not been able to provide sufficient protection to prevent the currently observed downward trend in northern Mexican and narrow-headed

gartersnakes or their prey species, and the concurrent upward trend in threats.

Section 404 of the Clean Water Act regulates placement of fill into waters of the United States, including the majority of northern Mexican and narrow-headed gartersnake habitat. However, many actions with the potential to be highly detrimental to both species, their prey base, and their habitat, such as gravel mining and irrigation diversion structure construction and maintenance, may be exempted from the Clean Water Act. Other detrimental actions, such as bank stabilization and road crossings, are covered under nationwide permits that receive limited environmental review. A lack of thorough, site-specific analyses for projects can allow substantial adverse effects to northern Mexican or narrow-headed gartersnakes, their prey base, or their habitat.

The majority of the extant populations of northern Mexican and narrow-headed gartersnakes in the United States occur on lands managed by the U.S. Bureau of Land Management (BLM) and U.S. Forest Service. Both agencies have riparian protection goals that may provide habitat benefits to both species; however, neither agency has specific management plans for northern Mexican or narrow-headed gartersnakes. As a result, some of the significant threats to these gartersnakes, for example, those related to nonnative species, are not addressed on these lands. The BLM considers the northern Mexican gartersnake as a “Special Status Species,” and agency biologists actively attempt to identify gartersnakes observed incidentally during fieldwork for their records (Young 2005). Otherwise, no specific protection or land-management consideration is afforded to that species on BLM lands.

The U.S. Forest Service does not include northern Mexican or narrow-headed gartersnakes on their Management Indicator Species List, but both species are included on the Regional Forester’s Sensitive Species List (USFS 2007, pp. 38–39). This means they are considered in land management decisions, but no specific protective measures are conveyed to these species. Individual U.S. Forest Service biologists who work within the range of either northern Mexican or narrow-headed gartersnakes may opportunistically gather data for their records on gartersnakes observed incidentally in the field, although it is not required. The Gila National Forest mentions the narrow-headed gartersnake in their land and resource management plan, which includes standards relating to forest management

for the benefit of endangered and threatened species as identified through approved management and recovery plans (CBD *et al.* 2011, p. 18). Neither species is mentioned in any other land and resource management plan for the remaining national forests where they occur (CBD *et al.* 2011, p. 18).

The New Mexico Department of Game and Fish lists the northern Mexican gartersnake as State-endangered and the narrow-headed gartersnake as State-threatened (NMDGF 2006, Appendix H). A species is State-endangered if it is in jeopardy of extinction or extirpation within the State; a species is State-threatened if it is likely to become endangered within the foreseeable future throughout all or a significant portion of its range in New Mexico (NMDGF 2006, p. 52). “Take,” defined as “to harass, hunt, capture or kill any wildlife or attempt to do so” by NMSA 17–2–38.L., is prohibited without a scientific collecting permit issued by the New Mexico Department of Game and Fish as per NMSA 17–2–41.C and New Mexico Administrative Code (NMAC) 19.33.6. However, while the New Mexico Department of Game and Fish can issue monetary penalties for illegal take of either northern Mexican gartersnakes or narrow-headed gartersnakes, the same provisions are not in place for actions that result in loss or modification of their habitats (NMSA 17–2–41.C and NMAC 19.33.6) (Painter 2005).

Prior to 2005, the Arizona Game and Fish Department allowed for take of up to four northern Mexican or narrow-headed gartersnakes per person per year as specified in Commission Order 43. The Arizona Game and Fish Department defines “take” as “pursuing, shooting, hunting, fishing, trapping, killing, capturing, snaring, or netting wildlife or the placing or using any net or other device or trap in a manner that may result in the capturing or killing of wildlife.” The Arizona Game and Fish Department subsequently amended Commission Order 43, effective January 2005. Take of northern Mexican and narrow-headed gartersnakes is no longer permitted in Arizona without issuance of a scientific collecting permit (Ariz. Admin. Code R12–4–401 *et seq.*), or special authorization. While the Arizona Game and Fish Department can seek criminal or civil penalties for illegal take of these species, the same provisions are not in place for actions that result in destruction or modification of the gartersnakes’ habitat. In addition to making the necessary regulatory changes to promote the conservation of northern Mexican and narrow-headed gartersnakes, the

Arizona Game and Fish Departments' Nongame Branch continues to be a strong partner in research and survey efforts that further our understanding of current populations, and assist with conservation efforts and the establishment of long-term conservation partnerships.

Throughout Mexico, the Mexican gartersnake is listed at the species level of its taxonomy as "Amenazadas," or Threatened, by the Secretaria de Medio Ambiente y Recursos Naturales (SEMARNAT) (SEDESOL 2001). Threatened species are "those species, or populations of the same, likely to be in danger of disappearing in a short or medium timeframe, if the factors that negatively impact their viability, cause the deterioration or modification of their habitat or directly diminish the size of their populations continue to operate" (SEDESOL 2001 (NOM-059-ECOL-2001), p. 4). This designation prohibits taking of the species, unless specifically permitted, as well as prohibits any activity that intentionally destroys or adversely modifies its habitat (SEDESOL 2000 (LGVS) and 2001 (NOM-059-ECOL-2001)). Additionally, in 1988, the Mexican Government passed a regulation that is similar to the National Environmental Policy Act of the United States. This Mexican regulation requires an environmental assessment of private or government actions that may affect wildlife or their habitat (SEDESOL 1988 (LGEEPA)).

The Mexican Federal agency known as the Instituto Nacional de Ecología (INE) is responsible for the analysis of the status and threats that pertain to species that are proposed for listing in the Norma Oficial Mexicana NOM-059 (the Mexican equivalent to an endangered and threatened species list), and, if appropriate, the nomination of species to the list. INE is generally considered the Mexican counterpart to the United States' Fish and Wildlife Service. INE developed the Method of Evaluation of the Risk of Extinction of the Wild Species in Mexico (MER), which unifies the criteria of decisions on the categories of risk and permits the use of specific information fundamental to listing decisions. The MER is based on four independent, quantitative criteria: (1) Size of the distribution of the taxon in Mexico; (2) state (quality) of the habitat with respect to natural development of the taxon; (3) intrinsic biological vulnerability of the taxon; and (4) impacts of human activity on the taxon. INE began to use the MER in 2006; therefore, all species previously listed in the NOM-059 were based solely on expert review and opinion in many cases. Specifically, until 2006, the

listing process under INE consisted of a panel of scientific experts who convened as necessary for the purpose of defining and assessing the status and threats that affect Mexico's native species that are considered to be at risk, and applying those factors to the definitions of the various listing categories. In 1994, when the Mexican gartersnake was placed on the NOM-059 (SEDESOL 1994 (NOM-059-ECOL-1994), p. 46) as a threatened species, the decision was made by a panel of scientific experts.

Although the Mexican gartersnake is listed as a threatened species in Mexico and based on our experience collaborating with Mexico on transborder conservation efforts, no recovery plan or other conservation planning occurs because of this status and enforcement of the regulation protecting the gartersnake is sporadic, depending on available resources and location. Based upon the best available scientific and commercial information on the status of the species, and the historic and continuing threats to its habitat in Mexico, our analysis concludes that regulatory mechanisms enacted by the Mexican government to conserve the northern Mexican gartersnake are not adequate to address threats to the species or its habitat.

In summary, there are a number of existing regulations that potentially address issues affecting the northern Mexican and narrow-headed gartersnakes and their habitats. However, existing regulations within the range of northern Mexican and narrow-headed gartersnakes typically only address the direct take of individuals without a permit, and provide little, if any, protection of gartersnake habitat. Arizona and New Mexico statutes do not provide protection of habitat and ecosystems. Legislation in Mexico prohibits intentional destruction or modification of northern Mexican gartersnake habitat, but neither that, nor prohibitions of take, appear to be adequate to address ongoing threats.

#### *Current Conservation of Northern Mexican and Narrow-Headed Gartersnakes*

Several conservation measures implemented by land and resource managers, private land owners, and other stakeholders can directly or indirectly benefit populations of northern Mexican and narrow-headed gartersnakes. For example, the AGFD's conservation and mitigation program (implemented under an existing section 7 incidental take permit) has committed to either stocking (with captive bred

stock) or securing two populations each of northern Mexican and narrow-headed gartersnakes to help minimize adverse effects to these species from their sport fish stocking program through 2021 (USFWS 2011, Appendix C). However, to achieve these goals, challenges must be overcome. First, captive propagation of both gartersnake species remains problematic. After approximately 5 years of experimentation with captive propagation at five institutions, using two colonies of northern Mexican gartersnakes and three colonies of narrow-headed gartersnakes, success has been limited (see GCWG 2007, 2008, 2009, 2010). In 2012, approximately 40 northern Mexican gartersnakes were produced at one institution, and they were subsequently marked and released along Cienega Creek. These were the first gartersnakes of either species to be produced under this program, but their current status in the wild remains unknown. No narrow-headed gartersnakes have been produced in captivity under this program since its inception. Secondly, in order to be successful, the process of "securing" a population of either species will likely involve an aggressive nonnative removal strategy, and will have to account for habitat connectivity to prevent reinvasion of unwanted species. Therefore, securing a population of either species may involve removal of harmful nonnatives from an entire subbasin.

To improve the status of northern Mexican gartersnakes in this subbasin, the AGFD recently purchased the approximate 200-acre (81-ha) Horseshoe Ranch along the Agua Fria River located near the Bloody Basin Road crossing, east of Interstate 17 and southeast of Cordes Junction, Arizona. The AGFD plans to introduce northern Mexican gartersnakes as well as lowland leopard frogs and native fish species into a large pond, protected by bullfrog exclusion fencing, located adjacent to the Agua Fria River. The bullfrog exclusion fencing around the pond will permit the dispersal of northern Mexican gartersnakes and lowland leopard frogs from the pond, allowing the pond to act as a source population to the Agua Fria River. The AGFD's short- to mid-term conservation planning for Horseshoe Ranch will help ensure the northern Mexican gartersnake persists in this historical stronghold.

In 2007, the New Mexico Department of Game and Fish completed a recovery plan for narrow-headed gartersnakes in New Mexico (Pierce 2007, pp. 13-15) that included the following management objectives: (1) Researching the effect of known threats to, and natural history of,

the species; (2) acquiring funding sources for research, monitoring, and management; (3) enhancing education and outreach; and (4) managing against known threats to the species. Implementation of the recovery plan was to occur between the second half of 2007 through 2011, and was divided into three main categories: (1) Improve and maintain knowledge of potential threats to the narrow-headed gartersnake; (2) improve and maintain knowledge of the biology of the narrow-headed gartersnake; and (3) develop and maintain high levels of cooperation and coordination between stakeholders and interested parties (Pierce 2007, pp. 16–17). Our review of the plan found that it lacked specific threat-mitigation commitments on the landscape, as well as stakeholder accountability for implementing activities prescribed in the plan. We also found that actions calling for targeted nonnative species removal or management were absent in the implementation schedule provided in Pierce (2007; p. 17). As we have discussed at length, harmful nonnative species are the primary driver of continued declines in both gartersnake species. No recovery plan, conservation plan, or conservation agreement currently exists in New Mexico with regard to the northern Mexican gartersnake (NMDGF 2006, Table 6–3).

Both northern Mexican and narrow-headed gartersnakes are considered “Candidate Species” in the Arizona Game and Fish Department draft document, *Wildlife of Special Concern (WSCA) (AGFD In Prep., p. 12)*. A “Candidate Species” is one “whose threats are known or suspected but for which substantial population declines from historical levels have not been documented (though they appear to have occurred)” (AGFD *In Prep.*, p. 12). The purpose of the WSCA list is to provide guidance in habitat management implemented by land-management agencies. Additionally, both northern Mexican and narrow-headed gartersnakes are considered a “Tier 1b Species of Greatest Conservation Need (SGCN)” in the Arizona Game and Fish Department document, *Arizona’s Comprehensive Wildlife Conservation Strategy (CWCS) (AGFD 2006a, pp. 499–501)*. The purpose for the CWCS is to “provide an essential foundation for the future of wildlife conservation and a stimulus to engage the States, federal agencies, and other conservation partners to strategically think about their individual and coordinated roles in prioritizing conservation efforts” (AGFD 2006a, p. 2). A “Tier 1b SGCN” is one that

requires immediate conservation actions aimed at improving conditions through intervention at the population or habitat level (AGFD 2006a, p. 32). In the 2011 draft revised State wildlife action plan (an updated version of the CWCS), northern Mexican gartersnake is a Tier 1a SGCN. Tier 1a species “comprise a large percentage of [AGFD’s] management resource allocation” and “are [their] highest priorities.” Neither the WSCA nor the CWCS are regulatory documents and, consequently, do not provide and specific protections for either the gartersnakes themselves, or their habitats. The Arizona Game and Fish Department does not have specified or mandated recovery goals for either the northern Mexican or narrow-headed gartersnake, nor has a conservation agreement or recovery plan been developed for either species.

Indirect benefits for both gartersnake species occur through recovery actions designed for their prey species. Since the Chiricahua leopard frog was listed as threatened under the Act, significant strides have been made in its recovery, and the mitigation of its known threats. The northern Mexican gartersnake, in particular, has likely benefitted from these actions, at least in some areas, such as at the Las Cienegas Natural Conservation Area and in Scotia Canyon of the Huachuca Mountains. However, much of the recovery of the Chiricahua leopard frog has occurred in areas that have not directly benefitted the northern Mexican gartersnake, either because these activities have occurred outside the known distribution of the northern Mexican gartersnake or because they have occurred in isolated lentic systems that are far removed from large perennial streams that typically provide source populations of northern Mexican gartersnakes. In recent years, significant strides have been made in controlling bullfrogs on local landscape levels in Arizona, such as in the Scotia Canyon area, in the Las Cienegas National Conservation Area, on the BANWR, and in the vicinity of Pena Blanca Lake in the Pajarito Mountains. Recent efforts to return the Las Cienegas National Conservation Area to a wholly native biological community have involved bullfrog eradication efforts, as well as efforts to recover the Chiricahua leopard frog and native fish species. These actions should assist in conserving the northern Mexican gartersnake population in this area. Bullfrog control has been shown to be most effective in simple, lentic systems such as stock tanks. Therefore, we encourage livestock managers to work with resource managers in the systematic eradication

of bullfrogs from stock tanks where they occur, or at a minimum, ensure they are never introduced.

An emphasis on native fish recovery in fisheries management and enhanced nonnative species control to favor native communities may be the single most efficient and effective manner to recover these gartersnakes, in addition to all listed or sensitive native fish and amphibian species which they prey upon. Alternatively, resource management policies that either directly benefit or maintain nonnative community assemblages to the exclusion of native species are likely to significantly reduce the potential for the conservation and recovery of northern Mexican and narrow-headed gartersnakes.

Fisheries managers strive to balance the needs of the recreational angling community against those required by native aquatic communities. Fisheries management has direct implications for the conservation and recovery of northern Mexican and narrow-headed gartersnakes in the United States. Clarkson *et al.* (2005) discuss management conflicts as a primary factor in the decline of native fish species in the southwestern United States, and declare the entire native fish fauna as imperiled. The investigators cite nonnative species as the most consequential factor leading to rangewide declines of native fish, and that such declines prevent or negate species’ recovery efforts from being implemented or being successful (Clarkson *et al.* 2005, p. 20). Maintaining the status quo of current management of fisheries within the southwestern United States will have serious adverse effects to native fish species (Clarkson *et al.* 2005, p. 25), which will affect the long-term viability of northern Mexican and narrow-headed gartersnakes and their potential for recovery. Clarkson *et al.* (2005, p. 20) also note that over 50 nonnative species have been introduced into the Southwest as either sportfish or baitfish, and some are still being actively stocked, managed for, and promoted by both Federal and State agencies as nonnative recreational fisheries.

To help resolve the fundamental conflict of management between native fish and recreational sport fisheries, Clarkson *et al.* (2005, pp. 22–25) propose the designation of entire subbasins as having either native or nonnative fisheries and management for these goals aggressively. The idea of watershed-segregated fisheries management is also supported by Marsh and Pacey (2005, p. 62). As part of the Arizona Game and Fish Department’s

overall wildlife conservation strategy, the AGFD has planned an integrated fisheries management approach (AGFD 2006a, p. 349), which is apparently designed to manage subbasins specifically for either nonnative or native fish communities. The AGFD has not yet decided how fisheries will be managed in Arizona's subbasins. However, angler access, existing fish communities, and stream flow considerations are likely to inform such broadly based decisions. Several of Arizona's large perennial rivers present an array of existing sport fishing opportunities and access points, contain harmful nonnative fish species, and also serve as important habitat for either northern Mexican or narrow-headed gartersnakes. These rivers may be targeted though this planning exercise for nonnative fisheries management, which would likely remove any recovery potential for gartersnakes in these areas, and, perhaps, even result in the local extirpations of populations of northern Mexican and narrow-headed gartersnakes. Alternatively, subbasins that are targeted for wholly native species assemblages would likely secure the persistence of northern Mexican and narrow-headed gartersnakes that occur there, if not result in their complete recovery in these areas. Specific subbasins where targeted fisheries management is to occur were not provided in AGFD (2006a), but depending on which areas are chosen for each management emphasis, the potential for future conservation and recovery of northern Mexican and narrow-headed gartersnakes could either be significantly bolstered, or significantly hampered. Close coordination with the Arizona Game and Fish Department on the delineation of fisheries management priorities in Arizona's subbasins will be instrumental to ensuring that conservation and recovery of northern Mexican and narrow-headed gartersnakes can occur.

Conservation of these gartersnakes has been implemented in the scientific and management communities as well. The AGFD recently produced identification cards for distribution that provide information to assist field professionals with the identification of each of Arizona's five native gartersnake species, as well as guidance on submitting photographic vouchers for university museum collections. Arizona State University and the University of Arizona now accept photographic vouchers in lieu of physical specimens, in their respective museum collections. These measures appreciably reduce the

necessity for physical specimens (unless discovered postmortem) for locality voucher purposes and, therefore, further reduce impacts to vulnerable populations of northern Mexican or narrow-headed gartersnakes.

Despite these collective efforts we have described above, northern Mexican and narrow-headed gartersnakes have continued to decline throughout their ranges.

#### Proposed Determination

In our review of the best available science, we found that aquatic ecosystems which northern Mexican and narrow-headed gartersnakes rely on and are part of have been significantly compromised by harmful nonnative species. We found this threat to be the most significant and pervasive of all threats affecting both species. Harmful nonnative species have been intentionally released or have naturally moved into virtually every subbasin throughout the range of the northern Mexican and narrow-headed gartersnakes. This has resulted in widespread declines in native fish and amphibian communities, which are integral to the continued survival of the northern Mexican and narrow-headed gartersnakes. In addition to widespread competitive pressures, harmful nonnative species have directly impacted both gartersnake species through predation. In combination, these factors have resulted in widespread population declines and extirpations in both species, as neither gartersnake nor their prey evolved in their presence.

In addition to the declining status of the biotic communities where the northern Mexican and narrow-headed gartersnakes occur, land use activities, drought, and wildfires threaten vital elements of their habitat that are important for their survival. Dams, diversions, flood-control projects, and groundwater pumping have dewatered entire reaches of historically occupied habitat for both species, rangewide. Large dams planned in the future threaten to dewater additional reaches. Climate change predictions include increased aridity, lower annual precipitation totals, lower snow pack levels, higher variability in flows (lower low-flows and higher high-flows), and enhanced stress on ponderosa pine communities in the southwestern United States and northern Mexico. Increasing water demands from a rapidly growing human population in the arid southwestern United States, combined with a drought-limited supply of surface water, fuels future needs for even more dams, diversions,

and groundwater pumping. Due in part to the fire management policies of recent decades, wildfires in the arid southwestern United States have grown more frequent and severe. Since 2011, both Arizona and New Mexico experienced the largest wildfires in their respective State histories. High-intensity wildfires that affect large areas contribute to significant flooding and sedimentation, resulting in fish kills and the filling-in of important pool habitat. These conditions remove a portion of, or the entire prey base, for northern Mexican and narrow-headed gartersnakes for extended periods of time. This scenario places significant stress on resident gartersnake populations through starvation.

Other activities, factors, or conditions that act in combination, such as mismanaged or unmanaged livestock grazing; road construction, use, and management; adverse human interactions; environmental contaminants; erosion control techniques; and competitive pressures from sympatric species, occur within the distribution of these gartersnakes and have the tendency to contribute to further population declines or extirpations where gartersnakes occur at low population densities. In the presence of harmful nonnative species, the negative effects of these threats on northern Mexican and narrow-headed gartersnakes are amplified. Yet, there are currently no regulatory mechanisms in place to address the threats to these species that specifically target the conservation of northern Mexican or narrow-headed gartersnakes or their habitat in the United States or Mexico.

Collectively, the ubiquitous nature of these threats across the landscape has appreciably reduced the quality and quantity of suitable gartersnake habitat and changed its spatial orientation on the landscape. This ultimately renders populations much less resilient to stochastic, natural, or anthropogenic stressors that could otherwise be withstood. Over time and space, subsequent population declines have threatened the genetic representation of each species because many populations have become disconnected and isolated from neighboring populations. Expanding distances between extant populations coupled with threats that prevent normal recolonizing mechanisms leave existing populations vulnerable to extirpation. This subsequently leads to a reduction in species redundancy when isolated, small populations are at increased vulnerability to the effects of stochastic events, without a means for natural recolonization. Ultimately, the effect of

scattered, small, and disjunct populations, without the means to naturally recolonize, is weakened species resiliency as a whole, which ultimately enhances the risk of the species becoming endangered.

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 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.” We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the species, and have determined that the northern Mexican gartersnake and narrow-headed gartersnake both meet the definition of a threatened species under the Act. Significant threats are occurring now and are likely to continue in the foreseeable future, at a high intensity, and across these species’ entire ranges; therefore, we have determined these species are likely to become endangered throughout all or a significant portion of their ranges within the foreseeable future. Because these threats are likely to cause these gartersnakes to become endangered throughout all or a significant portion of their ranges within the foreseeable future, we find these species are threatened, not endangered. Therefore, on the basis of the best available scientific and commercial information, we propose listing the northern Mexican gartersnake and narrow-headed gartersnake as threatened species in accordance with sections 3(20) and 4(a)(1) of the Act. The current status of the northern Mexican and narrow-headed gartersnakes meets the definition of threatened, not endangered, because while we found numerous threats to be significant and rangewide, our available survey data conclude that the remaining small number of populations are viable. Alternatively and based upon the data available, the northern Mexican and narrow-headed gartersnakes appear to remain extant, as low-density populations with the threat of extirpation, in most subbasins where they historically occurred.

*Special Rule for Northern Mexican Gartersnake Under Section 4(d) of the Act*

Whenever a species is listed as a threatened species under the Act, the Secretary may specify regulations that she deems necessary and advisable to provide for the conservation of that species under the authorization of section 4(d) of the Act. These rules,

commonly referred to as “special rules,” are found in part 17 of title 50 of the Code of Federal Regulations (CFR) in §§ 17.40–17.48. This proposed special rule for § 17.42 would exempt take of northern Mexican gartersnakes as a result of livestock use at or maintenance activities of livestock tanks located on private, State, or Tribal lands.

The proposed special rule would replace the Act’s general prohibitions against take of the northern Mexican gartersnake with special measures tailored to the conservation of the species on all non-Federal lands. Through the maintenance and operation of the stock tanks for cattle, habitat is provided for the northern Mexican gartersnake and numerous prey species; hence there is a conservation benefit to the species. Under the proposed special rule, take of northern Mexican gartersnake caused by livestock use of or maintenance activities at livestock tanks located on private, State, or Tribal lands would be exempt from section 9 of the Act. A livestock tank is defined as an existing or future impoundment in an ephemeral drainage or upland site constructed primarily as a watering site for livestock. The proposed special rule targets tanks on private, State, and Tribal lands to encourage landowners and ranchers to continue to maintain these tanks as they provide habitat for the northern Mexican gartersnake. Livestock use and maintenance of tanks on Federal lands would be addressed through the section 7 process. When a Federal action, such as permitting livestock grazing on Federal lands, may affect a listed species, consultation between us and the action agency is required under section 7 of the Act. The conclusion of consultation may include mandatory changes in livestock programs in the form of measures to minimize take of a listed animal or to avoid jeopardizing the continued existence of a listed species. Changes in a proposed action resulting from consultations are almost always minor.

**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 results in public awareness and conservation by Federal, State, Tribal, 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 by Federal agencies and the

prohibitions against certain activities 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. 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, preparation of a draft and final recovery plan, and revisions to the plan as significant new information becomes available. The recovery outline guides the immediate implementation of urgent recovery actions and describes the process to be used to develop a recovery plan. The recovery plan identifies site-specific management actions that will achieve recovery of the species, measurable criteria that determine when a species 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 (comprised of species experts, Federal and State agencies, nongovernment 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 Arizona 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, Tribal, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (e.g., 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. To achieve 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, under section 6 of the Act, the States of Arizona and New Mexico would be eligible for Federal funds to implement management actions that promote the protection and recovery of the northern Mexican and narrow-headed gartersnakes. Information on our grant programs that are available to aid species recovery can be found at: <http://www.fws.gov/grants>.

Although the northern Mexican and narrow-headed gartersnakes 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 this 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 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. Section 7(a)(4) of the Act 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) of the Act 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 affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service.

Federal agency actions within the species' habitats that may require conference or consultation or both as described in the preceding paragraph include management and any other landscape altering activities on Federal lands administered by the Fish and Wildlife Service, U.S. Bureau of Reclamation, or U.S. Forest Service;

issuance of section 404 Clean Water Act permits by the U.S. Army Corps of Engineers; construction and management of gas pipeline and power line rights-of-way by the Federal Energy Regulatory Commission; construction and maintenance of roads or highways by the Federal Highway Administration; and other discretionary actions that effect the species composition of biotic communities where these species or their habitats occur, such as funding or permitting programs that result in the continued stocking of nonnative, spiny-rayed fish.

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. The prohibitions of section 9(a)(2) of the Act, codified at CFR 17.31 for threatened wildlife, make it such that all the provisions of 50 CFR 17.21 apply, except § 17.21(c)(5).

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. 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) Unauthorized collecting, handling, possessing, selling, delivering, carrying, or transporting of the species, including import or export across State lines and international boundaries, 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) The unauthorized introduction of harmful nonnative species that compete with or prey upon northern Mexican and narrow-headed gartersnakes, such as the stocking of nonnative, spiny-rayed fish, or illegal transport, use, or release of bullfrogs or crayfish in the States of Arizona and New Mexico;

(3) The unauthorized release of biological control agents that attack any age class of northern Mexican and narrow-headed gartersnakes or any life stage of their prey species;

(4) Unauthorized modification of the channel, reduction or elimination of water flow of any stream or water body, or the complete removal or significant destruction of riparian vegetation associated with occupied northern Mexican or narrow-headed gartersnake habitat; and

(5) Unauthorized discharge of chemicals or fill material into any waters in which northern Mexican and narrow-headed gartersnakes are known to occur.

Questions regarding whether specific activities would constitute a violation of section 9 of the Act should be directed to the Arizona Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**). 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, P.O. Box 1306, Albuquerque, New Mexico 87103 (telephone (505) 248–6920, facsimile (505) 248–6922).

#### Peer Review

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of peer review is to ensure that our listing determination 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 listing determination.

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 the **FOR FURTHER INFORMATION CONTACT** section. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing.

**Required Determinations**

*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.

*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 an endangered or threatened species 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).

**References Cited**

A complete list of references cited in this rulemaking is available on the Internet at <http://www.regulations.gov> and upon request from the Arizona Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

**Authors**

The primary authors of this proposed rule are the staff members of the Arizona Ecological Services Field 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; 1531–1544; and 4201–4245, unless otherwise noted.

■ 2. In § 17.11(h), add entries for “Gartersnake, northern Mexican” and “Gartersnake, narrow-headed” to the List of Endangered and Threatened Wildlife in alphabetical order under REPTILES 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						
<b>REPTILES</b>							
* Gartersnake, northern Mexican.	* <i>Thamnophis eques megalops</i> .	* U.S.A. (AZ, NM), Mexico.	* Entire .....	* T .....	* .....	* 17.95(d)	* 17.42(g)
* Gartersnake, narrow-headed.	* <i>Thamnophis rufipunctatus</i> .	* U.S.A. (AZ, NM) .....	* Entire .....	* T .....	* .....	* 17.95(d)	* NA
* 	* 	* 	* 	* 	* 	* 	* 

■ 3. Amend § 17.42 by adding a new paragraph (g) to read as follows:

**§ 17.42 Special rules—reptiles.**

\* \* \* \* \*

(g) Northern Mexican gartersnake (*Thamnophis eques megalops*)—(1) *Which populations of the northern Mexican gartersnake are covered by this special rule?* This rule covers the distribution of this species in the contiguous United States.

(2) *What activities are prohibited?*

Any activity where northern Mexican gartersnakes are attempted to be, or are intended to be, trapped, hunted, shot, or collected, in the contiguous United States, is prohibited. It is also prohibited to incidentally trap, shoot, capture, pursue, or collect northern Mexican gartersnakes in the course of otherwise legal activities.

(3) *What activities are allowed?*

Incidental take of northern Mexican gartersnakes is not a violation of section 9 of the Act if it occurs from any other otherwise legal activities involving northern Mexican gartersnakes and their habitat that are conducted in accordance with applicable State, Federal, tribal, and local laws and regulations. Such activities occurring in northern Mexican gartersnake habitat include maintenance

activities at livestock tanks located on private, State, or Tribal lands. A livestock tank is an existing or future impoundment in an ephemeral drainage

or upland site constructed primarily as a watering site for livestock.

\* \* \* \* \*

Dated: June 24, 2013.

**Daniel M. Ashe,**  
*Director, U.S. Fish and Wildlife Service.*  
[FR Doc. 2013-16521 Filed 7-9-13; 8:45 am]

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Part III

## Department of the Interior

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Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Northern Mexican Gartersnake and Narrow-Headed Gartersnake; Proposed Rule

**DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service****50 CFR Part 17**

[Docket No. FWS-R2-ES-2013-0022;  
4500030113]

RIN 1018-AZ35

**Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Northern Mexican Gartersnake and Narrow-Headed Gartersnake**

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

**ACTION:** Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, propose to designate critical habitat for the northern Mexican gartersnake (*Thamnophis eques megalops*) and narrow-headed gartersnake (*Thamnophis rufipunctatus*) in Arizona and New Mexico, under the Endangered Species Act of 1973, as amended (Act). If we finalize this rule as proposed, it would extend the Act's protections to these species' habitats. The effect of this regulation is to conserve northern Mexican and narrow-headed gartersnake habitat under the Act.

**DATES:** We will accept comments received or postmarked on or before September 9, 2013. 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 **FOR FURTHER INFORMATION CONTACT** section by August 26, 2013.

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

(1) *Electronically:* Go to the Federal eRulemaking Portal: <http://www.regulations.gov>. Search for Docket No. FWS-R2-ES-2013-0022, which is the docket number for this rulemaking. You may submit a comment by clicking on "Comment Now!"

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS-R2-ES-2013-0022; 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

Information Requested section below for more information).

The coordinates or plot points or both from which the critical habitat maps are generated are included in the administrative record for this rulemaking and are available at <http://www.fws.gov/southwest/es/arizona>, <http://www.regulations.gov> at Docket No. FWS-R2-ES-2013-0022, and at the Arizona Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**). Any additional tools or supporting information that we may develop for this rulemaking 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 of this proposal and/or at <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Steve Spangle, Field Supervisor, U.S. Fish and Wildlife Service, Arizona Ecological Services Field Office, 2321 West Royal Palm Road, Suite 103, Phoenix, AZ 85021; telephone: 602-242-0210; facsimile: 602-242-2513. 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 Act, once a species is determined to be an endangered or threatened species throughout all or a significant portion of its range, we are required to promptly publish a proposal in the **Federal Register** and make a determination on our proposal within 1 year. Additionally, critical habitat shall be designated, to the maximum extent prudent and determinable, for any species determined to be an endangered or threatened species under the Act. Designations and revisions of critical habitat can only be completed by issuing a rule. Elsewhere in today's **Federal Register**, we propose to list the northern Mexican and narrow-headed gartersnakes as threatened species under the Act.

*This rule consists of:* A proposed rule for designation of critical habitat for northern Mexican and narrow-headed gartersnakes. These gartersnakes are proposed for listing under the Act. This rule proposes designation of critical habitat necessary for the conservation of the species.

*The basis for our action.* Under the Act, when a species is proposed for listing, to the maximum extent prudent and determinable, we must designate critical habitat for the species. These species are proposed for listing as

threatened. Therefore, we propose to designate critical habitat for the northern Mexican gartersnake in Greenlee, Graham, Apache, La Paz, Mohave, Yavapai, Navajo, Gila, Coconino, Cochise, Santa Cruz, Pima, and Pinal Counties in Arizona, as well as in Grant and Catron Counties in New Mexico, and critical habitat for the narrow-headed gartersnake in Greenlee, Graham, Apache, Yavapai, Navajo, Gila, and Coconino Counties in Arizona, as well as in Grant, Hidalgo, Sierra, and Catron Counties in New Mexico.

*We will seek peer review.* We are seeking comments from knowledgeable individuals with scientific expertise to review our analysis of the best available science and application of that science and to provide any additional scientific information to improve this proposed rule. Because we will consider all comments and information received during the comment period, our final determinations may differ from this proposal.

**Information Requested**

We intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from other concerned governmental agencies, Native American tribes, the scientific community, industry, or any other interested parties concerning this proposed rule. We particularly seek comments concerning:

(1) 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 threats outweighs the benefit of designation such that the designation of critical habitat is not prudent.

(2) Specific information on:

(a) The amount and distribution of northern Mexican or narrow-headed gartersnakes and their habitat;

(b) What may constitute "physical or biological features essential to the conservation of the species," within the geographical range currently occupied by the species;

(c) Where these features are currently found;

(d) Whether any of these features may require special management considerations or protection;

(e) 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; and

(f) What areas not occupied at the time of listing are essential for the conservation of the species and why.

(3) 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 this species and proposed critical habitat.

(4) 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.

(5) 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.

(6) 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.

(7) If considered for exclusion from critical habitat designation under section 4(b)(2) of the Act, documentation that describes how lands are managed for wildlife and habitat and how that management specifically benefits either or both the northern Mexican or narrow-headed gartersnake or their prey bases.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

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 an endangered or threatened 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>.

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, Arizona Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

#### Previous Federal Actions

All previous Federal actions are described in the proposal to list the northern Mexican and narrow-headed gartersnakes as threatened species under the Act published elsewhere in today's **Federal Register**.

#### 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 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, etc.) 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. 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 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) 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.

#### *Prudence 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 shall designate critical habitat at the time the species is determined to be an endangered or threatened species. 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 imminent threat of take attributed to collection or vandalism 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 would 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 northern Mexican and narrow-headed gartersnakes.

#### *Critical Habitat Determinability*

Having determined that designation is prudent, under section 4(a)(3) of the Act, we must find whether critical habitat for the northern Mexican and narrow-headed gartersnakes is determinable. 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 best available scientific and commercial information pertaining to the biological needs of the species and habitat characteristics where the species are located. Based on this information, we conclude that sufficient information is known regarding the species' needs and habitats to determine critical habitat for the northern Mexican and narrow-headed gartersnakes.

#### *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 derived the specific physical or biological features (PBFs) required for the northern Mexican and narrow-headed gartersnakes from the best available scientific and commercial information available, including research of these species' habitat, ecology, and life history as described below. Additional insight is provided by Rosen and Schwalbe (1988, pp. 14–48), Degenhardt *et al.* (1996, pp. 317–319, 326–328), Rossman *et al.* (1996, pp. 55–116, 171–177, 241–248), and Ernst and Ernst (2003, pp. 391–393, 416–419). We have determined that the following physical or biological features are essential for northern Mexican and narrow-headed gartersnakes:

#### Space and Physical Habitat Requirements for Individual and Population Growth and for Normal Behavior

Both the northern Mexican and narrow-headed gartersnakes depend on the presence of water, primarily for the maintenance of their primary aquatic prey bases, not because their own physiology requires an aquatic environment. The northern Mexican gartersnake is a riparian obligate and occurs chiefly in streams, rivers, cienegas, stock tanks, and spring sources that are often found within large-river riparian woodlands and forests and streamside gallery forests (defined as well-developed broadleaf deciduous riparian forests with limited, if any, herbaceous ground cover or dense grass) (Hendrickson and Minckley 1984, p. 131; Rosen and Schwalbe 1988, pp. 14–16; Arizona Game and Fish Department 2001, p. 2). Northern Mexican gartersnakes occur at elevations from 130 to 8,497 feet (ft) (40 to 2,590 meters (m)) (Rossman *et al.* 1996, p. 172), and in a wide range of biotic communities, including Sonoran Desertscrub at the lower elevations, through Semidesert Grassland, Interior Chaparral, and Madrean Evergreen Woodland and into the lower reaches of Petran Montane Conifer Forest as elevation increases (Brennan and Holycross 2006, p. 122). Narrow-headed gartersnakes are widely considered to be one of the most aquatic gartersnake species (Rossman *et al.* 1996, p. 246), and are strongly associated with clear, rocky streams, using predominantly pool and riffle habitat that includes cobbles and boulders (Rosen and Schwalbe 1988, pp. 33–34; Degenhardt *et al.* 1996, p. 327; Rossman *et al.* 1996, p. 246). Narrow-headed gartersnakes

occur at elevations from approximately 2,300–8,200 ft (700 m–2,500 m), inhabiting Petran Montane Conifer Forest, Great Basin Conifer Woodland, Interior Chaparral, and the Arizona Upland subdivision of Sonoran Desertscrub communities (Rosen and Schwalbe 1988, p. 33; Brennan and Holycross 2006, p. 122; Burger 2008).

Northern Mexican gartersnakes employ a variety of strategies when foraging for prey. Rosen and Schwalbe (1988, p. 21) observed: (1) Aquatic and terrestrial ambush; (2) aquatic foraging in riffles, vegetation mats, and in open water (such as pool habitat, stock tanks, etc.); and (3) opportunistic capitalization on transitory concentrations of prey. These observations suggest that areas with slow riffles, pools, and backwater habitat are important for prey acquisition, because the prey of northern Mexican gartersnakes are largely aquatic and the snakes themselves need to remain somewhat stabilized to allow for striking behaviors. Narrow-headed gartersnakes often forage underwater, using concealment and ambush behaviors within and between boulder and cobble complexes along the bottom of streams (Rosen and Schwalbe 1988; p. 39). Hibbitts and Fitzgerald (2005, p. 364) described their hunting technique in greater detail, which included anchoring their body with their tail around rocks on the bottom of streams and orienting themselves in position with the current, with their head and neck exposed to the force of the water and the body unanchored on the substrate to allow for forward directed strikes. Narrow-headed gartersnakes are believed to be mainly visual hunters (Hibbitts and Fitzgerald 2005, p. 364) and heavily dependent on visual cues when foraging, based on comparative analyses among other species of gartersnakes (de Queiroz 2003, p. 381). However, foraging activity that occurs during the monsoon season, which is characterized by turbid water conditions, suggests they also use chemosensory abilities to direct strikes. This information suggests that the presence of rock structure along the bottom of streams is important to narrow-headed gartersnakes in compensating for the inertia of flow and for providing opportunities for camouflage-based ambush. However, Fitzgerald (1986; Table 4) also found narrow-headed gartersnakes foraging in stream and river reaches characterized as having sandy substrates. These observations suggest a more opportunistic nature of foraging

behavior that may be based more on the presence of prey than the type of substrate.

Both northern Mexican and narrow-headed gartersnakes are largely dependent on native fish as a primary source of food, but have been observed using nonnative, soft-rayed fish species as prey on occasion; for narrow-headed gartersnakes, fish are the principle prey item (Rosen and Schwalbe 1988, pp. 18, 38–39; Degenhardt *et al.* 1996, p. 328; Rossman *et al.* 1996, p. 247; Nowak 2006, p. 22). Therefore, habitat-based attributes that are important for the survival of fish prey species are equally important for the survival of northern Mexican and narrow-headed gartersnakes. Many species of native and nonnative soft-rayed fish require unregulated flows (or flooding) for: (1) Removing excess sediment from some portions of the stream; (2) removing predatory nonnative, spiny-rayed fish species from a given area; and (3) increasing prey species diversity. Flows fluctuate seasonally, with snowmelt causing spring pulses and occasional floods, and late-summer or monsoonal rains producing floods of varying intensity and duration. These high flows likely rejuvenate spawning and foraging habitat for native and nonnative, soft-rayed fish (Propst *et al.* 1986, p. 3), break-up embedded bottom materials (Mueller 1984, p. 355), stimulate spawning, and enhance recruitment of native species by eliminating or reducing populations of harmful nonnative species (Stefferdud and Rinne 1996a, p. 80), such as spiny-rayed fish. Flooding also allows for the scouring of sand and gravel in riffle areas, which reduces the degree of embeddedness of cobble and boulder substrates (Britt 1982, p. 45). Typically, sediment is carried along the bed of a stream and deposited at the downstream, undersurface side of cobbles and boulders. Over time, this can result in the filling of cavities under cobbles and boulders (Rinne 2001, p. 69). Flooding removes the extra sediment, and the cavities created under cobbles by the scouring action of the flood waters provide enhanced opportunities for spawning of native fish, as well as foraging opportunities, particularly for narrow-headed gartersnakes.

In addition to aquatic habitat, northern Mexican and narrow-headed gartersnakes rely on terrestrial habitat for thermoregulation, gestation, shelter, protection from predators, immigration, emigration, and brumation (cold-season dormancy). The northern Mexican gartersnake also uses terrestrial habitat for foraging opportunities when primary prey items, such as leopard frogs and

native fish, are uncommon or absent from aquatic habitats. Rosen (1991, pp. 308–309) found that northern Mexican gartersnakes spent approximately 60 percent of their time moving, 13 percent of their time basking on vegetation, 18 percent of their time basking on the ground, and 9 percent of their time under surface cover. Foraging may occur spontaneously and opportunistically during any of these behaviors. In studying the Mexican gartersnake, Drummond and Marcías-García (1983, pp. 24, 35) found individuals wandering hundreds of meters away from water, perhaps in response to a decline or disappearance of the prey base. Observation records for northern Mexican gartersnakes from semi-remote livestock tanks and spring sources suggest the species moves across the local landscape as part of its foraging ecology. Rosen and Schwalbe (1988, p. 47) suggested that vegetation such as knotgrass, deergrass, sacaton, cattails, tules, and spikerush were important to the northern Mexican gartersnake, as well as the presence of rock piles. Boyarski (2011, p. 3) found that four of five telemetered northern Mexican gartersnakes over-wintered along a hillside “immediately south” of hatchery ponds where they spent the majority of their time during the surface-active season, but the distance of those specific over-wintering sites was not disclosed. However, Rosen and Schwalbe (1988, p. 27) report observing northern Mexican gartersnakes at a distance of 330 ft (100 m) away from permanent water.

Important terrestrial habitat components for the narrow-headed gartersnake include cobbles, boulders, and bankside shrub vegetation for basking and foraging (Fleharty 1967, pp. 215–216; Rosen and Schwalbe 1988, p. 48; Ernst and Ernst 2003, p. 418). In the Black River and Oak Creek in Arizona, the majority of narrow-headed gartersnakes captured were observed under rocks or shoreline debris, which may indicate these habitat components are ecologically important (Brennan and Rosen 2009, pp. 7, 11). In order of preference, Jennings and Christman (2011, pp. 14, 20) found that narrow-headed gartersnakes used rocks, logs or stumps, and debris jams as cover. Narrow-headed gartersnake detections appear to correlate with the presence of large willows growing along the streambank, which are used for basking (Fernandez and Rosen 1996, p. 70). Holycross *et al.* (2006, p. 51) found that willows overhanging the stream channel are particularly important for adult narrow-headed gartersnakes. The greater

need of narrow-headed gartersnakes to thermoregulate at higher elevations makes optimal basking sites, such as shrubs and snags, essential (Rosen and Schwalbe 1988, p. 34). Pregnant female narrow-headed gartersnakes are rarely encountered near streams, apparently moving away from water during gestation, in favor of the higher thermal environs of rock piles (Rosen and Schwalbe 1988, pp. 33–34, 48). Telemetry data presented in Nowak (2006, pp. 17–18) suggest that terrestrial habitat is important to narrow-headed gartersnakes; home ranges were often set up perpendicular to the stream channel, while others were parallel to the channel. This orientation of home ranges likely indicates the species uses both active and inactive channels, depending on the activity. Such channels are typically found within 600 ft (182.9 m) of active stream channels. For example, it is ecologically disadvantageous for an individual gartersnake to brumate within the bankfull boundary of an active stream because of the risk of flooding, and subsequent drowning, during the cold-season dormancy period. This hypothesis is supported by the findings of Nowak (2006, pp. 19–21), which found telemetered narrow-headed gartersnakes using crevices in rock walls or large rock outcrops as over-wintering sites, some as far as 650 ft (200 m) away from the stream channel. Additionally, micro-sites chosen as cover for gartersnakes may be artificial or natural; Nowak (2006, p. 19) reported observing narrow-headed gartersnakes commonly using such items such as rock foundations and retaining walls, chimneys, and old water pipes under house foundations, vegetation thickets, burrows, boulders, and downed logs. The largest home range documented by Jennings and Christman (2011, p. 18) for narrow-headed gartersnakes was 239,077 square feet (22,211 square meters), but home range sizes in this study were considered to be underestimated by the authors.

Therefore, based on the information above, we identify the presence of aquatic habitats to support individual and population growth, and support normal behavior, and the presence of terrestrial habitats in appropriate proximity to occupied aquatic habitats to support individual and population growth, and support normal behavior, to be physical or biological features for these species.

#### Biotic Community Requirements for Individual and Population Growth

The success of northern Mexican and narrow-headed gartersnake populations

appears to be uniquely tied to the presence of adequate native prey populations, and, in some cases, nonnative prey species consisting of larval and juvenile bullfrogs, as well as soft-rayed, nonnative fish species (Rosen and Schwalbe 1988, pp. 18, 20, 44; Holycross *et al.* 2006, p. 23). Generally, the diet of the northern Mexican gartersnake consists predominantly of amphibians and fishes, but other invertebrates and vertebrate species may also be used opportunistically (Gregory *et al.* 1980, pp. 87, 90–92; Rosen and Schwalbe 1988, pp. 18, 20; Holm and Lowe 1995, pp. 30–31; Degenhardt *et al.* 1996, p. 318; Rossman *et al.* 1996, p. 176; Manjarrez 1998). Marcías-García and Drummond (1988, pp. 129–134) found that adult northern Mexican gartersnakes in Hidalgo, Mexico, primarily fed on aquatic vertebrates, whereas juveniles often fed on invertebrates, such as earthworms and leeches. Narrow-headed gartersnakes specialize on fish (primarily native fish and, secondarily, nonnative, soft-rayed species, such as trout) as their principle prey item (Rosen and Schwalbe 1988, pp. 38–39; Nowak 2006, pp. 22–23; Degenhardt *et al.* 1996, p. 328; Rossman *et al.* 1996, p. 247). Detailed information on the diet of northern Mexican and narrow-headed gartersnakes is presented in the proposed rule to list both species as threatened under the Act, which is published elsewhere in today's **Federal Register**.

Both the northern Mexican and narrow-headed gartersnakes have been documented as highly vulnerable to effects from nonnative species as a result of their competition with gartersnakes for prey and effects from direct predation on the gartersnakes themselves (Rosen and Schwalbe 1988, pp. 28–31, 32, 44–45). We conducted a broad review of all available scientific and commercial data, and have determined that nonnative species, such as bullfrogs, crayfish, and spiny-rayed fish, in the families Centrarchidae and Ictaluridae, continue to be the most significant threat to northern Mexican and narrow-headed gartersnakes throughout their respective ranges. Our analysis of the roles that the declines in the anuran prey base, declines in the native fish prey base, bullfrog predation, crayfish interactions, and effects from nonnative, spiny-rayed fish play with regard to the observed declines of the northern Mexican and narrow-headed gartersnakes is presented in detail in the proposed rule to list both species as threatened under the Act, which is

published elsewhere in today's **Federal Register**.

*Primary Constituent Elements for Northern Mexican and Narrow-Headed Gartersnakes*

Under the Act and its implementing regulations, we are required to identify the physical or biological features essential to the conservation of northern Mexican and narrow-headed gartersnakes in areas occupied at the time of listing, focusing on the features' primary constituent elements (PCEs). We consider primary constituent elements to be the elements of physical or biological features that provide for a species' life-history processes and are essential to the conservation of the species.

*Northern Mexican Gartersnake's PCEs*

Based on our current knowledge of the physical or biological features and habitat characteristics required to sustain the species' life-history processes, we determine that the primary constituent elements specific to northern Mexican gartersnakes are:

(1) Aquatic or riparian habitat that includes:

a. Perennial or spatially intermittent streams of low to moderate gradient that possess appropriate amounts of in-channel pools, off-channel pools, or backwater habitat, and that possess a natural, unregulated flow regime that allows for periodic flooding or, if flows are modified or regulated, a flow regime that allows for adequate river functions, such as flows capable of processing sediment loads; or

b. Lentic wetlands such as livestock tanks, springs, and cienegas; and

c. Shoreline habitat with adequate organic and inorganic structural complexity to allow for thermoregulation, gestation, shelter, protection from predators, and foraging opportunities (e.g., boulders, rocks, organic debris such as downed trees or logs, debris jams, small mammal burrows, or leaf litter); and

d. Aquatic habitat with characteristics that support a native amphibian prey base, such as salinities less than 5 parts per thousand, pH greater than or equal to 5.6, and pollutants absent or minimally present at levels that do not affect survival of any age class of the northern Mexican gartersnake or the maintenance of prey populations.

(2) Adequate terrestrial space (600 ft (182.9 m) lateral extent to either side of bankfull stage) adjacent to designated stream systems with sufficient structural characteristics to support life-history functions such as gestation,

immigration, emigration, and brumation (extended inactivity).

(3) A prey base consisting of viable populations of native amphibian and native fish species.

(4) An absence of nonnative fish species of the families Centrarchidae and Ictaluridae, bullfrogs (*Lithobates catesbeianus*), and/or crayfish (*Orconectes virilis*, *Procambarus clarki*, etc.), or occurrence of these nonnative species at low enough levels such that recruitment of northern Mexican gartersnakes and maintenance of viable native fish or soft-rayed, nonnative fish populations (prey) is still occurring.

*Narrow-Headed Gartersnake's PCEs*

Based on our current knowledge of the physical or biological features and habitat characteristics required to sustain the species' life-history processes, we determine that the primary constituent elements specific to narrow-headed gartersnakes are:

(1) Stream habitat, which includes:

a. Perennial or spatially intermittent streams with sand, cobble, and boulder substrate and low or moderate amounts of fine sediment and substrate embeddedness, and that possess appropriate amounts of pool, riffle, and run habitat to sustain native fish populations;

b. A natural, unregulated flow regime that allows for periodic flooding or, if flows are modified or regulated, a flow regime that allows for adequate river functions, such as flows capable of processing sediment loads;

c. Shoreline habitat with adequate organic and inorganic structural complexity (e.g., boulders, cobble bars, vegetation, and organic debris such as downed trees or logs, debris jams), with appropriate amounts of shrub- and sapling-sized plants to allow for thermoregulation, gestation, shelter, protection from predators, and foraging opportunities; and

d. Aquatic habitat with no pollutants or, if pollutants are present, levels that do not affect survival of any age class of the narrow-headed gartersnake or the maintenance of prey populations.

(2) Adequate terrestrial space (600 ft (182.9 m) lateral extent to either side of bankfull stage) adjacent to designated stream systems with sufficient structural characteristics to support life-history functions such as gestation, immigration, emigration, and brumation.

(3) A prey base consisting of viable populations of native fish species or soft-rayed, nonnative fish species.

(4) An absence of nonnative fish species of the families Centrarchidae and Ictaluridae, bullfrogs (*Lithobates*

*catesbeianus*), and/or crayfish (*Orconectes virilis*, *Procambarus clarki*, etc.), or occurrence of these nonnative species at low enough levels such that recruitment of narrow-headed gartersnakes and maintenance of viable native fish or soft-rayed, nonnative fish populations (prey) is still occurring.

*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.

All areas proposed for designation as critical habitat will require some level of management to address the current and future threats to northern Mexican and narrow-headed gartersnakes and to maintain or restore the PCEs. Special management within proposed critical habitat will be needed to ensure these areas provide adequate water quantity, quality, and permanence or near permanence; cover (particularly in the presence of harmful nonnative species); an adequate prey base; and absence of or low numbers of harmful nonnative species that can affect population persistence. Activities that may be considered adverse to the conservation benefits of proposed critical habitat include those which: (1) Completely dewater or reduce the amount of water to unsuitable levels in proposed critical habitat; (2) result in a significant reduction of protective cover within proposed critical habitat when harmful nonnative species are present; (3) remove or significantly alter structural terrestrial features of proposed critical habitat that alter natural behaviors such as thermoregulation, brumation, gestation, and foraging; (4) appreciably diminish the prey base; and (5) directly promote increases in harmful nonnative species populations or result in the introduction of harmful nonnative species.

Common examples of these activities may include, but are not limited to, various types of development, channelization, diversions, road construction, erosion control, bank stabilization, wastewater discharge, enhancement or expansion of human recreation opportunities, fish community renovations, and stocking of nonnative, spiny-rayed fish species or promotion of policies that directly or indirectly introduce harmful nonnative species as bait.

The activities listed above are just a subset of examples that have the

potential to affect critical habitat and PCEs if they are conducted within designated units; however, some of these activities, when conducted appropriately, may be compatible with maintenance of adequate PCEs.

#### *Criteria Used To Identify 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 species. In accordance with the Act and its implementing regulation at 50 CFR 424.12(e), we consider whether designating additional areas—outside those currently occupied as well as those occupied at the time of listing—are necessary to ensure the conservation of the species. We are not currently proposing to designate any areas outside the geographic area considered occupied by the northern Mexican or narrow-headed gartersnake because occupied areas are distributed in several subbasins and currently provide a distribution and configuration of habitat areas sufficient for the conservation of these species.

To identify areas proposed for critical habitat for the northern Mexican and narrow-headed gartersnakes, we used a variety of sources which included riparian species survey reports, museum records, heritage data from State wildlife agencies, peer-reviewed literature, agency reports, interviews with species experts, and regional Geographic Information System (GIS) coverages. Some information sources were used heavily in determining the current and historical distributions of northern Mexican and narrow-headed gartersnakes such as Fitzgerald (1986, entire), Rosen and Schwalbe (1988, entire), Rosen *et al.* (2001, entire), and Holycross *et al.* (2006, entire), as they comprise the majority of rangewide survey information for these species. Hellekson (2012a, pers. comm.) was an important source of information pertaining to narrow-headed gartersnake status in New Mexico. In addition to reviewing gartersnake-specific survey reports, we also focused on survey reports for fish and amphibians as they captured important data on the existing community ecology that affects the status of these gartersnakes within their range.

Critical habitat for both gartersnake species is being proposed in areas considered currently occupied. Survey information for both species is significantly lacking in many streams, and both species of gartersnake are cryptic, secretive, difficult to detect,

quick to escape underwater, and capable of persisting in low or very low population densities that make positive detections nearly impossible in structurally complex habitat. Therefore, we considered factors such as the date of the last known records of either species in an area, as well as records of one or more native prey species. We used all records for each species that were dated 1980 or later because the 1980s marked the first systematic survey efforts for these species across their ranges (see Rosen and Schwalbe (1988, entire) and Fitzgerald (1986, entire)) and previous records were often dated several decades prior and may not as accurately represented the likelihood for occupation in current times. Additionally, in evaluating whether a site should be considered currently occupied by these gartersnake species, a record of a native prey species suggests that a source of prey may still be available to gartersnakes in areas invaded by harmful nonnative species. This provides evidence that either gartersnake may still likely occur in a given area if other sensitive, native, aquatic or riparian species are also present, despite limited or negative survey data. Specifically, for both species, we considered a stream or geographic area as occupied if it is within the historical range of the species, contains suitable habitat, and meets both of the following: (1) Has a last known record for either species dated 1980 or later, and (2) has at least one native prey species also present.

The shape, size, and scope of proposed critical habitat can be evaluated in terms of its length (number of stream miles), width (lateral extent, in feet), or area (number of acres). With respect to length (in proposed designations based on flowing streams), the proposed areas were designed to provide sufficient aquatic and terrestrial habitat for normal behaviors of northern Mexican and narrow-headed gartersnakes of all age classes. In addition, with respect to width, we evaluated the lateral extent (terrestrial space) necessary to support the PCEs for northern Mexican and narrow-headed gartersnakes. The resulting designations take into account the naturally dynamic nature of riverine systems, floodplains, and riparian habitat (including adjacent upland areas) that are an integral part of these gartersnakes' ecology. For example, riparian areas are seasonally flooded habitats (i.e., wetlands) that are major contributors to a variety of functions vital to the gartersnakes' fish prey base within the associated stream channel (Brinson *et al.* 1981, pp. 2–61,

2–69, 2–72, 2–75, 2–84 through 2–85; Federal Interagency Stream Restoration Working Group 1998, p. 2–61). Riparian areas filter runoff, absorb and gradually release floodwaters, recharge groundwater, maintain streamflow, protect stream banks from erosion, and provide shade and cover for fish and other aquatic species; all of these functions contribute to the physical quality of gartersnake habitat.

Healthy riparian and adjacent upland areas help ensure water courses maintain the habitat important for aquatic species (e.g., see USFS 1979, pp. 18, 109, 158, 264, 285, 345; Middle Rio Grande Biological Interagency Team 1993, pp. 64, 89, 94; Castelle *et al.* 1994, pp. 279–281) that are prey for northern Mexican and narrow-headed gartersnakes, as well as for the snakes themselves. Habitat quality within the mainstem river channels in the historical range of the northern Mexican and narrow-headed gartersnakes is intrinsically related to the character of the floodplain and the associated tributaries, side channels, and backwater habitats that contribute to important habitat features that provide gartersnakes opportunities for foraging and basking in these reaches. We have determined that a relatively intact riparian area, along with periodic flooding in a generally natural pattern, is important for maintaining the PCEs necessary for long-term conservation of the northern Mexican and narrow-headed gartersnakes, as well as their primary prey species.

The lateral extent (width) of riparian corridors fluctuates considerably between a stream's headwaters and its mouth. The appropriate width of riparian terrestrial habitat to protect stream function has been the subject of several studies and varies depending on the specific function (Castelle *et al.* 1994, pp. 879–881). Most Federal and State agencies generally consider a zone 75 to 150 ft (23 to 46 m) wide on each side of a stream to be adequate (Natural Resource Conservation Service 1998, pp. 2–3; Moring *et al.* 1993, p. 204; Lynch *et al.* 1985, p. 164), although widths as wide as 500 ft (152 m) have been recommended for achieving flood attenuation benefits (U.S. Army Corps 1999, pp. 5–29). In most instances, however, adequate riparian space is primarily intended to reduce detrimental impacts to the stream from sources outside the river channel, such as pollutants, in adjacent areas. Consequently, while a riparian corridor 75 to 150 ft (23 to 46 m) in width may protect water quality and provide some level of riparian habitat protection, a wider area would provide full

protection of riparian habitat because the stream itself can move within the floodplain in response to high flow events, and also provide terrestrial space required by northern Mexican and narrow-headed gartersnakes to engage in normal behaviors such as foraging, basking, gestation, brumation, establishing home ranges, dispersal, and so forth. Using telemetry data (Nowak 2006, pp. 19–21), the farthest distance a narrow-headed gartersnake has been detected from water is 650 ft (200 m), while Rosen and Schwalbe (1988, p. 27) report observing a northern Mexican gartersnake at a distance of 330 ft (100 m) away from permanent water. Based on the literature, we expect the majority of terrestrial activity for both species occurs within 600 ft (182.9 m) of permanent water in lotic habitat.

We believe a 600-ft (182.9-m) lateral extent to either side of bankfull stage will sufficiently protect the majority of important terrestrial habitat; provide brumation, gestation, and dispersal opportunities; and reduce the impacts of high flow events, thereby providing adequate protection to proposed critical habitat areas. We believe this width is necessary to accommodate stream properties such as meandering and high flows, and ensure these designations contain ample terrestrial space such that features essential to the conservation of these gartersnakes and their prey species can occur naturally. Bankfull stage is defined as the upper level of the range of channel-forming flows, which transport the bulk of available sediment over time. Bankfull stage is generally considered to be that level of stream discharge reached just before flows spill out onto the adjacent floodplain. The discharge that occurs at bankfull stage, in combination with the range of flows that occur over a length of time, govern the shape and size of the river channel (its geomorphology) (Rosgen 1996, pp. 2–2 to 2–4; Leopold 1997, pp. 62–63, 66). The use of bankfull stage and 600 ft (182.9 m) on either side recognizes the naturally dynamic nature of riverine systems, recognizes that floodplains are an integral part of the stream ecosystem, and contains sufficient terrestrial space and associated features essential to the conservation of the northern Mexican and narrow-headed gartersnakes. Bankfull stage is not an ephemeral feature, meaning it does not disappear. Bankfull stage can always be determined and delineated for any stream we have designated as critical habitat. We acknowledge that the bankfull stage of any given stream may change depending on the magnitude of a flood event, but it is a definable and

standard measurement for stream systems. Unlike trees, cliff faces, and other immovable habitat elements, stream systems provide habitat that is in constant change. Following high flow events, stream channels can move from one side of a canyon to the opposite side, for example.

Designating critical habitat based on the location of the stream on a specific date is problematic for maintaining important habitat elements. For example, the area within such a designation could transition from providing aquatic habitat and prey to become a dry channel in a short period of time as a result of a high flow event and the subsequent shift in the location of the channel.

We determined the 600-ft (182.9-m) lateral extent for several reasons. Although we considered using either the 100-year or 500-year floodplain, as defined by the Federal Emergency Management Agency, we found that the information was not readily available from the Federal Emergency Management Agency or from the U.S. Army Corps of Engineers for remote areas we are proposing for designation. Therefore, we selected the 600-ft (182.9-m) lateral extent, rather than some other delineation, for four biological reasons: (1) The biological integrity and natural dynamics of the river system and associated riparian habitat are maintained within this area (*i.e.*, the floodplain and its riparian vegetation provide space for natural flooding patterns and latitude for necessary natural channel adjustments to maintain appropriate channel morphology and geometry, store water for slow release to maintain base flows, provide protected side channels and other protected areas, and allow the river to meander within its main channel in response to large flow events); (2) conservation of the adjacent riparian area also helps to provide important nutrient recharge to benefit the food web and protection from sediment and pollutants; (3) vegetated lateral zones are widely recognized as providing a variety of aquatic habitat functions and values (*e.g.*, aquatic habitat for prey such as fish and other aquatic organisms and detritus for aquatic food webs) and help improve or maintain local water quality (see U.S. Army Corps of Engineers' Final Notice of Issuance and Modification of Nationwide Permits, March 9, 2000, 65 FR 12818); and (4) a 600-ft (182.9-m) buffer contributes to the functioning of a river or stream system and provides adequate terrestrial space for normal northern Mexican and narrow-headed gartersnake behaviors, thereby supporting the PCEs needed for

suitable northern Mexican and narrow-headed gartersnake habitat as described by the best available scientific and commercial information.

When determining proposed critical habitat boundaries, we made every effort to avoid including large developed areas such as lands covered by buildings, pavement, and other structures because such lands lack physical or biological features for the northern Mexican and narrow-headed gartersnakes. While reptiles, including gartersnakes, may use artificial materials for cover, areas that have been significantly altered by construction-related development are not generally suitable for gartersnakes or their prey 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 proposed rule have been excluded by text in the proposed rule and are not proposed for designation as critical habitat. Therefore, if critical habitat is finalized as proposed, a Federal action involving these lands would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification, unless the specific action would affect the physical or biological features in the adjacent critical habitat.

We are proposing for designation of critical habitat lands that we have determined are occupied at the time of listing and contain sufficient elements of physical or biological features to support life-history processes essential for the conservation of the species.

Units are proposed for designation based on sufficient elements of physical or biological features being present to support the northern Mexican and narrow-headed gartersnakes' life-history processes. Some units contain all of the identified elements of physical or biological features and support multiple life-history processes. Some segments contain only some elements of the physical or biological features necessary to support the northern Mexican and narrow-headed gartersnakes' particular use of that habitat.

The critical habitat designation is defined by the maps, as modified by any accompanying regulatory text, presented at the end of this document in the Proposed Regulation Promulgation section. We include more detailed information on the proposed 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-R2-ES-2013-0022, on our Internet site at <http://www.fws.gov/southwest/es/arizona>, and at the field office responsible for the designation (see **FOR FURTHER INFORMATION CONTACT** above).

**Proposed Critical Habitat Designation**

We are proposing 14 units as critical habitat for the northern Mexican gartersnake and 6 units as critical habitat for the narrow-headed gartersnake. The critical habitat areas we describe below constitute our current best assessment of areas that meet the definition of critical habitat for the northern Mexican and narrow-headed gartersnakes. The 14 units we

propose as critical habitat for the northern Mexican gartersnake include lands in the following areas: (1) Gila River Mainstem; (2) Mule Creek; (3) Bill Williams River; (4) Agua Fria River Subbasin; (5) Upper Salt River Subbasin; (6) Tonto Creek; (7) Verde River Subbasin; (8) Upper Santa Cruz River Subbasin; (9) Redrock Canyon; (10) Buenos Aires National Wildlife Refuge; (11) Cienega Creek Subbasin; (12) San Pedro River Subbasin; (13) Babocomari River Subbasin; and (14) the San Bernardino National Wildlife Refuge (SBNWR). The six units we propose as critical habitat for the narrow-headed gartersnake are: (1) Upper Gila River Subbasin; (2) Middle Gila River Subbasin; (3) San Francisco River Subbasin; (4) Salt River Subbasin;

(5) Tonto Creek Subbasin; and (6) Verde River Subbasin. All units for both species are considered occupied. It is important to recognize that while all units for both species are considered occupied, the majority of populations in these proposed critical habitat units are currently considered likely not viable into the future. We have concluded that 83 percent of the northern Mexican gartersnake's populations in the United States and 76 percent of the narrow-headed gartersnake's populations occur at low densities and are likely not viable. Please see Appendix A (available at <http://www.regulations.gov> under Docket No. FWS-R2-ES-2013-0022) for detailed information on occupancy status.

**TABLE 3a—LAND OWNERSHIP FOR PROPOSED CRITICAL HABITAT UNITS FOR THE NORTHERN MEXICAN GARTERSNAKE**  
 [Area estimates reflect all land within critical habitat unit boundaries. County-owned lands are considered as private lands]

Unit	Subunit	Land ownership by type				Size of unit
		Federal	State	Tribal	Private	
Upper Gila River ....	.....	10,845 ac (4,389 ha).	467 ac (189 ha) ..	.....	9,822 ac (3,975 ha).	21,135 ac (8,553 ha).
Unit Total .....	.....	10,845 ac (4,389 ha).	467 ac (189 ha) ..	.....	9,822 ac (3,975 ha).	21,135 ac (8,553 ha).
Mule Creek .....	.....	1,327 ac (537 ha)	.....	.....	1,253 ac (507 ha)	2,579 ac (1,044 ha).
Unit Total .....	.....	1,327 ac (537 ha)	.....	.....	1,253 ac (507 ha)	2,579 ac (1,044 ha).
Bill Williams River ..	.....	3,820 ac (1,546 ha).	516 ac (209 ha) ..	.....	1,076 ac (435 ha)	5,412 ac (2,190 ha).
Unit Total .....	.....	3,820 ac (1,546 ha).	516 ac (209 ha) ..	.....	1,076 ac (435 ha)	5,412 ac (2,190 ha).
Agua Fria River Subbasin.	Agua Fria River Mainstem.	3,313 ac (1,341 ha).	918 ac (372 ha) ..	.....	2,758 ac (1,116 ha).	6,989 ac (2,828 ha).
	Little Ash Creek ..	877 ac (355 ha) ..	.....	.....	80 ac (32 ha) .....	957 ac (387 ha).
Unit Total .....	.....	4,010 ac (1,696 ha).	918 ac (372 ha) ..	.....	2,838 ac (1,148 ha).	7,946 ac (3,215 ha).
Upper Salt River Subbasin.	Black River .....	2,632 ac (1,065 ha).	.....	13,760 ac (5,569 ha).	.....	16,392 ac (6,634 ha).
	Big Bonito Creek .....	.....	.....	5,826 ac (2,358 ha).	.....	5,826 ac (2,358 ha).
Unit Total .....	.....	2,632 ac (1,065 ha).	.....	19,586 ac (7,927 ha).	.....	22,218 ac (8,991 ha).
Tonto Creek .....	.....	7,766 ac (3,143 ha).	.....	.....	1,170 ac (474 ha)	8,936 ac (3,616 ha).
Unit Total .....	.....	7,766 ac (3,143 ha).	.....	.....	1,170 ac (474 ha)	8,936 ac (3,616 ha).
Verde River Subbasin.	Upper Verde River.	13,903 ac (5,626 ha).	1,209 ac (489 ha)	192 ac (78 ha) ....	5,223 ac (2,114 ha).	20,526 ac (8,307 ha).
	Oak Creek .....	1,873 ac (758 ha)	274 ac (111 ha) ..	.....	3,386 ac (1,370 ha).	5,533 ac (2,239 ha).
	Spring Creek .....	2,572 ac (1,041 ha).	188 ac (76 ha) ....	.....	371 ac (150 ha) ..	3,131 ac (1,267 ha).
Unit Total .....	.....	18,348 ac (7,425 ha).	1,671 ac (676 ha)	192 ac (78 ha) ....	8,980 ac (3,634 ha).	29,191 ac (11,813 ha).
Upper Santa Cruz River Subbasin.	.....	77,387 ac (31,318 ha).	3,969 ac (1,606 ha).	.....	32,538 ac (13,168 ha).	113,895 ac (46,092 ha).

TABLE 3a—LAND OWNERSHIP FOR PROPOSED CRITICAL HABITAT UNITS FOR THE NORTHERN MEXICAN GARTERSNAKE—Continued

[Area estimates reflect all land within critical habitat unit boundaries. County-owned lands are considered as private lands]

Unit	Subunit	Land ownership by type				Size of unit
		Federal	State	Tribal	Private	
Unit Total .....	.....	77,387 ac (31,318 ha).	3,969 ac (1,606 ha).	.....	32,538 ac (13,168 ha).	113,895 ac (46,092 ha).
Redrock Canyon .....	.....	1,423 ac (576 ha)	.....	.....	549 ac (222 ha) ..	1,972 ac (798 ha).
Unit Total .....	.....	1,423 ac (576 ha)	.....	.....	549 ac (222 ha) ..	1,972 ac (798 ha).
Buenos Aires National Wildlife Refuge.	.....	117,313 ac (47,475 ha).	.....	.....	.....	117,313 ac (47,475 ha).
Unit Total .....	.....	117,313 ac (47,475 ha).	.....	.....	.....	117,313 ac (47,475 ha).
Cienega Creek Subbasin.	Cienega Creek .....	24 ac (10 ha) .....	1,078 ac (436 ha)	.....	11 ac (4 ha) .....	1,113 ac (450 ha).
	Las Cienegas National Conservation Area.	39,913 ac (16,152 ha).	5,105 ac (2,066 ha).	.....	1 ac (<1 ha) .....	45,020 ac (18,219 ha).
	Cienega Creek Natural Preserve.	.....	.....	.....	4,260 ac (1,724 ha).	4,260 ac (1,724 ha).
Unit Total .....	.....	39,937 ac (16,162 ha).	6,183 ac (2,502 ha).	.....	4,272 ac (1,728 ha).	50,393 ac (20,393 ha).
San Pedro River Subbasin.	San Pedro River	6,973 ac (2,822 ha).	1,163 ac (470 ha)	76 ac (31 ha) .....	14,456 ac (5,850 ha).	22,669 ac (9,174 ha).
	Bear Canyon Creek.	639 ac (259 ha) ..	.....	.....	383 ac (155 ha) ..	1,022 ac (414 ha).
	Unit Total .....	7,612 ac (3,081 ha).	1,163 ac (470 ha)	76 ac (31 ha) .....	14,839 ac (6,005 ha).	23,690 ac (9,587 ha).
Babocomari River Subbasin.	Babocomari River/Cienega.	625 ac (253 ha) ..	56 ac (23 ha) .....	.....	2,773 ac (1,122 ha).	3,454 ac (1,398 ha).
	Post Canyon .....	431 ac (175 ha) ..	.....	.....	363 ac (147 ha) ..	795 ac (322 ha).
	O'Donnell Canyon	124 ac (50 ha) ....	.....	.....	274 ac (111 ha) ..	398 ac (161 ha).
	Turkey Creek .....	888 ac (359 ha) ..	2 ac (1 ha) .....	.....	788 ac (319 ha) ..	1,678 ac (679 ha).
	Appleton-Whittell Research Ranch.	5,283 ac (2,138 ha).	.....	.....	2,515 ac (1,018 ha).	7,798 ac (3,156 ha).
	Canelo Hills Cienega Preserve.	.....	.....	.....	213 ac (86 ha) ....	213 ac (86 ha).
Unit Total .....	.....	7,351 ac (2,975 ha).	58 ac (24 ha) .....	.....	6,926 ac (2,803 ha).	14,334 ac (5,801 ha).
San Bernardino National Wildlife Refuge.	.....	2,387 ac (966 ha)	.....	.....	.....	2,387 ac (966 ha).
Total .....	.....	302,338 ac (122,352 ha).	14,966 ac (6,057 ha).	19,855 ac (8,035 ha).	84,263 ac (34,100 ha).	421,423 ac (170,544 ha).

Note: Numbers may not sum due to rounding.

TABLE 3b—LAND OWNERSHIP FOR PROPOSED CRITICAL HABITAT UNITS FOR NARROW-HEADED GARTERSNAKES

[Area estimates reflect all land within critical habitat unit boundaries. County-owned lands are considered as private lands]

Unit	Subunit	Land ownership by type				Size of unit
		Federal	State	Tribal	Private	
Upper Gila River Subbasin.	Gila River .....	10,845 ac (4,389 ha).	467 ac (189 ha) ..	.....	9,822 ac (3,975 ha).	21,135 ac (8,553 ha).
	East Fork Gila River.	2,929 ac (1,185 ha).	.....	.....	649 ac (263 ha) ..	3,579 ac (1,148 ha).
	West Fork Gila River.	4,793 ac (1,940 ha).	.....	.....	376 ac (152 ha) ..	5,169 ac (2,092 ha).
	Middle Fork Gila River.	4,875 ac (1,973 ha).	.....	.....	89 ac (36 ha) .....	4,964 ac (2,009 ha).

TABLE 3b—LAND OWNERSHIP FOR PROPOSED CRITICAL HABITAT UNITS FOR NARROW-HEADED GARTERSNAKES—  
Continued

[Area estimates reflect all land within critical habitat unit boundaries. County-owned lands are considered as private lands]

Unit	Subunit	Land ownership by type				Size of unit
		Federal	State	Tribal	Private	
Middle Gila River Subbasin.	Black Canyon .....	3,465 ac (1,402 ha).	.....	.....	38 ac (15 ha) .....	3,503 ac (1,418 ha).
	Diamond Creek ...	2,995 ac (1,212 ha).	.....	.....	550 ac (223 ha) ..	3,545 ac (1,435 ha).
	Gilita Creek .....	1,704 ac (690 ha)	.....	.....	.....	1,704 ac (690 ha).
	Iron Creek .....	1,731 ac (701 ha)	.....	.....	.....	1,731 ac (701 ha).
	Little Creek .....	2,223 ac (900 ha)	.....	.....	13 ac (5 ha) .....	2,236 ac (905 ha).
	Turkey Creek .....	2,338 ac (946 ha)	.....	.....	.....	2,338 ac (946 ha).
Unit Total .....	.....	37,898 ac (15,338 ha).	467 ac (189 ha) ..	.....	11,537 ac (4,669 ha).	49,903 ac (20,195 ha).
Middle Gila River Subbasin.	Gila River .....	422 ac (171 ha) ..	.....	.....	11 ac (4 ha) .....	432 ac (175 ha).
	Eagle Creek .....	2,016 ac (816 ha)	54 ac (22 ha) .....	2,258 ac (1,035 ha).	3,754 ac (1,519 ha).	8,382 ac (3,392 ha).
Unit Total .....	.....	2,438 ac (987 ha)	54 ac (22 ha) .....	2,258 ac (1,035 ha).	3,765 ac (1,523 ha).	8,814 ac (3,567 ha).
San Francisco River Subbasin.	San Francisco River.	15,661 ac (6,338 ha).	216 ac (88 ha) ....	.....	7,300 ac (2,954 ha).	23,178 ac (9,380 ha).
	Blue River .....	6,484 ac (2,624 ha).	.....	.....	948 ac (383 ha) ..	7,432 ac (3,007 ha).
	Campbell Blue Creek.	2,888 ac 1,169 ha).	.....	.....	120 ac (49 ha) ....	3,008 ac (1,217 ha).
	Dry Blue Creek ...	1,320 ac (534 ha)	.....	.....	.....	1,320 ac (534 ha).
	South Fork Negro-grito Creek.	1,383 ac (560 ha)	.....	.....	100 ac (40 ha) ....	1,483 ac (600 ha).
	Saliz Creek .....	852 ac (345 ha) ..	.....	.....	247 ac (100 ha) ..	1,099 ac (445 ha).
	Tularosa River .....	1,875 ac (759 ha)	.....	.....	2,852 ac (1,154 ha).	4,728 ac (1,913 ha).
	Whitewater Creek	2,282 ac (923 ha)	.....	.....	547 ac (221 ha) ..	2,289 ac (1,145 ha).
Unit Total .....	.....	32,745 ac (13,252 ha).	216 ac (88 ha) ....	.....	12,114 ac (4,901 ha).	45,075 ac (18,241 ha).
Upper Salt River Subbasin.	Salt River .....	5,342 ac (2,162 ha).	.....	7,502 ac (3,036 ha).	33 ac (13 ha) .....	12,877 ac (5,211 ha).
	White River .....	.....	.....	2,588 ac (1,047 ha).	.....	2,588 ac (1,047 ha).
	Canyon Creek .....	1,182 ac (478 ha)	.....	6,160 ac (2,493 ha).	3 ac (1 ha) .....	7,346 ac (2,973 ha).
	Carrizo Creek .....	158 ac (64 ha) ....	.....	8,875 ac (3,592 ha).	.....	9,033 ac (1,229 ha).
	Cibecue Creek ....	.....	.....	6,669 ac (2,699 ha).	.....	6,669 ac (2,699 ha).
	Diamond Creek ...	.....	.....	3,117 ac (1,261 ha).	.....	3,117 ac (1,261 ha).
	Black River .....	2,632 ac (1,065 ha).	.....	13,752 ac (5,565 ha).	.....	16,384 ac (6,630 ha).
	Unit Total .....	.....	9,314 ac (3,769 ha).	.....	48,663 ac (19,693 ha).	36 ac (14 ha) .....
Tonto Creek Subbasin.	Haigler Creek .....	2,831 ac (1,146 ha).	.....	.....	206 ac (83 ha) ....	3,037 ac (1,229 ha).
	Houston Creek ....	1,747 ac (707 ha)	.....	.....	299 ac (121 ha) ..	2,046 ac (828 ha).
	Tonto Creek .....	7,017 ac (2,840 ha).	.....	.....	696 ac (282 ha) ..	7,712 ac (3,121 ha).
	Unit Total .....	.....	11,595 ac (4,693 ha).	.....	.....	1,201 ac (486 ha)
Verde River Subbasin.	Verde River .....	12,098 ac (4,896 ha).	1,209 ac (489 ha)	192 ac (78 ha) ....	5,223 ac (2114 ha).	18,721 ac (7576 ha).
	Oak Creek .....	3,340 ac (1,352 ha).	328 ac (133 ha) ..	.....	3,701 ac (1,498 ha).	7,369 ac (2,982 ha).
	West Fork Oak Creek.	2,137 ac (865 ha)	.....	.....	.....	2,137 ac (865 ha).

TABLE 3b—LAND OWNERSHIP FOR PROPOSED CRITICAL HABITAT UNITS FOR NARROW-HEADED GARTERSNAKES—Continued

[Area estimates reflect all land within critical habitat unit boundaries. County-owned lands are considered as private lands]

Unit	Subunit	Land ownership by type				Size of unit
		Federal	State	Tribal	Private	
	East Verde River	6,682 ac (2,704 ha).	.....	.....	678 ac (274 ha) ..	7,360 ac (2,978 ha).
Unit Total .....	.....	24,257 ac (9,817 ha).	1,537 ac (622 ha)	192 ac (78 ha) ....	9,602 ac (3,886 ha).	35,586 ac (14,401 ha).
Total .....	.....	118,247 ac (47,853 ha).	2,275 ac (921 ha)	51,415 ac (20,807 ha).	38,253 ac (15,480 ha).	210,189 ac (85,060 ha).

Note: Numbers may not sum due to rounding.

The following are brief descriptions of all units and our reasoning as to why they meet the definition of critical habitat for the northern Mexican gartersnake or the narrow-headed gartersnake.

*Northern Mexican Gartersnake*

Upper Gila River Unit

The Upper Gila River Unit is generally located in southwestern New Mexico in the Gila Wilderness of the Gila National Forest in Hidalgo and Grant Counties, New Mexico, and eastern Arizona in Graham County. This unit consists of a total of 21,135 acres (8,553 ha) along 148 stream mi (239 km) of proposed critical habitat along the Gila River mainstem. Land ownership or land management within this unit consists of lands managed by the U.S. Forest Service, New Mexico Department of Game and Fish, State Trust lands, and private ownership. The identified area described in the Upper Gila River Unit has records since 1980 for northern Mexican gartersnakes, and is within the geographical area currently occupied by the species. We are proposing the area in this unit because it is occupied by the species and because it contains essential physical or biological features that may require special management considerations or protection. The following narrative describes the area proposed as critical habitat in the Upper Gila River Unit.

We are proposing to designate 21,135 acres (8,553 ha) of critical habitat along 148.2 stream mi (238.6 km) of the upper Gila River, from its confluence with the San Francisco River in Graham County, Arizona, upstream to its confluence with East Fork Gila River and Black Canyon in Catron County, New Mexico. The Upper Gila River Unit is primarily privately owned, with additional parcels managed by the Gila National Forest, the New Mexico Department of Game and Fish, and the Arizona and

New Mexico State Land Departments. Several reaches of the Gila River in New Mexico have been adversely affected by channelization and diversions, which have reduced or eliminated baseflow. As a whole, however, this unit contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics) and 2 (terrestrial habitat characteristics), but PCEs 3 (prey base) and 4 (absence or low level of harmful nonnative species) are deficient. Special management may be required to maintain or develop the physical or biological features, including the elimination or reduction of harmful nonnative species and improving the status of ranid frog populations. Lands within The Nature Conservancy’s Gila Riparian Preserve in this unit are being considered for exclusion from the final rule for critical habitat under section 4(b)(2) of the Act (see *Application of Section 4(b)(2) of the Act* below).

The Upper Gila River Unit is proposed as critical habitat for the northern Mexican gartersnake because it is occupied at the time of listing and contains sufficient physical or biological features to support life-history functions essential for the conservation of the species. Some reaches of the Gila River have been adversely affected by channelization and water diversions. There remains the potential for the construction of Hooker Dam in the reach of the Gila River above Mogollon Creek and below Turkey Creek as part of the Central Arizona Project, which would adversely affect both the physical habitat for northern Mexican gartersnakes as well as their prey base, but this project remains in deferment status. The physical or biological features in this unit may require special management consideration due to competition with, and predation by, harmful nonnative species that are present in this unit; water diversions; channelization; potential for high-

intensity wildfires; and human development of areas adjacent to proposed critical habitat.

Mule Creek Unit

The Mule Creek Unit is generally located in southwestern New Mexico in the vicinity of Mule Creek, New Mexico (Grant and Catron Counties). This unit consists of a total of 2,579 acres (1,044 ha) along 19 stream mi (30 km) of proposed critical habitat along Mule Creek. Land ownership or land management within this unit consists of lands managed by the U.S. Forest Service and private ownership. The identified area described in the Mule Creek Unit has records for northern Mexican gartersnakes since 1980, and is considered as being within the geographical area currently occupied by the species. We are proposing this area under section 3(5)(A)(i) of the Act because it is occupied by the species and because it contains essential physical or biological features that may require special management considerations or protection. The following narrative describes the area proposed as critical habitat in the Mule Creek Unit.

We are proposing to designate 2,579 acres (1,044 ha) of critical habitat along 18.7 stream mi (30.1 km) of Mule Creek, from its confluence with the San Francisco River, upstream to its origin northwest of North Sawmill Canyon in Grant and Catron Counties, New Mexico. The Mule Creek Subunit is managed by the Gila National Forest, with additional parcels under private ownership. Mule Creek supports native fish and supports an adequate amount of suitable aquatic and terrestrial habitat with the appropriate characteristics to support the northern Mexican gartersnake. However, the habitat quality is somewhat compromised by the presence of bullfrogs, which are known to have a negative association

with northern Mexican gartersnakes. This subunit contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat characteristics), and 3 (prey base), but PCE 4 (absence or low level of harmful nonnative species) is deficient. Special management may be required to maintain or develop the physical or biological features, including management to remove or reduce bullfrogs.

The Mule Creek Unit is proposed as critical habitat for the northern Mexican gartersnake because it is occupied at the time of listing and contains sufficient physical or biological features to support life-history functions essential for the conservation of the species. The physical or biological features in this unit may require special management consideration due to competition with, and predation by, harmful nonnative species that are present in this unit; potential for high-intensity wildfires; and human development of areas adjacent to proposed critical habitat.

#### Bill Williams River Unit

The Bill Williams River Unit is generally located in western Arizona, northeast of Parker, Arizona, in La Paz and Mohave Counties. This unit consists of a total of 5,412 acres (2,190 ha) along 36 stream mi (58 km) of proposed critical habitat along the Bill Williams River, Arizona. We are proposing to designate the reach of the Bill Williams River running from its confluence with Lake Havasu, upstream to Alamo Lake Dam. The Bill Williams River Unit occurs on lands primarily managed by the U.S. Bureau of Land Management. Remaining land management and ownership includes the Bill Williams National Wildlife Refuge, U.S. Department of Defense lands, Arizona State Land Department, and private land owners. All identified areas described in this unit have records for northern Mexican gartersnakes since 1980, and all identified areas are considered as being within the geographical area currently occupied by the species. We are proposing this unit under section 3(5)(A)(i) of the Act because it is occupied by the species and because it contains essential physical or biological features that may require special management considerations or protection. This unit contains adequate populations of lowland leopard frogs, but native fish appear to be absent. Crayfish and several species of nonnative, spiny-rayed fish maintain robust populations in this reach. Within this unit, PCEs 1 (aquatic habitat characteristics) and 2

(terrestrial habitat characteristics) are present, but PCEs 3 (prey base) and 4 (absence or low level of harmful nonnative species) are deficient. Special management may be required to maintain or develop the physical or biological features, including the elimination or reduction of crayfish and nonnative, spiny-rayed fish, as well as the prevention of a bullfrog invasion.

The Bill Williams River Unit is proposed as critical habitat for the northern Mexican gartersnake because it is occupied at the time of listing and contains sufficient physical or biological features to support life-history functions essential for the conservation of the species. The physical or biological features in this unit may require special management consideration due to competition with, and predation by, harmful nonnative species that are present in this unit and flood-control projects.

#### Agua Fria River Subbasin Unit

The Agua Fria River Subbasin Unit is generally located in central Arizona, paralleling Interstate 17, just north of the Phoenix metropolitan area, in Yavapai County, Arizona. This unit consists of a total of 7,946 acres (3,215 ha) along 56 stream mi (91 km) of proposed critical habitat along the Agua Fria River and Little Ash Creek. Land ownership or land management within this unit consists of lands managed by the U.S. Bureau of Land Management, U.S. Forest Service, State Trust lands, and private ownership. All identified areas described in the Agua Fria River Subbasin Unit have records since 1980 for northern Mexican gartersnakes, and all are considered as being within the geographical area currently occupied by the species. We are proposing the areas in this unit under section 3(5)(A)(i) of the Act because they are essential for the conservation of the northern Mexican gartersnake. The following narratives describe all of the subunits proposed as critical habitat in the Agua Fria River Subbasin Unit.

Agua Fria River Mainstem Subunit. We are proposing to designate 6,989 acres (2,828 ha) of critical habitat along 49.1 stream mi (80.0 km) of the Agua Fria River mainstem, from its confluence with Squaw Creek east of Black Canyon City, upstream to its confluence with the unnamed drainage south of Highway 169 in Dewey, Arizona (Yavapai County). Also included in this subunit are 88 acres (36 ha) of the Arizona Game and Fish Department's Horseshoe Ranch property, which is located along the Agua Fria River at its confluence with Indian Creek. The Agua Fria River

Mainstem Subunit is primarily privately owned or managed by the U.S. Bureau of Land Management, with additional parcels managed by the Arizona State Land Department. The Agua Fria River contains nonnative, soft-rayed fish and lowland leopard frogs as prey, and contains an adequate amount of suitable aquatic and terrestrial habitat with the appropriate characteristics to support the northern Mexican gartersnake. However, the dominance of crayfish, bullfrogs, and nonnative, spiny-rayed fish in some reaches negatively affects the proposed subunit's suitability for northern Mexican gartersnakes. This subunit contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat characteristics), and 3 (prey base), but PCE 4 (absence or low level of harmful nonnative species) is deficient. Special management may be required to maintain or develop the physical or biological features, including management to remove or reduce crayfish, bullfrogs, and nonnative, spiny-rayed fish. Lands within the Arizona Game and Fish Department's Horseshoe Ranch property are being considered for exclusion from the final rule for critical habitat under section 4(b)(2) of the Act (see *Application of Section 4(b)(2) of the Act* below).

Little Ash Creek Subunit. We are proposing to designate 957 acres (387 ha) of critical habitat along 6.7 stream mi (10.7 km) of Little Ash Creek, from the confluence of Ash Creek, upstream to its confluence with an unnamed drainage east of the bridge over Dugas Road in Yavapai County, Arizona. The Little Ash Creek Subunit is primarily managed by the Prescott National Forest and U.S. Bureau of Land Management with additional parcels under Arizona State Land Department and private ownership. According to GIS analysis, Little Ash Creek supports populations of lowland leopard frogs and two species of native fish, and contains adequate amount of suitable aquatic and terrestrial habitat with the appropriate characteristics to support the northern Mexican gartersnake, but the dominance of crayfish, bullfrogs, and nonnative, spiny-rayed fish in some reaches negatively affects the suitability for northern Mexican gartersnakes. This subunit contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat characteristics), and 3 (prey base), but PCE 4 (absence or low level of harmful nonnative species) is deficient. Special management may be required to maintain or develop the

physical or biological features, including management against crayfish, bullfrogs, and nonnative, spiny-rayed fish.

The Agua Fria Subbasin Unit is proposed as critical habitat for the northern Mexican gartersnake because it is occupied at the time of listing and contains sufficient physical or biological features to support life-history functions essential for the conservation of the species. The physical or biological features in this unit may require special management consideration due primarily to competition with, and predation by, harmful nonnative species that are present in this unit and to a lesser extent human development of areas adjacent to proposed critical habitat.

#### Upper Salt River Subbasin Unit

The Upper Salt River Subbasin Unit is generally located along the Mogollon Rim in east-central Arizona, and includes portions of Gila, Graham, Apache, Navajo, and Greenlee Counties. The Upper Salt River Subbasin Unit largely includes remote, rural areas, generally under the ownership and management of tribal governments, specifically the White Mountain Apache and San Carlos Apache Tribes. This unit consists of a total of 22,218 acres (8,991 ha) along 156 stream mi (251 km) of proposed critical habitat along the Black River and Big Bonito Creek. Land ownership or land management within this unit consists of tribal lands and those managed by the U.S. Forest Service. All identified areas described in the Salt River Subbasin Unit have records since 1980 for northern Mexican gartersnakes, and all identified areas are considered as being within the geographical area currently occupied by the species. We are proposing the areas in this unit under section 3(5)(A)(i) of the Act because they are occupied by the species and because they contain sufficient amounts of the essential physical or biological features that may require special management considerations or protection. The following narratives describe all of the subunits proposed as critical habitat in the Upper Salt River Subbasin Unit.

**Black River Subunit.** We are proposing to designate 16,392 acres (6,634 ha) of critical habitat along 114.4 stream mi (184.0 km) of the Black River from its confluence with the Salt and White rivers, upstream to the confluence with the East and West Forks of the Black River. The Black River Drainage Subunit occurs in Apache, Gila, Graham, Greenlee, and Navajo Counties, Arizona. The Black River drainage is primarily owned by

the White Mountain Apache and San Carlos Apache Tribes, with additional parcels managed by the Apache-Sitgreaves National Forest. Water in the Black River is diverted for use at the Morenci Mine, which may affect baseflow. This subunit contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat characteristics), and PCE 3 (prey base), but PCE 4 (absence or low level of harmful nonnative species) is deficient. Special management may be required to maintain or develop the physical or biological features, including the elimination or reduction of crayfish and possibly nonnative, spiny-rayed fish, as well as to maintain adequate base flows in the Black River. Lands owned by the White Mountain Apache and San Carlos Apache Tribes are being considered for exclusion from the final rule for critical habitat under section 4(b)(2) of the Act (see *Application of Section 4(b)(2) of the Act* below).

**Big Bonito Creek Subunit.** We are proposing to designate 5,826 acres (2,358 ha) of critical habitat along 41.5 stream mi (66.8 km) of Big Bonito Creek, from its confluence with the Black River east of the mouth of Sawmill Canyon, upstream to its origin southwest of Mount Baldy in the White Mountains, in Apache and Navajo Counties, Arizona. Big Bonito Creek is solely owned by the White Mountain Apache Tribe. This subunit contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics) and 2 (terrestrial habitat characteristics), but PCEs 3 (prey base) and 4 (absence or low level of harmful nonnative species) are deficient. Special management may be required to maintain or develop the physical or biological features, including the elimination or reduction of crayfish and nonnative, spiny-rayed fish, as well as management to support a native prey base for northern Mexican gartersnakes. This subunit is being considered for exclusion from the final rule for critical habitat under section 4(b)(2) of the Act (see *Application of Section 4(b)(2) of the Act* below).

The Upper Salt River Subbasin Unit is proposed as critical habitat for the northern Mexican gartersnake because it is occupied at the time of listing and largely contains sufficient physical or biological features to support life-history functions essential for the conservation of the species. However, the 2011 Wallow Fire adversely affected a large proportion of the Black River drainage, and subsequent ash and sediment flows have likely resulted in a depressed fish community, which could

stress resident northern Mexican gartersnake populations in the short to medium term. The physical or biological features in this unit may require special management consideration due to competition with, and predation by, harmful nonnative species that are present in this unit; water diversions; potential for high-intensity wildfires; and human development of areas adjacent to proposed critical habitat.

#### Tonto Creek Unit

The Tonto Creek Unit is generally located southeast of Payson, Arizona, and northeast of the Phoenix metropolitan area, in Gila County. We are proposing to designate 8,936 acres (3,616 ha) of critical habitat along 65.1 stream mi (104.7 km) of Tonto Creek, from its confluence with Roosevelt Lake upstream to its origin northeast of Tonto Spring, south of Rim Road, in Gila County, Arizona. Tonto Creek occurs predominately on lands managed by the Tonto National Forest. The remaining landownership is private. Therefore, we are proposing this unit under section 3(5)(A)(i) of the Act because it is occupied by the species and because it contains sufficient amounts of the essential physical or biological features that may require special management considerations or protection. Some reaches along Tonto Creek experience seasonal drying as a result of regional groundwater pumping, while others are affected by diversions or existing or planned flood control projects. Development along private reaches of Tonto Creek may also affect terrestrial characteristics of northern Mexican gartersnake habitat. Mercury has been detected in fish samples within Tonto Creek, and further research is necessary to determine if mercury is bioaccumulating in the resident food chain. In general, this unit contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat characteristics), and 3 (prey base), but PCE 4 (absence or low level of harmful nonnative species) is deficient. Special management may be required to maintain or develop the physical or biological features, including the elimination or reduction of crayfish, bullfrogs, and nonnative, spiny-rayed fish, as well as improve base flows.

The Tonto Creek Unit is proposed as critical habitat for the northern Mexican gartersnake because it is occupied at the time of listing and contains sufficient physical or biological features to support life-history functions essential for the conservation of the species. The physical or biological features in this

unit may require special management consideration due to competition with, and predation by, harmful nonnative species that are present in this unit; water diversions; flood-control projects; and development of areas adjacent to or within proposed critical habitat.

#### Verde River Subbasin Unit

The Verde River Subbasin Unit is generally located southwest of Paulden, Arizona, and northwest of Payson, Arizona, in Coconino, Gila, and Yavapai Counties. This unit consists of a total of 29,191 acres (11,813 ha) along approximately 201 stream mi (323 km) of proposed critical habitat along the Verde River, Oak Creek, and Spring Creek. Lands within this unit consist of federally managed lands, State Trust lands and other State-managed lands, tribal lands, and privately owned lands. All identified areas described in the Verde River Subbasin Unit have records for northern Mexican gartersnakes, and all identified areas are considered as being currently within the geographical area occupied by the species. Therefore, we are proposing the areas in this unit under section 3(5)(A)(i) of the Act because they are occupied by the species and because they contain essential physical or biological features that may require special management considerations or protection. The following narratives describe all of the subunits proposed as critical habitat in the Verde River Subbasin Unit.

**Upper Verde River Subunit.** We are proposing to designate 20,526 acres (8,307 ha) of critical habitat along 139.8 stream mi (224.9 km) of the Verde River, from its confluence with Horseshoe Reservoir, upstream to its confluence with Sullivan Lake, in Gila and Yavapai Counties, Arizona. The Verde River occurs predominantly on lands managed by the U.S. Forest Service on the Prescott, Tonto, and Coconino National Forests. Remaining land management and ownership includes the Arizona Game and Fish Department, Arizona State Parks, Arizona State Trust, Yavapai Apache Tribe, and private land owners. Proposed groundwater pumping of the Big Chino Aquifer may adversely affect future baseflow in the Verde River, and therefore PCE 1. Development along the Verde River has eliminated habitat along portions of the Verde River through the Verde Valley. In general, this subunit contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat characteristics), and 3 (prey base), but PCE 4 (absence or low level of harmful nonnative species) is deficient. Special management may be

required to maintain or develop the physical or biological features, including the elimination or reduction of crayfish, bullfrogs, and nonnative, spiny-rayed fish, as well as ensuring adequate flow is retained in the Verde River. Lands along the Verde River included in the Arizona Game and Fish Departments' Upper Verde Wildlife Area, The Nature Conservancy's Verde Springs Preserve and Verde Valley property, lands owned by the Yavapai Apache Tribe, and lands owned by the Salt River Project and managed under their Horseshoe-Bartlett and Roosevelt HCPs are being considered for exclusion from the final rule for critical habitat under section 4(b)(2) of the Act (see *Application of Section 4(b)(2) of the Act* below).

**Oak Creek Subunit.** We are proposing to designate 5,533 acres (2,239 ha) of critical habitat along 38.5 stream mi (62.0 km) of Oak Creek, from its confluence with the Verde River south of Cornville, upstream to Midgely Bridge at the confluence with Wilson Canyon, in Coconino County, Arizona. Also included in this subunit are 149 acres (60 ha) of the Arizona Game and Fish Department's Bubbling Ponds and Page Springs State Fish Hatcheries, which are adjacent to each other, and occur along Oak Creek, upstream of its confluence with Spring Creek. The Oak Creek subunit occurs predominately on privately owned lands or lands managed by the Coconino National Forest. Remaining lands are managed by Arizona Game and Fish Department and Arizona State Parks. This reach of lower Oak Creek is largely dominated by crayfish, bullfrogs, and nonnative, spiny-rayed fish. This subunit contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics) and 2 (terrestrial habitat characteristics), but PCEs 3 (prey base) and 4 (absence or low level of harmful nonnative species) are deficient. Special management may be required to maintain or develop the physical or biological features, including managing for native prey species and eliminating or reducing crayfish, bullfrog, and nonnative, spiny-rayed fish populations. Lands along lower Oak Creek included within the Arizona Game and Fish Department's Bubbling Ponds and Page Springs State Fish Hatcheries are being considered for exclusion from the final rule for critical habitat under section 4(b)(2) of the Act (see *Application of Section 4(b)(2) of the Act* below).

**Spring Creek Subunit.** We are proposing to designate 3,131 acres (1,267 ha) of critical habitat along 22.5 stream mi (36.2 km) of Spring Creek, from its confluence with the Oak Creek

upstream to its origin southwest of Buck Ridge, in Yavapai County, Arizona. Spring Creek occurs predominately on lands managed by U.S. Forest Service on the Tonto and Coconino National Forests. Remaining lands are Arizona State Trust and privately owned lands. Spring Creek contains populations of lowland leopard frogs and several species of native fish which serve as the prey base for northern Mexican gartersnakes. However, crayfish have been observed as abundant in this subunit. This subunit contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat characteristics), and 3 (prey base), but PCE 4 (absence or low level of harmful nonnative species) is deficient. Special management may be required to maintain or develop the physical or biological features, including the elimination or reduction of crayfish.

The Verde River Subbasin Unit is proposed as critical habitat for the northern Mexican gartersnake because it is occupied at the time of listing and contains sufficient physical or biological features to support life-history functions essential for the conservation of the species. The physical or biological features in this unit may require special management consideration due to competition with, and predation by, harmful nonnative species that are present in this unit; water diversions; existing and proposed groundwater pumping potentially resulting in drying of habitat; potential for high-intensity wildfires; and human development of areas adjacent to proposed critical habitat.

#### Upper Santa Cruz River Subbasin Unit

The Upper Santa Cruz River Subbasin Unit is generally located in southeastern Arizona, east of Nogales, southeast of Patagonia, and southwest of Sierra Vista, in the San Rafael Valley, in Santa Cruz and Cochise Counties, Arizona. This unit consists of springs, seeps, streams, stock tanks, and terrestrial space (overland areas) in between these features within a total of 113,895 acres (46,092 ha) of proposed critical habitat in the San Rafael Valley, including portions of Parker and Scotia canyons of the Huachuca Mountains, Arizona. For the streams within this unit, we are proposing the reach of Parker Canyon that includes 5.8 stream mi (9.3 km) from Duquesne Road south of Loop Road, upstream to and including Parker Canyon Lake. The reach of Scotia Canyon we are proposing as critical habitat includes 3.7 stream mi (5.9 km) from its confluence with an unnamed drainage at the junction with Bodie

Canyon, upstream to its origin west of the Coronado National Forest-Fort Huachuca Boundary. The upper Santa Cruz River occurs within the San Rafael Valley, flowing south into Mexico. We are proposing 13.8 stream mi (22.2 km) of the upper Santa Cruz River, from the International Border, upstream to its headwaters at the top of Sheep Ridge Canyon. The Upper Santa Cruz River Subbasin Unit occurs on lands primarily managed by the Coronado National Forest, with remaining land management under the Arizona State Parks Department. This unit also contains private lands. All identified areas described in this unit have records for northern Mexican gartersnakes, and all identified areas are considered as being currently within the geographical area occupied by the species. Therefore, we are proposing this unit under section 3(5)(A)(i) of the Act because it is occupied by the species and because it contains sufficient amounts of the essential physical or biological features that may require special management considerations or protection.

This unit contains adequate populations of Chiricahua and lowland leopard frogs, as well as native fish species in various locations and densities, with the former being actively recovered in Scotia Canyon. Bullfrogs and nonnative, spiny-rayed fish are also known to occur at various densities within this unit, and Parker Canyon Lake is managed as a warm-water sport fishery. Crayfish are also likely to occur in various locations and densities within this unit. Within this unit, PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat characteristics) and 3 (prey base) are generally met, but PCE 4 (absence or low level of harmful nonnative species) is deficient. Special management may be required to maintain or develop the physical or biological features, including continuing to promote the recovery or expansion of native leopard frogs and fish, and eliminating or reducing harmful nonnative species. The San Rafael Ranch is being considered for exclusion from the final rule for critical habitat under section 4(b)(2) of the Act (see *Application of Section 4(b)(2) of the Act* section below).

The Upper Santa Cruz River Subbasin Unit is proposed as critical habitat for the northern Mexican gartersnake because it is occupied at the time of listing and contains sufficient physical or biological features to support life-history functions essential for the conservation of the species. The physical or biological features in this unit may require special management consideration due to competition with,

and predation by, harmful nonnative species that are present in this unit and potential effects from future high-intensity wildfires.

#### Redrock Canyon Unit

We are proposing to designate 1,971 acres (798 ha) of critical habitat along 14.0 stream mi (22.5 km) of Redrock Canyon, from its confluence with Sonoita Creek, upstream to its origin north of Meadow Valley in the Canelo Hills, in Santa Cruz County. Redrock Canyon occurs predominately on lands managed by the Coronado National Forest with remaining land in private ownership. The area proposed along Redrock Canyon is within the area considered occupied by the northern Mexican gartersnake. Therefore, we are proposing the areas in this unit under section 3(5)(A)(i) of the Act because they are occupied by the species and because they contain sufficient amounts of the essential physical or biological features that may require special management considerations or protection.

Redrock Canyon supports four species of native fish, and Chiricahua leopard frogs and Sonora tiger salamanders have been reported. This subunit contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat characteristics), and 3 (prey base), but PCE 4 (absence or low level of harmful nonnative species) is deficient. Special management may be required to maintain or develop the physical or biological features, including the elimination or reduction of bullfrogs and the prevention of potential invasions from nonnative, spiny-rayed fish. Lands within The Nature Conservancy's Patagonia-Sonoita Creek Preserve in this unit are being considered for exclusion from the final rule for critical habitat under section 4(b)(2) of the Act (see *Application of Section 4(b)(2) of the Act* below).

The Redrock Canyon Unit is proposed as critical habitat for the northern Mexican gartersnake because it is occupied at the time of listing and contains sufficient physical or biological features to support life-history functions essential for the conservation of the species. The physical or biological features in this unit may require special management consideration due to competition with, and predation by, harmful nonnative species that are present in this unit.

#### Buenos Aires National Wildlife Refuge Unit

The Buenos Aires National Wildlife Refuge Unit is generally located in

southern Arizona, northwest of Nogales and south of Three Points, in Pima County, Arizona. This unit consists of a total of 117,335 acres (47,484 ha) of proposed critical habitat, including springs, seeps, streams, stock tanks, and terrestrial space in between these features within the Buenos Aires National Wildlife Refuge. The Buenos Aires National Wildlife Refuge Unit occurs on lands solely managed by the U.S. Fish and Wildlife Service. This unit is considered as being currently within the geographical area occupied by the species. Therefore, we are proposing this unit under section 3(5)(A)(i) of the Act because it is occupied by the species and because it contains sufficient amounts of the essential physical or biological features that may require special management considerations or protection.

This unit has been a focal point for the recovery of Chiricahua leopard frogs, providing prey for the northern Mexican gartersnake in a core area of stock tanks in the central region of the Refuge. Chiricahua leopard frogs also likely disperse from this area into other areas within the Refuge. Bullfrogs and crayfish remain a concern in Arivaca Cienega and Arivaca Creek. While not part of this unit, Arivaca Lake is operated as a warm-water sport fishery, and nonnative, spiny-rayed fish may be washed down and persist below the lake dam after overflow events. Within this unit, PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat characteristics), and 3 (prey base) are generally present, but PCE 4 (absence or low level of harmful nonnative species) is deficient. Special management may be required to maintain or develop the physical or biological features, including the elimination or reduction of crayfish, bullfrogs, and nonnative, spiny-rayed fish, as well as the prevention of a bullfrog invasion in Chiricahua leopard frog recovery core areas.

The Buenos Aires National Wildlife Refuge Unit is proposed as critical habitat for the northern Mexican gartersnake because it is occupied at the time of listing and contains sufficient physical or biological features to support life-history functions essential for the conservation of the species. The physical or biological features in this unit may require special management consideration due to competition with, and predation by, harmful nonnative species that are present in this unit.

#### Cienega Creek Subbasin Unit

The Cienega Creek Subbasin Unit is generally located in southern Arizona, east of the Santa Rita Mountains, north

of the Canelo Hills, and west of the Whetstone Mountains, in Pima and Santa Cruz Counties. This unit consists of springs, seeps, streams, stock tanks, and terrestrial space in between these features within a total of 50,393 acres (20,393 ha) of proposed critical habitat in the Las Cienegas National Conservation Area and Cienega Creek Natural Preserve. Also included in this unit is 7.1 stream mi (11.4 km) of Cienega Creek that occur outside of these specific ownership areas. The Cienega Creek Subbasin Unit occurs on lands primarily managed by the U.S. Bureau of Land Management and the Arizona State Land Department, with remaining lands under private ownership. All identified areas are considered as being within the geographical area currently occupied by the species. We are proposing the areas in this unit under section 3(5)(A)(i) of the Act because they are occupied by the species and because they contain essential physical or biological features that may require special management considerations or protection. The following narratives describe all of the subunits proposed as critical habitat in the Cienega Creek Subbasin Unit.

**Cienega Creek Subunit.** We are proposing to designate 1,113 acres (450 ha) of critical habitat along 7.1 stream mi (11.4 km) of Cienega Creek, from the northern boundary of the Las Cienegas National Conservation Area to the southern boundary of Cienega Creek Natural Preserve in Pima County, Arizona. The Cienega Creek Subunit occurs on lands managed by the Arizona State Land Department in addition to a small amount of private land. Native fish and both Chiricahua and lowland leopard frog populations provide prey for northern Mexican gartersnakes, and recent, ongoing bullfrog eradication in the area reduces the threat of bullfrogs within this subunit. This subunit contains sufficient physical or biological features, including all PCEs. However, special management may be required to maintain or develop the physical or biological features, including preventing the invasion or reinvasion of bullfrogs.

**Las Cienegas National Conservation Area Subunit.** We are proposing to designate critical habitat for a total of 45,020 acres (18,219 ha) of springs, seeps, streams, stock tanks, and terrestrial space in between these features within the Las Cienegas National Conservation Area in Pima County, including portions of Cienega Creek and Empire Gulch that occur within the Las Cienegas National Conservation Area. The Las Cienegas National Conservation Area is managed by the U.S. Bureau of Land

Management, although it includes some Arizona State Trust Lands. Native fish and both Chiricahua and lowland leopard frog populations provide prey for northern Mexican gartersnakes, and recent, ongoing bullfrog eradication in the area reduces the threat of bullfrogs within this subunit. This subunit contains sufficient physical or biological features, including all PCEs. However, special management may be required to maintain or develop the physical or biological features, including preventing the invasion or reinvasion of bullfrogs.

**Cienega Creek Natural Preserve Subunit.** We are proposing to designate critical habitat for a total of 4,260 acres (1,724 ha) of springs, seeps, streams, stock tanks, and terrestrial space in between these features within the Cienega Creek Natural Preserve in Pima County, Arizona, including the reach of Cienega Creek that occurs within the Cienega Creek Natural Preserve. The Cienega Creek Natural Preserve is owned and managed by Pima County. Native fish and lowland leopard frog populations provide prey for northern Mexican gartersnakes, and recent, ongoing bullfrog eradication in the area reduces the threat of bullfrogs within this subunit. This subunit contains sufficient physical or biological features, including all PCEs. However, special management may be required to maintain or develop the physical or biological features, including preventing the invasion or reinvasion of bullfrogs. This subunit is being considered for exclusion from the final rule for critical habitat under section 4(b)(2) of the Act (see *Application of Section 4(b)(2) of the Act* below).

The Cienega Creek Subbasin Unit is proposed as critical habitat for the northern Mexican gartersnake because it is occupied at the time of listing and contains sufficient physical or biological features to support life-history functions essential for the conservation of the species. The physical or biological features in this unit may require special management consideration due to ongoing and regional threat of bullfrogs.

#### San Pedro River Subbasin Unit

The San Pedro River Subbasin Unit is generally located in southeastern Arizona, east of Sierra Vista, Tucson, and Florence and west Douglas, Wilcox, and Safford, in Cochise, Pima, and Pinal Counties. This unit consists of a total of 23,690 acres (9,587 ha) along 165 stream mi (266 km) of proposed critical habitat along the San Pedro River and Bear Creek. Land ownership or land management within this unit consists of lands managed by the U.S. Bureau of Land Management, Coronado National

Forest, Arizona State Land Department, San Carlos Apache Tribe, and privately owned lands. All identified areas described in the San Pedro River Subbasin Unit have records for northern Mexican gartersnakes, and all identified areas are considered as being currently within the geographical area occupied by the species. Therefore, we are proposing the areas in this unit under section 3(5)(A)(i) of the Act because they are occupied by the species and because they contain sufficient amounts of the essential physical or biological features that may require special management considerations or protection. The following narratives describe all of the subunits proposed as critical habitat in the San Pedro River Subbasin Unit.

**San Pedro River Subunit.** We are proposing to designate 22,669 acres (9,174 ha) of critical habitat along 158.4 stream mi (254.9 km) of the San Pedro River from its confluence with the Gila River at Winkelman, upstream to the International Border, in Cochise, Pima, and Pinal Counties, Arizona. The San Pedro River Subunit occurs predominately on privately owned lands, with remaining lands managed by the U.S. Bureau of Land Management. Native fish and lowland leopard frogs occur throughout the San Pedro River and provide a prey base for northern Mexican gartersnakes, with prey population densities increasing in the downstream direction. Crayfish, bullfrogs, and nonnative, spiny-rayed fish occur predominately upstream of the Interstate 10 crossing. In general, this subunit contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat characteristics), and 3 (prey base), but PCE 4 (absence or low level of harmful nonnative species) is deficient. Special management may be required to maintain or develop the physical or biological features, including the elimination or reduction of harmful nonnative species. Lands in this subunit that are owned or under conservation easement with The Nature Conservancy as conservation preserves, lands owned by the Salt River Project and managed under their Horseshoe-Bartlett and Roosevelt HCPs, as well as lands owned by the San Carlos Apache Tribe, are being considered for exclusion from the final rule for critical habitat under section 4(b)(2) of the Act (see *Application of Section 4(b)(2) of the Act* below).

**Bear Canyon Creek Subunit.** We are proposing to designate 1,022 acres (414 ha) of critical habitat along 7.1 stream mi (11.3 km) of Bear Canyon Creek, from the International Border, upstream

to its origin south of Granite Peak in the Huachuca Mountains, in Cochise County, Arizona. The Bear Canyon Creek Subunit occurs predominately on lands managed by the Coronado National Forest with remaining land in private ownership. Native fish comprise the fishery of Bear Canyon Creek, and GIS analysis suggests that native leopard frogs may also occur in limited density. Crayfish are also present. This subunit contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat characteristics), and 3 (prey base), but PCE 4 (absence or low level of harmful nonnative species) is deficient. Special management may be required to maintain or develop the physical or biological features, including the elimination or reduction of crayfish and the establishment of secure leopard frog populations.

The San Pedro River Subbasin Unit is proposed as critical habitat for the northern Mexican gartersnake because it is occupied at the time of listing and contains sufficient physical or biological features to support life-history functions essential for the conservation of the species. The physical or biological features in this unit may require special management consideration due to competition with, and predation by, harmful nonnative species that are present in this unit.

#### Babocomari River Subbasin Unit

The Babocomari River Subbasin Unit is generally located in southeastern Arizona, east of Santa Rita Mountains, north of the Canelo Hills and Huachuca Mountains, south of the Whetstone Mountains, and west of the San Pedro River, in Santa Cruz and Cochise Counties. This unit consists of springs, seeps, streams, stock tanks, and terrestrial space in between these features within a total of 14,334 acres (5,801 ha) of proposed critical habitat in the Canelo Hills Cienega Preserve and Appleton-Whittell Research Ranch as well as along a total of 45 stream mi (72 km) of portions of the Babocomari River, Post Canyon, O'Donnell Canyon, and Turkey Creek. Land ownership or management within this unit consists of lands managed by the U.S. Bureau of Land Management, Coronado National Forest, Arizona State Land Department, and privately owned lands. All identified areas described in the Babocomari River Subbasin Unit have records for northern Mexican gartersnakes, and all identified areas are considered as being currently within the geographical area occupied by the species. Therefore, we are proposing the areas in this unit under section

3(5)(A)(i) of the Act because they are occupied by the species and because they contain sufficient amounts of the essential physical or biological features that may require special management considerations or protection. The following narratives describe all of the subunits proposed as critical habitat in the Babocomari River Subbasin Unit.

**Babocomari River/Cienega Subunit.** We are proposing to designate 3,454 acres (1,398 ha) of critical habitat along approximately 24.4 stream mi (39.2 km) of the Babocomari River from its confluence with the San Pedro River northwest of Fairbank, upstream to its confluence with an unnamed drainage south of the railroad and southeast of Elgin, in Cochise and Santa Cruz Counties, Arizona. The Babocomari River Subunit occurs predominately on privately owned lands, with remaining lands managed by the U.S. Bureau of Land Management. Crayfish, bullfrogs, and nonnative, spiny-rayed fish all occur within this subunit at various densities, reducing the likelihood of maintaining a suitable native prey base for northern Mexican gartersnakes. This subunit contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics) and 2 (terrestrial habitat characteristics), but PCEs 3 (prey base) and 4 (absence or low level of harmful nonnative species) are deficient. Special management may be required to maintain or develop the physical or biological features, including the elimination or reduction of harmful nonnative species and reestablishment of native prey species.

**Post Canyon Subunit.** We are proposing to designate 795 acres (322 ha) of critical habitat along approximately 5.7 stream mi (9.1 km) of Post Canyon, from the western boundary of the Appleton-Whittell Research Ranch, upstream to Post Well at the top of Post Canyon, in Santa Cruz County, Arizona. The Post Canyon Subunit occurs largely on privately owned lands as well as those managed by the Coronado National Forest.

Lowland leopard frogs and, perhaps, Chiricahua leopard frogs provide prey for northern Mexican gartersnakes in Post Canyon. Native fish may also occur due to a connection with nearby habitat that native fish are known to occupy. Crayfish occur in Post Canyon, and nonnative, spiny-rayed fish, as well as bullfrogs, are known from the vicinity and may be present. This subunit contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat characteristics), and 3 (prey base), but PCE 4 (absence or low level of harmful nonnative species) is

deficient. Special management may be required to maintain or develop the physical or biological features, including the elimination or reduction of crayfish and the prevention of potential bullfrog and nonnative, spiny-rayed fish invasions. Lands owned by the Appleton-Whittell Research Ranch within this subunit are being considered for exclusion from the final rule for critical habitat under section 4(b)(2) of the Act (see *Application of Section 4(b)(2) of the Act* below).

**O'Donnell Canyon Subunit.** We are proposing to designate 398 acres (161 ha) of critical habitat along approximately 2.5 stream mi (4.0 km) of O'Donnell Canyon, between the southern boundary of the Appleton-Whittell Research Ranch upstream to the northern boundary of the Canelo Hills Cienega Preserve, and then from the southern boundary of the Canelo Hills Cienega Preserve upstream to its confluence with Pauline and Middle canyons, in Santa Cruz County, Arizona. The O'Donnell Canyon Subunit occurs predominantly on privately owned lands and those managed by the Coronado National Forest. The area proposed along O'Donnell Canyon is within the area considered occupied by the northern Mexican gartersnake.

Populations of native fish and Chiricahua leopard frogs provide a prey base for northern Mexican gartersnakes in O'Donnell Canyon, but crayfish and nonnative, spiny-rayed fish may be present. Bullfrogs inhabit the region and present a threat of invasion. This subunit contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat characteristics), and 3 (prey base), but PCE 4 (absence or low level of harmful nonnative species) is deficient. Special management may be required to maintain or develop the physical or biological features, including the elimination or reduction of crayfish and nonnative, spiny-rayed fish, as well as the prevention of potential bullfrog invasions. Lands owned by the Appleton-Whittell Research Ranch and the Canelo Hills Cienega Preserve within this subunit are being considered for exclusion from the final rule for critical habitat under section 4(b)(2) of the Act (see *Application of Section 4(b)(2) of the Act* below).

**Turkey Creek Subunit.** We are proposing to designate 1,678 acres (679 ha) of critical habitat along approximately 12.0 stream mi (19.4 km) of Turkey Creek, from its confluence with the Babocomari River, upstream to the northern boundary of the Appleton-Whittell Research Ranch, and then from

the southwestern boundary of the Appleton-Whittell Research Ranch to its origin at an unnamed pond east of State Highway 83 and south of Forest Road 201, in Santa Cruz and Cochise Counties. The Turkey Creek Subunit occurs predominantly on privately owned lands and those managed by the Coronado National Forest.

Turkey Creek historically supported two species of native fish, which could still remain and supplement possible resident amphibian prey sources. One bullfrog was detected in 2004 within Turkey Creek, but no crayfish or nonnative, spiny-rayed fish species are thought to currently occur there. This subunit contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat characteristics), and 4 (absence or low level of harmful nonnative species), but PCE 3 (prey base) may be deficient. However, special management may be required to maintain or develop the physical or biological features, including preventing harmful nonnative species from becoming established and reintroducing native fish and leopard frogs into Turkey Creek. Lands owned by the Appleton-Whittell Research Ranch within this subunit are being considered for exclusion from the final rule for critical habitat under section 4(b)(2) of the Act (see *Application of Section 4(b)(2) of the Act* below).

Appleton-Whittell Research Ranch Subunit. We are proposing to designate critical habitat on approximately 7,798 acres (3,156 ha) of springs, seeps, streams, stock tanks, and terrestrial space in between these features within the Appleton-Whittell Research Ranch, in Santa Cruz County, Arizona. Portions of Post Canyon, O'Donnell Canyon, and Turkey Creek are included in this subunit. The Appleton-Whittell Research Ranch subunit occurs on privately owned lands, as well as lands managed by the Bureau of Land Management and Coronado National Forest. The management of the Appleton-Whittell Research Ranch is overseen by The Audubon Society. Native fish and native leopard frog populations occur throughout Ranch and provide prey for northern Mexican gartersnakes. However, crayfish, bullfrogs, and nonnative, spiny-rayed fish occur regionally and are an ongoing threat to northern Mexican gartersnakes in this area. This subunit contains sufficient physical or biological features, including all PCEs. However, special management may be required to maintain or develop the physical or biological features, including preventing the invasion of harmful nonnative

species. Private lands in this subunit are being considered for exclusion from the final rule for critical habitat under section 4(b)(2) of the Act (see *Application of Section 4(b)(2) of the Act* below).

Canelo Hills Cienega Preserve Subunit. We are proposing to designate critical habitat on approximately 213 acres (86 ha) of springs, seeps, streams, stock tanks, and terrestrial space in between these features within the Canelo Hills Cienega Preserve, in Santa Cruz County, Arizona. Portions of Post Canyon and O'Donnell Canyon are included within this subunit. The Canelo Hills Cienega Preserve includes lands owned by The Nature Conservancy, as well as other private lands under conservation easements with The Nature Conservancy. Native fish and leopard frogs may occur within this subunit. We do not have updated information on the status of harmful nonnative species in this subunit, but its management likely favors native species within the Preserve. Therefore, we conclude that this subunit contains all PCEs. However, special management may be required to maintain or develop the physical or biological features, including preventing harmful nonnative species from becoming established. This subunit is being considered for exclusion from the final rule for critical habitat under section 4(b)(2) of the Act (see *Application of Section 4(b)(2) of the Act* below).

The Babocomari River Subbasin Unit is proposed as critical habitat for the northern Mexican gartersnake because it is occupied at the time of listing and contains sufficient physical or biological features to support life-history functions essential for the conservation of the species. The physical or biological features in this unit may require special management consideration due to competition with, and predation by, harmful nonnative species that are present in this unit.

#### San Bernardino National Wildlife Refuge (SBNWR) Unit

The SBNWR Unit is generally located in extreme southeastern Arizona, east of Douglas and west of the New Mexico border, and sharing its southern border with Mexico, in Cochise County, Arizona. This unit consists of a total of 2,387 acres (966 ha) of springs, seeps, streams, stock tanks, and terrestrial space in between these features, including the headwaters of the Yaqui River. The U.S. Fish and Wildlife Service is the sole land manager within this unit.

The SBNWR was a historical stronghold for northern Mexican

gartersnakes, but the species has become rare in current times. Therefore, we are proposing this unit under section 3(5)(A)(i) of the Act because it is occupied by the species and because it contains sufficient amounts of the essential physical or biological features that may require special management considerations or protection. The SBNWR contains records for five species of native fish as well as lowland and Chiricahua leopard frog populations, but the status of the latter is uncertain due to the presence of bullfrogs on the refuge. This unit contains an adequate amount of physically suitable aquatic and terrestrial habitat, with the appropriate characteristics to support the northern Mexican gartersnake. Within this unit, PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat characteristics), and 3 (prey base) are generally present, but PCE 4 (absence or low level of harmful nonnative species) is deficient. Special management may be required to maintain or develop the physical or biological features, including the elimination or reduction of bullfrogs.

The SBNWR Unit is proposed as critical habitat for the northern Mexican gartersnake because it is occupied at the time of listing and contains sufficient physical or biological features to support life-history functions essential for the conservation of the species. The physical or biological features in this unit may require special management consideration due to competition with, and predation by, bullfrogs that are present in this unit.

#### Narrow-Headed Gartersnake

##### Upper Gila River Subbasin Unit

The Upper Gila River Subbasin Unit is generally located southwestern New Mexico in the Gila Wilderness of the Gila National Forest in Catron, Grant, Hidalgo, and Sierra Counties, New Mexico, and eastern Arizona in Graham County. This unit consists of a total of 49,903 acres (20,195 ha) along 359 stream mi (578 km) of proposed critical habitat along the mainstem, East, West, and Middle Forks of the Gila River, Black Canyon, Diamond Creek, Gilita Creek, Iron Creek, Little Creek, and Turkey Creek. Land ownership or land management within this unit consists of lands managed by the U.S. Forest Service, U.S. Bureau of Land Management, National Park Service, New Mexico Department of Game and Fish, State Trust lands, and private ownership. All identified areas described in the Upper Gila River Subbasin Unit have records since 1980 for narrow-headed gartersnakes, and all

identified areas are considered as being within the geographical area currently occupied by the species. We are proposing the areas in this unit under section 3(5)(A)(i) of the Act because they are occupied by the species and because they contain essential physical or biological features that may require special management considerations or protection. The following narratives describe all of the subunits proposed as critical habitat in the Upper Gila River Subbasin Unit.

**Gila River Subunit.** We are proposing to designate 21,135 acres (8,553 ha) of critical habitat along 148.2 stream mi (238.6 km) of the Gila River mainstem, from its confluence with the San Francisco River in Graham County, Arizona, through Hidalgo county, New Mexico, upstream to its confluence with East Fork Gila River and Black Canyon in Catron County, New Mexico. The mainstem Gila River Subunit contains primarily privately owned lands, as well as lands managed by the Gila National Forest, the New Mexico Department of Game and Fish, and the Arizona and New Mexico State Land Departments. Several reaches of the Gila River in New Mexico have been adversely affected by channelization and diversions, which have reduced or eliminated baseflow. As a whole, however, this subunit contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat characteristics), and 3 (prey base), but PCE 4 (absence or low level of harmful nonnative species) is deficient. Special management may be required to maintain or develop the physical or biological features, including the elimination or reduction of harmful nonnative species, as well as to maintain adequate base flow in the Gila River. Lands within The Nature Conservancy's Gila Riparian Preserve in this subunit are being considered for exclusion from the final rule for critical habitat under section 4(b)(2) of the Act (see *Application of Section 4(b)(2) of the Act* below).

**East Fork Gila River Subunit.** We are proposing to designate 3,579 acres (1,448 ha) of critical habitat along 27.6 stream mi (44.4 km) of the East Fork Gila River, from its confluence with the mainstem Gila River in Grant County, New Mexico, upstream to its confluence with Beaver Creek and Taylor Creek in Catron County, New Mexico. The East Fork Gila River Subunit is primarily managed by the Gila National Forest, with additional parcels under private ownership. This subunit contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat

characteristics), and 3 (prey base), but PCE 4 (absence or low level of harmful nonnative species) is deficient. Special management may be required to maintain or develop the physical or biological features, including the elimination or reduction of crayfish, bullfrogs, and nonnative, spiny-rayed fish.

**West Fork Gila River Subunit.** We are proposing to designate 5,169 acres (2,092 ha) of critical habitat along 37.2 stream mi (59.9 km) of the West Fork Gila River, from its confluence with the mainstem Gila River and East Fork Gila River in Grant County, New Mexico, upstream to its origin east of Center Baldy Peak in Catron County, New Mexico. The West Fork Gila River Subunit is primarily managed by the Gila National Forest with additional parcels under private ownership or managed by the National Park Service or the New Mexico Department of Game and Fish. Historically, the West Fork Gila River maintained large populations of bullfrogs and nonnative, spiny-rayed fish. As a result of ash and sediment flows following the 2012 Whitewater-Baldy Complex Fire, these harmful nonnative species may have been reduced (bullfrogs) or possibly eliminated (spiny-rayed fish). This subunit contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat characteristics), and 4 (absence or low level of harmful nonnative species), but PCE 3 (prey base) may be deficient. Special management may be required to maintain or develop the physical or biological features, including the preventing the reinvasion of harmful nonnative species and the reestablishment of native prey lost as a result of the 2012 Whitewater-Baldy Complex Fire.

**Middle Fork Gila River Subunit.** We are proposing to designate 4,964 acres (2,009 ha) of critical habitat along 37.0 stream mi (59.5 km) of the Middle Fork Gila River, from its confluence with the West Fork Gila River in Catron County, New Mexico, upstream to its confluence with Gilita Creek and Iron Creek in Catron County, New Mexico. The Middle Fork Gila River Subunit is primarily managed by the Gila National Forest with additional parcels managed by the New Mexico Department of Game and Fish. Historically, the West Fork Gila River maintained large populations of bullfrogs and nonnative, spiny-rayed fish. As a result of ash and sediment flows following the 2012 Whitewater-Baldy Complex Fire, these harmful nonnative species may have been reduced (bullfrogs) or possibly

eliminated (spiny-rayed fish). This subunit contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat characteristics), and 4 (absence or low level of harmful nonnative species), but PCE 3 (prey base) may be deficient. Special management may be required to maintain or develop the physical or biological features, including the preventing the reinvasion of harmful nonnative species and the reestablishment of native prey lost as a result of the 2012 Whitewater-Baldy Complex Fire.

**Black Canyon Subunit.** We are proposing to designate 3,503 acres (1,418 ha) of critical habitat along 25.8 stream mi (41.5 km) of Black Canyon, from its confluence with East Fork Gila River in Catron County, New Mexico, upstream to its confluence with Gilita Creek and Iron Creek in Catron County, New Mexico. Black Canyon is primarily managed by the Gila National Forest with additional parcels under private ownership. This area contains sufficient physical or biological features, including all PCEs. Special management may be required to maintain or develop the physical or biological features, including management against the invasion of harmful nonnative species.

**Diamond Creek Subunit.** We are proposing to designate 3,545 acres (1,435 ha) of critical habitat along 25.4 stream mi (40.9 km) of Diamond Creek, from its confluence with East Fork Gila River in Catron County, New Mexico, upstream to its confluence with the unnamed drainage northeast of Turkey Park in Sierra County, New Mexico. The Diamond Creek Subunit is primarily managed by the Gila National Forest with additional parcels under private ownership. This area contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat characteristics), and 3 (prey base), but PCE 4 (absence or low level of harmful nonnative species) is deficient. Special management may be required to maintain or develop the physical or biological features, including the elimination or reduction of crayfish and nonnative, spiny-rayed fish.

**Gilita Creek Subunit.** We are proposing to designate 1,704 acres (690 ha) of critical habitat along 12.1 stream mi (19.5 km) of Gilita Creek, from its confluence with Middle Fork Gila River in Catron County, New Mexico, upstream to its confluence with the unnamed drainage in Turkey Cienega, south of Bear Wallow Lookout Road, in Catron County, New Mexico. The Gilita Creek Subunit is managed by the Gila

National Forest. Several improved and unimproved road crossings occur along Gilita Creek, which may act as a source of sedimentation to the creek. However, this subunit appears to contain sufficient physical or biological features, including all PCEs. Special management may be required to maintain or develop the physical or biological features, including management against the invasion of harmful nonnative species, as well as to control erosion and sedimentation issues.

**Iron Creek Subunit.** We are proposing to designate 1,731 acres (701 ha) of critical habitat along 12.4 stream mi (19.9 km) of Iron Creek, from its confluence with Middle Fork Gila River in Catron County, New Mexico, upstream to its confluence with the unnamed drainage southeast of Whitewater Baldy Peak in Catron County, New Mexico. The Iron Creek Subunit is managed by the Gila National Forest. This subunit was affected by ash and sediment flows resulting from the 2012 Whitewater-Baldy Complex Fire that have likely reduced the prey base for narrow-headed gartersnakes. This subunit contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat characteristics), and 4 (absence or low level of harmful nonnative species), but PCE 3 (prey base) is deficient. Special management may be required to maintain or develop the physical or biological features, including management against the invasion of harmful nonnative species and the reestablishment of a native prey base.

**Little Creek Subunit.** We are proposing to designate 2,236 acres (905 ha) of critical habitat along 16.8 stream mi (27.0 km) of Little Creek, from its confluence with West Fork Gila River in Catron County, New Mexico, upstream to the unnamed spring northwest of Granite Peak in Catron County, New Mexico. The Little Creek Subunit is primarily managed by the Gila National Forest with additional parcels managed by the New Mexico Department of Game and Fish. This subunit was affected by ash and sediment flows resulting from the 2011 Miller Fire that have likely reduced the prey base for narrow-headed gartersnakes. This subunit contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat characteristics), and 4 (absence or low level of harmful nonnative species), but PCE 3 (prey base) is deficient. Special management may be required to maintain or develop the physical or biological features, including the elimination or reduction

of bullfrogs and the reestablishment of a native prey base.

**Turkey Creek Subunit.** We are proposing to designate 2,338 acres (946 ha) of critical habitat along 16.6 stream mi (26.7 km) of Turkey Creek, from its confluence with the Gila River mainstem in Grant County, New Mexico, upstream to its confluence with the unnamed drainage southwest of Granite Peak in Grant County, New Mexico. The Turkey Creek Subunit is managed by the Gila National Forest. This subunit contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat characteristics), and 3 (prey base), but PCE 4 (absence or low level of harmful nonnative species) is deficient. Special management may be required to maintain or develop the physical or biological features, including management against the reinvasion of crayfish and bullfrogs.

The Upper Gila River Subbasin Unit is proposed as critical habitat for the narrow-headed gartersnake because it is occupied at the time of listing and contains sufficient physical or biological features to support life-history functions essential for the conservation of the species. Some reaches of the Gila River have been adversely affected by channelization and water diversions. There remains the potential for the construction of Hooker Dam in the reach of the Gila River above Mogollon Creek and below Turkey Creek as part of the Central Arizona Project, which would adversely affect both the physical habitat for narrow-headed gartersnakes as well as their prey base, but this project remains in deferment status. The 2012 Whitewater-Baldy Complex Fire adversely affected the aquatic communities in the West and Middle Fork of the Gila River, as well as Iron Creek, as a result of excessive ash and sediment flows; this is similar to what occurred in Little Creek as a result of the 2011 Miller Fire. The physical or biological features in this unit may require special management consideration due to competition with, and predation by, harmful nonnative species that are present in this unit; water diversions; channelization; potential for high-intensity wildfires; and human development of areas adjacent to proposed critical habitat.

#### Middle Gila River Subbasin Unit

The Middle Gila River Mainstem Subbasin Unit is generally located within the Mogollon Rim in eastern Arizona (Greenlee and Graham Counties), from the upstream end of San Carlos Reservoir to the confluence of the

San Francisco and Gila rivers in Arizona. This unit consists of a total 8,814 acres (3,567 ha) along 63 stream mi (101 km) of proposed critical habitat along the Gila River and Eagle Creek. Land ownership or land management within this unit consists of federally managed lands, tribal lands, and privately owned lands. Federal lands include those managed by the U.S. Bureau of Land Management and the U.S. Forest Service. Tribal lands include those owned by the San Carlos Apache Tribe. All identified areas described in the Middle Gila River Subbasin Unit have records for narrow-headed gartersnakes, and all identified areas are considered as currently within the geographical area occupied by the species. Therefore, we are proposing the areas in this unit under section 3(5)(A)(i) of the Act because they are occupied by the species and because they contain sufficient amounts of the essential physical or biological features that may require special management considerations or protection. The following narratives describe all of the subunits proposed as critical habitat in the Middle Gila River Subbasin Unit.

**Gila River Subunit.** We are proposing to designate 432 acres (175 ha) of critical habitat along 2.8 stream mi (4.5 km) of the Gila River mainstem in Arizona, from the upstream end of the San Carlos Reservoir, upstream to its confluence with the San Francisco River, in Greenlee and Graham Counties. The reach of the Gila River mainstem within this subunit is managed by the U.S. Bureau of Land Management. This subunit contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat characteristics), and 3 (prey base), but PCE 4 (absence or low level of harmful nonnative species) is deficient. Special management may be required to maintain or develop the physical or biological features, including the elimination or reduction of harmful nonnative species.

**Eagle Creek Subunit.** We are proposing to designate 8,382 acres (3,392 ha) of critical habitat along 60.1 stream mi (96.7 km) of Eagle Creek, Arizona, from its confluence with the Gila River, upstream to its confluence with East Eagle Creek and Dry Prong Creek in Graham County. Eagle Creek occurs primarily on privately owned lands, with remaining lands managed by the Apache-Sitgreaves National Forest and the U.S. Bureau of Land Management, with additional lands owned by the San Carlos Apache Tribe. Groundwater pumping and water diversions from Eagle Creek for use at

the Morenci Mine may affect baseflow in Eagle Creek. However, this subunit generally contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat characteristics), and 3 (prey base), but PCE 4 (absence or low level of harmful nonnative species) is deficient. Special management may be required to maintain or develop the physical or biological features, including the elimination or reduction of crayfish and nonnative, spiny-rayed fish, as well as to maintain adequate base flows in Eagle Creek. Lands owned by the San Carlos Apache Tribe are being considered for exclusion from the final rule for critical habitat under section 4(b)(2) of the Act (see *Application of Section 4(b)(2) of the Act* below).

The Middle Gila River Subbasin Unit is proposed as critical habitat for the narrow-headed gartersnake because it is occupied at the time of listing and contains sufficient physical or biological features to support life-history functions essential for the conservation of the species. Agricultural diversions and groundwater pumping have caused declines in the water table, and surface flows in this reach of the Gila River. The physical or biological features in this unit may require special management consideration due to competition with, and predation by, harmful nonnative species that are present in this unit; water diversions; groundwater pumping; potential for high-intensity wildfires; and human development of areas adjacent to proposed critical habitat.

#### San Francisco River Subbasin Unit

The San Francisco River Subbasin Unit is generally located in eastern Arizona in the vicinity of Clifton (Greenlee County), including southwestern New Mexico in the vicinities of Glenwood and Reserve, New Mexico (Catron County). This unit consists of a total of 45,075 acres (18,241 ha) along 322 stream mi (517 km) of proposed critical habitat along the San Francisco mainstem, Blue River, Campbell Blue Creek, Dry Blue Creek, South Fork Negrito Creek, Saliz Creek, Tularosa River, and Whitewater Creek. Land ownership or land management within this unit consists of lands managed by the U.S. Forest Service, U.S. Bureau of Land Management, New Mexico Department of Fish and Game, State Trust lands, and private ownership. Some identified areas described in the San Francisco River Subbasin Unit have records for narrow-headed gartersnakes, but all identified areas are considered as being currently

within the geographical area occupied by the species. Therefore, we are proposing the areas in this unit under section 3(5)(A)(i) of the Act because they are occupied by the species and they contain sufficient amounts of the essential physical or biological features that may require special management considerations or protection. The following narratives describe all of the subunits proposed as critical habitat in the San Francisco River Unit.

**San Francisco River Subunit.** We are proposing to designate 23,178 acres (9,380 ha) of critical habitat along 163.3 stream mi (262.7 km) of the San Francisco River, from its confluence with the Gila River in Greenlee County, Arizona, upstream to its origin northwest of Long Canyon in the Noble Mountains in Catron County, New Mexico. The San Francisco River Subunit is primarily managed by the Apache-Sitgreaves and Gila National Forests, with additional parcels managed by the U.S. Bureau of Land Management, the Arizona State Land Department, and under private ownership. Water diversions have dewatered sections of the San Francisco River in the upper Alma Valley and at Pleasanton, New Mexico. The San Francisco River has historically maintained populations of bullfrogs, crayfish, and nonnative, spiny-rayed fish at various densities along its course. The 2012 Whitewater-Baldy Complex Fire burned at both moderate and high severity within the San Francisco River Subbasin and has likely resulted in significant flooding with excessive ash and sediment loads. These sediment and ash-laden floods may have simultaneously reduced populations of harmful nonnative species and native prey species for narrow-headed gartersnakes downstream of the confluences with affected tributaries. This subunit generally contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics) and 2 (terrestrial habitat characteristics), but PCEs 3 (prey base) and 4 (absence or low level of harmful nonnative species) may be deficient in some reaches. Special management may be required to maintain or develop the physical or biological features, including preventing the reinvasion of harmful nonnative species and reestablishing native prey lost as a result of flooding and ash and sediment flows from the 2012 Whitewater-Baldy Complex Fire.

**Blue River Subunit.** We are proposing to designate 7,432 acres (3,007 ha) of critical habitat along 53.4 stream mi (86.0 km) of the Blue River, from its confluence with the San Francisco

River, upstream to its confluence with Campbell Blue Creek and Dry Blue Creek near the Arizona-New Mexico State line in Catron County, New Mexico. The Blue River Subunit is primarily managed by the Apache-Sitgreaves National Forest with additional parcels under private ownership. The Blue River has historically maintained populations of crayfish and nonnative, spiny-rayed fish at various densities along its course. The 2011 Wallow Fire burned within this subbasin, which resulted in significant flooding with excessive ash and sediment loads. These sediment and ash-laden floods may have simultaneously reduced populations of harmful nonnative species and native prey species for narrow-headed gartersnakes downstream of the confluences with affected tributaries. This subunit generally contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics) and 2 (terrestrial habitat characteristics), but PCEs 3 (prey base) and 4 (absence or low level of harmful nonnative species) may be deficient in some reaches. Special management may be required to maintain or develop the physical or biological features, including preventing the reinvasion of harmful nonnative species and reestablishing of native prey lost as a result of flooding and ash and sediment flows from the 2011 Wallow Fire.

**Campbell Blue Creek Subunit.** We are proposing to designate 3,008 acres (1,217 ha) of critical habitat along 22.1 stream mi (35.6 km) of Campbell Blue Creek, from its confluence with the Blue River and Dry Blue Creek, upstream to its origin on Tenney Mountain in Greenlee County, Arizona. The Campbell Blue Creek Subunit is primarily managed by the Apache-Sitgreaves National Forest with additional parcels under private ownership. The Campbell Blue Creek subbasin resides within the footprint of the 2011 Wallow Fire, but the exact effects of the fire on this subunit are not entirely known at this time. This subunit generally contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat characteristics), and 3 (prey base), but PCE 4 (absence or low level of harmful nonnative species) is deficient. Special management may be required to maintain or develop the physical or biological features, including the elimination or reduction of bullfrogs and crayfish.

**Dry Blue Creek Subunit.** We are proposing to designate 1,320 acres (534 ha) of critical habitat along 9.4 stream

mi (15.2 km) of Dry Blue Creek, from its confluence with Campbell Blue Creek and Blue River, upstream to its origin north of Hy Clark Spring in Greenlee County, Arizona. The Dry Blue Creek Subunit is managed by the Apache-Sitgreaves National Forest. The area proposed along Dry Blue Creek is within the area occupied by the narrow-headed gartersnake. The Dry Blue Creek subbasin resides within the footprint of the 2011 Wallow Fire, but the exact effects of the fire on this subunit are not entirely known at this time. This subunit contains sufficient physical or biological features, including all PCEs. Special management may be required to maintain or develop the physical or biological features, including management against the invasion of bullfrogs and nonnative, spiny-rayed fish.

South Fork Negrito Creek Subunit. We are proposing to designate 1,483 acres (600 ha) of critical habitat along 10.6 stream mi (17.0 km) of South Fork Negrito Creek, from its confluence with Negrito Creek and North Fork Negrito Creek, upstream to its confluence with unnamed drainage south of FR 4313B, in Catron County, New Mexico. The South Fork Negrito Creek Subunit is managed by the Gila National Forest with additional parcels under private ownership. South Fork Negrito Creek may have been affected by the 2012 Whitewater-Baldy Complex Fire, but the exact effects of the fire on this subunit are not entirely known at this time. This subunit generally contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat characteristics), and 3 (prey base), but PCE 4 (absence or low level of harmful nonnative species) is deficient. Special management may be required to maintain or develop the physical or biological features, including the elimination or reduction of bullfrogs.

Saliz Creek Subunit. We are proposing to designate 1,099 acres (445 ha) of critical habitat along 8.2 stream mi (13.1 km) of Saliz Creek, from its confluence with the San Francisco River, upstream to its origin at an unnamed spring north of Highway Tank in Catron County, New Mexico. The Saliz Creek Subunit is managed by the Gila National Forest with additional parcels under private ownership. The narrow-headed gartersnake prey base in Saliz Creek was significantly affected by the 2006 Martinez Fire, but has since rebounded, and the creek now supports four species of native fish. This subunit contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics), 2 (terrestrial

habitat characteristics), and 3 (prey base), but PCE 4 (absence or low level of harmful nonnative species) is deficient. Special management may be required to maintain or develop the physical or biological features, including management against the invasion of bullfrogs, crayfish, and nonnative, spiny-rayed fish.

Tularosa River Subunit. We are proposing to designate 4,728 acres (1,913 ha) of critical habitat along 34.8 stream mi (55.9 km) of the Tularosa River, from its confluence with the San Francisco River, upstream to Tularosa Spring in Catron County, New Mexico. Land ownership along the Tularosa River is primarily private, with additional parcels managed by the Gila National Forest and the U.S. Bureau of Land Management. This subunit contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat characteristics), and 3 (prey base), but PCE 4 (absence or low level of harmful nonnative species) is deficient. Special management may be required to maintain or develop the physical or biological features, including the elimination or reduction of bullfrogs and crayfish.

Whitewater Creek Subunit. We are proposing to designate 2,829 acres (1,145 ha) of critical habitat along 19.8 stream mi (31.9 km) of Whitewater Creek, from its confluence with the San Francisco River, upstream to its origin south of Whitewater Baldy Peak in Catron County, New Mexico. Land along Whitewater Creek is primarily managed by the Gila National Forest with additional parcels managed by the New Mexico Department of Fish and Game or under private land ownership. The 2012 Whitewater-Baldy Complex Fire burned at both moderate and high severity within the Whitewater Creek Subbasin, which likely resulted in significant flooding with excessive ash and sediment loads. These sediment and ash-laden floods have likely reduced native prey populations for narrow-headed gartersnakes for the short to medium term. This subunit generally contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat characteristics), and 4 (absence or low level of harmful nonnative species), but PCE 3 (prey base) may be deficient. Special management may be required to maintain or develop the physical or biological features, including preventing the invasion of harmful nonnative species and reestablishing native prey lost as a result of flooding and ash and sediment flows

from the 2012 Whitewater-Baldy Complex Fire.

The San Francisco River Subbasin Unit is proposed as critical habitat for the narrow-headed gartersnake because it is occupied at the time of listing and contains sufficient physical or biological features to support life-history functions essential for the conservation of the species. The physical or biological features in this unit may require special management consideration due to competition with, and predation by, harmful nonnative species that are present in this unit; water diversions; potential for high-intensity wildfires; and human development of areas adjacent to proposed critical habitat.

#### Upper Salt River Subbasin Unit

The Upper Salt River Subbasin Unit is generally located along the Mogollon Rim in east-central Arizona, and includes portions of Gila, Graham, Apache, Navajo, Greenlee, and Coconino Counties. The Upper Salt River Subbasin Unit largely includes remote, rural areas, generally under the ownership and management of tribal governments, specifically the White Mountain Apache and San Carlos Apache Tribes. This unit consists of a total of 58,014 acres (23,478 ha) along 406 stream mi (654 km) of proposed critical habitat along the Salt River, White River, Canyon Creek, Carrizo Creek, Cibecue Creek, Diamond Creek, and Black River. Land ownership or land management within this unit consists of tribal lands and federally managed lands. Federal lands include those managed by the U.S. Forest Service. All identified areas described in the Upper Salt River Subbasin Unit have records for narrow-headed gartersnakes, and all identified areas are considered as currently within the geographical area occupied by the species. Therefore, we are proposing the areas in this unit under section 3(5)(A)(i) of the Act because they are occupied by the species and because they contain sufficient amounts of the essential physical or biological features that may require special management considerations or protection. The following narratives describe all of the subunits proposed as critical habitat in the Upper Salt River Subbasin Unit.

Salt River Subunit. We are proposing to designate 12,877 acres (5,211 ha) of critical habitat along 86.3 stream mi (138.8 km) of the Salt River, from its intersection with State Highway 288, upstream to its confluence with Black and White rivers, northwest of Forks Butte, in Gila County, Arizona. The reach of the Salt River within this subunit is primarily owned by the

White Mountain Apache and San Carlos Apache Tribes with additional parcels managed by the Tonto National Forest. This subunit contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat characteristics), and 3 (prey base), but PCE 4 (absence or low level of harmful nonnative species) is deficient. Special management may be required to maintain or develop the physical or biological features, including the elimination or reduction of crayfish and nonnative, spiny-rayed fish. Lands owned by the White Mountain Apache and San Carlos Apache Tribes are being considered for exclusion from the final rule for critical habitat under section 4(b)(2) of the Act (see *Application of Section 4(b)(2) of the Act* below).

White River Subunit. We are proposing to designate 2,588 acres (1,047 ha) of critical habitat along 18.1 stream mi (29.1 km) of the White River from its confluence with the Salt and Black rivers, upstream to its confluence with its own East and North Forks. The White River Subunit occurs in Gila and Navajo Counties, Arizona. The White River drainage is solely owned by the White Mountain Apache Tribe. This subunit contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat characteristics), and 3 (prey base), but PCE 4 (absence or low level of harmful nonnative species) is deficient. Special management may be required to maintain or develop the physical or biological features, including the elimination or reduction of nonnative, spiny-rayed fish and possibly crayfish or bullfrogs. This subunit is being considered for exclusion from the final rule for critical habitat under section 4(b)(2) of the Act (see *Application of Section 4(b)(2) of the Act* below).

Canyon Creek Subunit. We are proposing to designate 7,346 acres (2,973 ha) of critical habitat along 52.8 stream mi (85.0 km) of Canyon Creek, from its confluence with the Salt River northwest of Canyon Creek Butte, upstream to its origin southwest of Forest Lakes, south of Rim Road, in Coconino, Gila, and Navajo Counties, Arizona. Canyon Creek is primarily owned by the White Mountain Apache Tribe with additional parcels under management by the Apache-Sitgreaves and Tonto National Forests. The area proposed along Canyon Creek is within the area occupied by the narrow-headed gartersnake. This subunit contains sufficient physical or biological features, including all PCEs. Special management may be required to maintain or develop

the physical or biological features, including preventing the invasion of harmful nonnative species. Lands owned by the White Mountain Apache Tribe are being considered for exclusion from the final rule for critical habitat under section 4(b)(2) of the Act (see *Application of Section 4(b)(2) of the Act* below).

Carrizo Creek Subunit. We are proposing to designate 9,033 acres (3,656 ha) of critical habitat along 64.3 stream mi (103.5 km) of Carrizo Creek, from its confluence with the Salt River, upstream to its origin north of Carrizo Ridge, north of the White Mountain Apache Indian Reservation, in Gila and Navajo Counties, Arizona. Carrizo Creek is primarily owned by the White Mountain Apache Tribe with additional parcels under Apache-Sitgreaves National Forest management. This subunit contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat characteristics), and 3 (prey base), but PCE 4 (absence or low level of harmful nonnative species) may be deficient. Special management may be required to maintain or develop the physical or biological features, including the elimination or reduction of harmful nonnative species. Lands owned by the White Mountain Apache Tribe are being considered for exclusion from the final rule for critical habitat under section 4(b)(2) of the Act (see *Application of Section 4(b)(2) of the Act* below).

Cibecue Creek Subunit. We are proposing to designate 6,669 acres (2,699 ha) of critical habitat along 48.1 stream mi (77.3 km) of Cibecue Creek, from its confluence with the Salt River west of Coyote Canyon, upstream to its origin north of Gatewood Canyon on the White Mountain Apache Indian Reservation, in Gila and Navajo Counties, Arizona. Cibecue Creek is solely owned by the White Mountain Apache Tribe. This subunit contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat characteristics), and 3 (prey base), but PCE 4 (absence or low level of harmful nonnative species) may be deficient. Special management may be required to maintain or develop the physical or biological features, including the elimination or reduction of harmful nonnative species. This subunit is being considered for exclusion from the final rule for critical habitat under section 4(b)(2) of the Act (see *Application of Section 4(b)(2) of the Act* below).

Diamond Creek Subunit. We are proposing to designate 3,117 acres (1,261 ha) of critical habitat along 22.2

stream mi (35.7 km) of Diamond Creek, from its confluence with the White River, upstream to its origin northwest of Diamond Butte in White Mountains, in Apache and Navajo Counties, Arizona. Diamond Creek is solely owned by the White Mountain Apache Tribe. This subunit contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat characteristics), and 3 (prey base), but PCE 4 (absence or low level of harmful nonnative species) may be deficient. Special management may be required to maintain or develop the physical or biological features, including the elimination or reduction of harmful nonnative species. This subunit is being considered for exclusion from the final rule for critical habitat under section 4(b)(2) of the Act (see *Application of Section 4(b)(2) of the Act* below).

Black River Subunit. We are proposing to designate 16,384 acres (6,630 ha) of critical habitat along 114.4 stream mi (184.0 km) of the Black River from its confluence with the Salt and White rivers, upstream to its confluence with its own East and West Forks. The Black River Subunit occurs in Apache, Gila, Graham and Greenlee Counties, Arizona. Areas along the Black River are primarily owned by the White Mountain Apache and San Carlos Apache Tribes, with additional parcels managed by the Apache-Sitgreaves National Forest. Water in the Black River is diverted for use at the Morenci Mine, which may affect baseflow. This subunit contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics) and 2 (terrestrial habitat characteristics), but PCEs 3 (prey base) and 4 (absence or low level of harmful nonnative species) are deficient. The native fish prey base may be depressed in the short to medium term as a result of the 2011 Wallow Fire. Special management may be required to maintain or develop the physical or biological features, including the elimination or reduction of crayfish and, possibly, nonnative, spiny-rayed fish, as well as to maintain adequate base flows in the Black River. Lands owned by the White Mountain Apache and San Carlos Apache Tribes are being considered for exclusion from the final rule for critical habitat under section 4(b)(2) of the Act (see *Application of Section 4(b)(2) of the Act* below).

The Upper Salt River Subbasin Unit is proposed as critical habitat for the narrow-headed gartersnake because it is occupied at the time of listing and largely contains sufficient physical or biological features to support life-history functions essential for the

conservation of the species. However, the 2011 Wallow Fire adversely affected a large proportion of the Black River drainage, and subsequent ash and sediment flows have likely resulted in a depressed fish community, which could stress resident narrow-headed gartersnake populations in the short to medium term. The physical or biological features in this unit may require special management consideration due to competition with, and predation by, harmful nonnative species that are present in this unit; water diversions; potential for high-intensity wildfires; and human development of areas adjacent to proposed critical habitat.

#### Tonto Creek Subbasin Unit

The Tonto Creek Subbasin Unit is generally located southeast of Payson, Arizona, and northeast of the Phoenix metropolitan area, in Gila County. This unit consists of a total of 12,795 acres (5,178 ha) along 91 stream mi (146 km) of proposed critical habitat along Haigler Creek, Houston Creek, and Tonto Creek. Land ownership or land management within this unit consists of lands managed by the Tonto National Forest and privately owned lands. All identified areas are considered as being within the geographical area currently occupied by the species. We are proposing the areas in this unit under section 3(5)(A)(i) of the Act because they are occupied by the species and because they contain essential physical or biological features that may require special management considerations or protection. The following narratives describe all of the subunits proposed as critical habitat in the Tonto Creek Subbasin Unit.

**Haigler Creek Subunit.** We are proposing to designate 3,037 acres (1,229 ha) of critical habitat along 21.8 stream mi (35.2 km) of Haigler Creek, from its confluence with Tonto Creek upstream to its origin at east end of Naeglin Canyon, west of Cherry Creek, in Gila County, Arizona. Haigler Creek occurs predominately on lands managed by the Tonto National Forest. The remaining land ownership is private. This subunit contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat characteristics), and 3 (prey base), but PCE 4 (absence or low level of harmful nonnative species) is deficient. Special management may be required to maintain or develop the physical or biological features, including the elimination or reduction of crayfish.

**Houston Creek Subunit.** We are proposing to designate 2,046 acres (828

ha) of critical habitat along 14.7 stream mi (23.7 km) of Houston Creek, from its confluence with Tonto Creek upstream to its origin below Walnut Flat north of the town of Star Valley, in Gila County, Arizona. Houston Creek occurs predominately on lands managed by the Tonto National Forest. The remaining land ownership is private. This subunit contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat characteristics), and 3 (prey base), but PCE 4 (absence or low level of harmful nonnative species) is deficient. Special management may be required to maintain or develop the physical or biological features, including the elimination or reduction of crayfish and nonnative, spiny-rayed fish.

**Tonto Creek Subunit.** We are proposing to designate 7,712 acres (3,121 ha) of critical habitat along 54.1 stream mi (87.0 km) of Tonto Creek, from its confluence with an unnamed tributary northeast of Punkin Center upstream to its origin northeast of Tonto Spring, south of Rim Road, in Gila County, Arizona. Tonto Creek occurs predominately on lands managed by the Tonto National Forest. The remaining land ownership is private. Some reaches along Tonto Creek experience seasonal drying as a result of regional groundwater pumping, while others are affected by diversions or existing or planned flood control projects. Development along private reaches of Tonto Creek may also affect terrestrial characteristics of narrow-headed gartersnake habitat. Mercury has been detected in fish samples within Tonto Creek, and further research is necessary to determine if mercury is bioaccumulating in the resident food chain. In general, this subunit contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat characteristics), and 3 (prey base), but PCE 4 (absence or low level of harmful nonnative species) is deficient. Special management may be required to maintain or develop the physical or biological features, including the elimination or reduction of crayfish, bullfrogs, and nonnative, spiny-rayed fish, as well as to improve base flows.

The Tonto Creek Subbasin Unit is proposed as critical habitat for the narrow-headed gartersnake because it is occupied at the time of listing and contains sufficient physical or biological features to support life-history functions essential for the conservation of the species. The physical or biological features in this unit may require special management consideration due to

competition with, and predation by, harmful nonnative species that are present in this unit; water diversions; flood-control projects; potential for high-intensity wildfires; and development of areas adjacent to or within proposed critical habitat.

#### Verde River Subbasin Unit

The Verde River Subbasin Unit is generally located southwest of Paulden, Arizona, and northwest of Payson, Arizona, in Coconino, Gila, and Yavapai Counties. This unit consists of a total of 35,586 acres (14,401 ha) along approximately 248 stream mi (399 km) of proposed critical habitat along the Verde River and its tributaries, including Oak Creek, West Fork Oak Creek, and the East Verde River. Lands within this unit consist of federally managed lands, State Trust lands and other State-managed lands, tribal lands, and privately owned lands. All identified areas are considered as being within the geographical area currently occupied by the species. We are proposing the areas in this unit under section 3(5)(A)(i) of the Act because they are occupied by the species and because they contain essential physical or biological features that may require special management considerations or protection. The following narratives describe all of the subunits proposed as critical habitat in the Verde River Subbasin Unit.

**Verde River Subunit.** We are proposing to designate 18,721 acres (7,576 ha) of critical habitat along 127.5 stream mi (205.2 km) of the Verde River, from its confluence with Red Creek southwest of Wet Bottom Mesa, upstream to its confluence with Sullivan Lake, in Gila and Yavapai Counties, Arizona. The Verde River occurs predominantly on lands managed by the U.S. Forest Service on the Prescott, Tonto, and Coconino National Forests. Remaining land management and ownership includes the Arizona Game and Fish Department, Arizona State Parks, Arizona State Trust, Yavapai Apache Tribe, and private land owners. Proposed groundwater pumping of the Big Chino Aquifer may adversely affect future baseflow in the Verde River, and therefore PCE 1. Development along the Verde River has eliminated habitat along portions of the Verde River through the Verde Valley. In general, this subunit contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat characteristics), and 3 (prey base), but PCE 4 (absence or low level of harmful nonnative species) is deficient. Special management may be

required to maintain or develop the physical or biological features, including the elimination or reduction of crayfish, nonnative, spiny-rayed fish, and bullfrogs, as well as ensure adequate flow is retained in the Verde River. Lands along the Verde River mainstem included in the Arizona Game and Fish Departments' Upper Verde Wildlife Area, lands owned by the Yavapai Apache Tribe, the Nature Conservancy's Verde Springs Preserve, as well as those owned by the Salt River Project and addressed within their Horseshoe-Bartlett and Roosevelt Lake Habitat Conservation Plans (HCP) are being considered for exclusion from the final rule for critical habitat under section 4(b)(2) of the Act (see *Application of Section 4(b)(2) of the Act* below).

**Oak Creek Subunit.** We are proposing to designate 7,369 acres (2,982 ha) of critical habitat along 51.3 stream mi (82.5 km) of Oak Creek, from its confluence with the Verde River upstream to its confluence with Sterling Canyon, in Yavapai and Coconino Counties, Arizona. Above Sterling Canyon, flows are insufficient to maintain aquatic habitat and prey species. Oak Creek occurs predominately on lands managed by Coconino National Forest and privately owned lands. Remaining lands are managed by Arizona Game and Fish Department and Arizona State Parks. This subunit contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat characteristics), and 3 (prey base), but PCE 4 (absence or low level of harmful nonnative species) is deficient downstream of Midgely Bridge to the confluence with the Verde River. Special management may be required to maintain or develop the physical or biological features, including encouragement of native prey base and the elimination or reduction of crayfish, nonnative, spiny-rayed fish, and bullfrogs downstream of Midgely Bridge.

**West Fork Oak Creek Subunit.** We are proposing to designate 2,137 acres (865 ha) of critical habitat along 16.1 stream mi (25.9 km) of West Fork Oak Creek, from its confluence with the Oak Creek upstream to its origin southeast of Hog Hill, in Coconino County, Arizona. The West Fork of Oak Creek is managed by the Coconino National Forest. This subunit contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat characteristics), and 3 (prey base), but PCE 4 (absence or low level of harmful nonnative species) is

deficient. Special management may be required to maintain or develop the physical or biological features, including the elimination or reduction of harmful nonnative species.

**East Verde River Subunit.** We are proposing to designate 7,360 acres (2,978 ha) of critical habitat along 53.3 stream mi (85.8 km) of East Verde River, from the confluence with the Verde River upstream to its origin south of Rim Road along the Mogollon Rim, in Gila County, Arizona. East Verde River occurs predominantly on lands managed by the Tonto National Forest, with remaining lands privately owned. This subunit contains sufficient physical or biological features, including PCEs 1 (aquatic habitat characteristics), 2 (terrestrial habitat characteristics), and 3 (prey base), but PCE 4 (absence or low level of harmful nonnative species) is deficient. Special management may be required to maintain or develop the physical or biological features, including the elimination or reduction of crayfish and nonnative, spiny-rayed fish.

The Verde River Subbasin Unit is proposed as critical habitat for the narrow-headed gartersnake because it is occupied at the time of listing and contains sufficient physical or biological features to support life-history functions essential for the conservation of the species. Increasing demands for surface water allocations present a potential threat to baseflow in the East Verde River. The physical or biological features in this unit may require special management consideration due to competition with, and predation by, harmful nonnative species that are present in this unit; water diversions; existing and proposed groundwater pumping potentially resulting in drying of habitat; potential for high-intensity wildfires; and human development of areas adjacent to proposed critical habitat.

### Effects of Critical Habitat Designation

#### Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the

destruction or adverse modification of proposed critical habitat.

Decisions by the 5th and 9th Circuit Courts of Appeals have invalidated our regulatory definition of "destruction or adverse modification" (50 CFR 402.02) (see *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F. 3d 1059 (9th Cir. 2004) and *Sierra Club v. U.S. Fish and Wildlife Service et al.*, 245 F.3d 434, 442 (5th Cir. 2001)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the statutory provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. In addition to actions that occur on Federal lands, other examples of actions that are subject to the section 7 consultation process are actions on State, Tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act), or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat, and actions on State, Tribal, local, or private lands that are not federally-funded or authorized, do not require section 7 consultation.

As a result of section 7 consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, or are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or

destruction or adverse modification of critical habitat. We define “reasonable and prudent alternatives” (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency’s legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Director’s opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected by the action, 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. In this case, those 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 the northern Mexican and narrow-headed gartersnakes. 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 section 7 consultation related to effects to the northern Mexican or narrow-headed gartersnakes. These activities include, but are not limited to:

(1) Actions that would alter the amount, timing, or frequency of flow within a stream or the quantity of available water within wetland habitat such that the prey base for either gartersnake species, or the gartersnakes themselves, are appreciably diminished or threatened with extirpation. Such activities could include, but are not limited to: Water diversions; channelization; construction of any barriers or impediments within the active river channel; removal of flows in excess of those allotted under a given water right; construction of permanent or temporary diversion structures; groundwater pumping within aquifers associated with the river; or dewatering of isolated within-channel pools or stock tanks. These activities could result in the reduction of the distribution or abundance of important gartersnake prey species, as well as reduce the distribution and amount of suitable physical habitat on a regional landscape for the gartersnakes themselves.

(2) Actions that would significantly increase sediment deposition or scouring within the stream channel or pond that is habitat for the northern Mexican or narrow-headed gartersnake, or one or more of their prey species within the range of either gartersnake species. Such activities could include, but are not limited to: Excessive sedimentation from livestock overgrazing; road construction; commercial or urban development; channel alteration; timber harvest; prescribed fires or wildfire suppression; off-road vehicle or recreational use; and other alterations of watersheds and floodplains. These activities could adversely affect the potential for gartersnake prey species to survive or breed. They may also reduce the likelihood that their prey species, leopard frogs for example, could move among subpopulations in a functioning metapopulation. This would, in turn, decrease the viability of metapopulations and their component local populations of prey species.

(3) Actions that would alter water chemistry beyond the tolerance limits of a gartersnake prey base. Such activities could include, but are not limited to: Release of chemicals, biological

pollutants, or effluents into the surface water or into connected groundwater at a point source or by dispersed release (non-point source); aerial deposition of known toxicants, such as mercury, that are positively correlated to regional exceedences of water quality standards for these toxicants; livestock grazing that results in waters heavily polluted by feces; runoff from agricultural fields; roadside use of salts; aerial pesticide overspray; runoff from mine tailings or other mining activities; and ash flow and fire retardants from fires and fire suppression. These actions could adversely affect the ability of the habitat to support survival and reproduction of gartersnake prey species. Variations in water chemistry or temperature could also affect a leopard frog’s ability to survive with disease such as *Batrachochytrium dendrobatidis* (Bd).

(4) Actions that would remove, diminish, or significantly alter the structural complexity of key terrestrial habitat features within 600 feet (183 m) of aquatic habitat. Terrestrial features may be organic or inorganic, may be natural or manmade, and include, but are not limited to, boulders and boulder piles, rocks such as river cobble, downed trees or logs, debris jams, small mammal burrows, or leaf litter. Such activities could include, but are not limited to: Construction projects; flood control projects; vegetation management projects; or any project that requires a 404 permit from the U.S. Army Corps of Engineers. These activities could result in a reduction of the amount or distribution of these key habitat features that are important for gartersnake thermoregulation, gestation, shelter, protection from predators, and foraging opportunities.

(5) Actions and structures that would physically block movement of gartersnakes or their prey species within or between regionally proximal populations or suitable habitat. Such actions and structures include, but are not limited to: Urban, industrial, or agricultural development; reservoirs stocked with predatory fishes, bullfrogs, or crayfish that are 50 ac (20 ha) or more in size; highways that do not include reptile and amphibian fencing and culverts; and walls, dams, fences, canals, or other structures that could physically block movement of gartersnakes. These actions and structures could reduce or eliminate immigration and emigration among gartersnake populations, or that of their prey species, reducing the long-term viability of populations.

(6) Actions that would directly or indirectly result in the introduction, spread, or augmentation of harmful

nonnative species in gartersnake habitat, or in habitat that is hydrologically connected, even if those segments are occasionally intermittent, or introduction of other species that compete with or prey on either gartersnake species or their prey base, or introduce disease, particularly chytridiomycosis (the disease caused by Bd) which is a serious threat to the amphibian prey base of northern Mexican gartersnakes. Possible actions could include, but are not limited to: Introduction or stocking of nonnative, spiny-rayed fishes, bullfrogs, crayfish, tiger salamanders, or other predators on the prey base of northern Mexican or narrow-headed gartersnakes; creating or sustaining a sport fishery that encourages use of nonnative live fish, crayfish, tiger salamanders, or frogs as bait; maintaining or operating reservoirs that act as source populations for harmful nonnative species within a watershed; water diversions, canals, or other water conveyance that moves water from one place to another and through which inadvertent transport of harmful nonnative species into northern Mexican or narrow-headed gartersnake habitat may occur; and movement of water, mud, wet equipment, or vehicles from one aquatic site to another, through which inadvertent transport of Bd may occur. These activities directly or indirectly result in unnatural competition with and predation from harmful nonnative predators on these gartersnake species, leading to significantly reduced recruitment within gartersnake populations and diminishment or extirpation of their prey base.

(7) Actions that would deliberately remove, diminish, or significantly alter the native or nonnative, soft-rayed fish component of the gartersnake prey base within occupied habitat for a period of 7 days or longer. In general, these actions typically occur in association with fisheries management, such as the application of piscicides in conjunction with fish barrier construction. These activities are designed to completely remove target fish species from a treatment area and, if the area is fishless for an extended period of time, could result in starvation of a resident gartersnake population.

#### 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 geographic 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 designations for the northern Mexican and narrow-headed gartersnakes.

#### 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 impacts 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.

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.

When identifying the benefits of inclusion for an area, we consider the additional regulatory benefits that area would receive from the protection from adverse modification or destruction as a result of actions with a Federal nexus; the educational benefits of mapping essential habitat for recovery of the listed species; and any benefits that may result from a designation due to State or Federal laws that may apply to critical habitat.

When identifying the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation; the continuation, strengthening, or encouragement of partnerships; or implementation of a management plan that provides equal to or more conservation than a critical habitat designation would provide.

In the case of northern Mexican and narrow-headed gartersnakes, the benefits of critical habitat include public awareness of these gartersnakes' presence and the importance of habitat protection, and, in cases where a Federal nexus exists, increased habitat protection due to the protection from adverse modification or destruction of critical habitat.

The consultation provisions under section 7(a) of the Act constitute the regulatory benefits of critical habitat. Federal agencies must consult with us on discretionary actions that may affect critical habitat and must avoid destroying or adversely modifying critical habitat. Federal agencies must also consult with the Service on discretionary actions that may affect a listed species and refrain from undertaking actions that are likely to jeopardize the continued existence of such species. The analysis of effects to

critical habitat is a separate and different analysis from that of the effects to the species. Therefore, the difference in outcomes of these two analyses represents the regulatory benefit of critical habitat. For some species, and in some locations, the outcome of these analyses will be similar, because effects on habitat will often result in effects on the species. However, the regulatory standard is different. The jeopardy analysis looks at the action's impact on survival and recovery of the species, while the adverse modification analysis examines the action's effects on the designated habitat's contribution to the species' conservation. This will, in many instances, lead to different results and different regulatory requirements. Thus, critical habitat designations may provide greater regulatory benefits to the recovery of a species.

There are two limitations to the regulatory effect of critical habitat. First, a section 7(a)(2) consultation is required only where there is a Federal nexus (an action authorized, funded, or carried out by any Federal agency). If there is no Federal nexus, the critical habitat designation of non-Federal lands itself does not restrict any actions that destroy or adversely modify critical habitat. However, this does not apply in situations where non-Federal lands have a Federal nexus (e.g., a private project on non-Federal lands that requires the issuance of a permit from a Federal agency). Second, the designation only limits destruction or adverse modification. Critical habitat designation alone does not require property owners to undertake affirmative actions to promote the recovery of the species.

The designation of critical habitat does not require that any management or recovery actions take place on the lands included in the designation. Even in cases where consultation has been initiated under section 7(a)(2) of the Act, the end result of consultation is to avoid jeopardy to the species or adverse modification of its critical habitat or both, but not necessarily to manage critical habitat or institute recovery actions on critical habitat. Conversely, voluntary conservation efforts implemented through management plans may institute proactive actions over the lands they encompass and are often put in place to remove or reduce known threats to a species or its habitat, therefore implementing recovery actions.

Another benefit of including lands in critical habitat is that serves to educate landowners, State and local governments, and the public regarding the potential conservation value of an

area. This helps focus and promote conservation efforts by other parties by clearly delineating areas of high conservation value for the affected species. For example, critical habitat designation can help inform State agencies and local governments about areas that could be conserved under State laws or local ordinances.

Most federally listed species in the United States will not recover without the cooperation of non-Federal landowners. Geo-referenced data indicate that than 60 percent of the United States is privately owned, and at least 80 percent of endangered or threatened species occur either partially or solely on private lands. U.S. Department of Interior data indicate that only about 12 percent of listed species were found almost exclusively on Federal lands (90 to 100 percent of their known occurrences restricted to Federal lands) and that 50 percent of federally listed species are not known to occur on Federal lands at all.

The majority of northern Mexican and narrow-headed gartersnake habitat and localities are on Federal lands, mostly lands managed by the U.S. Forest Service or Bureau of Land Management. However, key aquatic sites are sometimes on non-Federal lands. This is particularly true for Arizona, where proposed critical habitat units include, in some cases, significant amounts of entirely non-Federal lands.

Building partnerships and promoting voluntary cooperation of landowners are essential to understanding the status of species on non-Federal lands, and necessary for implementing recovery actions, such as reestablishing listed species and restoring and protecting habitat. Many non-Federal landowners derive satisfaction from contributing to endangered species recovery. We strive to promote these private-sector efforts through the Department of the Interior's Cooperative Conservation philosophy. Conservation agreements with non-Federal landowners (HCPs, safe harbor agreements, other conservation agreements, easements, and State and local regulations) enhance species conservation by extending species protections beyond those available through section 7(a)(2) consultations. In the past decade and a half, we have encouraged non-Federal landowners to enter into conservation agreements, based on our philosophy that voluntary conservation can benefit both landowners and wildlife, and that we can achieve greater species conservation on non-Federal land through such partnerships than we can through regulatory methods (61 FR 63854; December 2, 1996). The Chiricahua

leopard frog provides an example; we have often used the Service's Partners for Fish and Wildlife grant program to work with non-Federal partners on recovery projects for this species. This grant program requires a commitment from the participating landowner to maintain the improvements funded by the program for 10 years. We have also worked with private landowners on Chiricahua leopard frog conservation via safe harbor agreements in Arizona and southwestern New Mexico, a conservation agreement for the Chiricahua leopard frog that protects frogs and their habitats on private and public lands in the Huachuca Mountains of Arizona, and HCPs in southeastern Arizona and southwestern New Mexico. Collectively, these projects, programs, and agreements benefit the northern Mexican gartersnake by meaningfully contributing to the recovery of an important prey species, which also indirectly benefits a Suite of native riparian or aquatic species by strengthening their ecosystem.

Many private landowners, however, are wary of the possible consequences of attracting or maintaining endangered species to their property. Mounting evidence suggests that some regulatory actions by the Federal government, while well-intentioned and required by law, can (under certain circumstances) have unintended negative consequences for the conservation of species on private lands (Wilcove *et al.* 1996, pp. 5–6; Bean 2002, pp. 2–3; Conner and Mathews 2002, pp. 1–2; James 2002, pp. 270–271; Koch 2002, pp. 2–3; Brooke *et al.* 2003, pp. 1639–1643). Many landowners fear a decline in their property value due to real or perceived restrictions on land-use options where endangered or threatened species are found. Consequently, harboring endangered species is viewed by many landowners as a liability. This perception results in anti-conservation incentives, because maintaining habitats that harbor endangered species represents a risk to future economic opportunities (Main *et al.* 1999, pp. 1264–1265; Brook *et al.* 2003, pp. 1644–1648).

According to some researchers, the designation of critical habitat on private lands significantly reduces the likelihood that landowners will support and carry out conservation actions (Main *et al.* 1999, p. 1263; Bean 2002, p. 2; Brook *et al.* 2003, pp. 1644–1648). The magnitude of this outcome is greatly amplified in situations where active management measures (such as reestablishment, fire management, control of harmful nonnative species)

are necessary for species conservation (Bean 2002, pp. 3–4). Such is the case for the northern Mexican and narrow-headed gartersnakes. We believe that the judicious exclusion of specific areas of non-federally owned lands from critical habitat designations can contribute to the species' recovery and provide a superior level of conservation.

The purpose of designating critical habitat is to contribute to the conservation of endangered and threatened species and the ecosystems upon which they depend. The outcome of the designation, triggering regulatory requirements for actions authorized, funded, or carried out by Federal agencies under section 7(a)(2) of the Act, can sometimes be counterproductive to its intended purpose on non-Federal lands. Thus, the benefits of excluding areas that are covered by effective partnerships or other conservation commitments can often be high.

Some areas proposed for critical habitat can be excluded based on an existing management plan. When we evaluate a management plan during our consideration of the benefits of exclusion, we assess a variety of factors, including, but not limited to, whether

the plan is finalized, how it provides for the conservation of the essential physical or biological features, whether there is a reasonable expectation that the conservation management strategies and actions contained in a management plan will be implemented into the future, whether the conservation strategies in the plan are likely to be effective, and whether the plan contains a monitoring program or adaptive management to ensure that the conservation measures are effective and can be adapted in the future in response to new information.

After identifying the benefits of inclusion and the benefits of exclusion, we carefully weigh the two sides to evaluate whether the benefits of exclusion outweigh those of inclusion. If our analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, we then determine whether exclusion would result in extinction. If exclusion of an area from critical habitat will result in extinction, we will not exclude it from the designation.

Based on the information provided by entities seeking exclusion, as well as any additional public comments received, we will evaluate whether certain lands within the proposed

critical habitat areas of the Upper Gila River, Agua Fria River, Upper Salt River, Verde River, Upper Santa Cruz River, Redrock Canyon, Cienega Creek, San Pedro River, and Babocomari River subbasins for the northern Mexican gartersnake; and the Upper Gila River, Middle Gila River, Upper Salt River, and Verde River subbasins for the narrow-headed gartersnake are appropriate for exclusion from the final designation pursuant to section 4(b)(2) of the Act. If the analysis indicates that the benefits of excluding lands from the final designation outweigh the benefits of designating those lands as critical habitat, then the Secretary may exercise his discretion to exclude the lands from the final designation.

After reviewing the following areas under section 4(b)(2) of the Act, we are considering excluding them from the critical habitat designation for northern Mexican and narrow-headed gartersnakes. Tables 4a and 4b below provide approximate areas (ac, ha) of lands that meet the definition of critical habitat, but which are under our consideration for possible exclusion under section 4(b)(2) of the Act from the final critical habitat rule.

TABLE 4a—AREAS CONSIDERED FOR EXCLUSION (BY CRITICAL HABITAT UNIT) FOR THE NORTHERN MEXICAN GARTERSNAKE

Unit/Subunit	Specific area	Areas meeting the definition of critical habitat, in acres (hectares)	Areas considered for possible exclusion, in acres (hectares)
Upper Gila River Unit/Gila River .....	The Nature Conservancy's Gila Riparian Preserve .....	133 (54)	133 (54)
Agua Fria River Subbasin Unit/Agua Fria River Mainstem.	Arizona Game and Fish Department's Horseshoe Ranch Property.	88 (36)	88 (36)
Upper Salt River Subbasin Unit/Black River ...	White Mountain Apache and San Carlos Apache Indian Reservations.	13,760 (5,569)	13,760 (5,569)
Upper Salt River Subbasin Unit/Big Bonito Creek.	White Mountain Apache Reservation .....	5,826 (2,358)	5,826 (2,358)
Verde River Subbasin Unit/Verde River .....	Yavapai Apache Reservation .....	192 (78)	192 (78)
Verde River Subbasin Unit/Verde River .....	Arizona Game and Fish Department's Upper Verde Wildlife Area.	372 (150)	372 (150)
Verde River Subbasin Unit/Verde River .....	The Nature Conservancy's Verde Springs Preserve and Verde Valley Property.	209 (84)	209 (84)
Verde River Subbasin Unit/Verde River .....	Salt River Project's Camp Verde Riparian Preserve .....	76 (31)	76 (31)
Verde River Subbasin Unit/Oak Creek .....	Arizona Game and Fish Department's Bubbling Ponds and Page Springs State Fish Hatcheries.	149 (60)	149 (60)
Upper Santa Cruz River Subbasin Unit .....	San Rafael Ranch .....	18,491 (7,483)	18,491 (7,483)
Redrock Canyon Subbasin Unit .....	The Nature Conservancy's Patagonia-Sonoita Creek Preserve.	65 (26)	65 (26)
Cienega Creek Subbasin Unit/Cienega Creek Natural Preserve.	Pima County's Cienega Creek Natural Preserve .....	4,260 (1,724)	4,260 (1,724)
San Pedro River Subbasin Unit/San Pedro River.	The Nature Conservancy's San Pedro River Preserve, A7 Ranch, Cascabel, Dudleyville, and Upper San Pedro Properties.	1,688 (683)	1,688 (683)
San Pedro River Subbasin Unit/San Pedro River.	San Carlos Apache Indian Reservation .....	76 (31)	76 (31)
San Pedro River Subbasin Unit/San Pedro River.	Salt River Project's Spirit Hollow Preserve and Annex, Stilling Preserve, and Adobe Preserve.	190 (77)	190 (77)
Babocomari River Subbasin Unit/Appleton-Whittell Research Ranch.	Appleton-Whittell Research Ranch (includes portions of Post Canyon, O'Donnel Canyon, and Turkey Creek).	7,754 (3,138)	2,515 (1,018)

TABLE 4a—AREAS CONSIDERED FOR EXCLUSION (BY CRITICAL HABITAT UNIT) FOR THE NORTHERN MEXICAN GARTERSNAKE—Continued

Unit/Subunit	Specific area	Areas meeting the definition of critical habitat, in acres (hectares)	Areas considered for possible exclusion, in acres (hectares)
Babocomari River Subbasin Unit/Canelo Hills Cienega Preserve.	The Nature Conservancy's Canelo Hills Cienega Preserve.	213 (86)	213 (86)

TABLE 4b—AREAS CONSIDERED FOR EXCLUSION (BY CRITICAL HABITAT UNIT) FOR THE NARROW-HEADED GARTERSNAKE

Unit/Subunit	Specific area	Areas meeting the definition of critical habitat, in acres (hectares)	Areas considered for possible exclusion, in acres (hectares)
Upper Gila River Subbasin Unit/Gila River .....	The Nature Conservancy's Gila Riparian Preserve .....	133 (54)	133 (54)
Middle Gila River Subbasin Unit/Eagle Creek	San Carlos Apache Reservation .....	2,558 (1,035)	2,558 (1,035)
Upper Salt River Subbasin Unit/Salt River .....	White Mountain Apache and San Carlos Apache Indian Reservations.	7,502 (3,036)	7,502 (3,036)
Upper Salt River Subbasin Unit/Black River ...	White Mountain Apache and San Carlos Apache Indian Reservations.	13,752 (5,565)	13,752 (5,565)
Upper Salt River Subbasin Unit/White River ...	White Mountain Apache Reservation .....	2,588 (1,047)	2,588 (1,047)
Upper Salt River Subbasin Unit/Canyon Creek	White Mountain Apache Reservation .....	6,160 (2,493)	6,160 (2,493)
Upper Salt River Subbasin Unit/Carrizo Creek	White Mountain Apache Reservation .....	8,875 (3,592)	8,875 (3,592)
Upper Salt River Subbasin Unit/Cibeque Creek.	White Mountain Apache Reservation .....	6,669 (2,699)	6,669 (2,699)
Upper Salt River Subbasin Unit/Diamond Creek.	White Mountain Apache Reservation .....	3,117 (1,261)	3,117 (1,261)
Verde River Subbasin Unit/Verde River .....	Yavapai Apache Reservation .....	192 (78)	192 (78)
Verde River Subbasin Unit/Verde River .....	Arizona Game and Fish Department's Upper Verde River Wildlife Area.	372 (150)	372 (150)
Verde River Subbasin Unit/Verde River .....	Salt River Project's Camp Verde Riparian Preserve .....	76 (31)	76 (31)
Verde River Subbasin Unit/Verde River .....	The Nature Conservancy's Verde Springs Preserve and Verde Valley Property.	209 (84)	209 (84)

We are considering these areas for exclusion because we believe that:

(1) Their value for conservation will be preserved in the future by existing protective actions, or

(2) They are appropriate for exclusion under the "other relevant factor" provision of section 4(b)(2) of the Act.

However, we specifically solicit comments on the inclusion or exclusion of such areas.

**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. Potential land use sectors that may be affected by this proposed rulemaking include development, livestock grazing, mining, timber, recreation, flood control, fisheries management, and agriculture.

We will announce the availability of the draft economic analysis as soon as it is completed, at which time we will seek public review and comment. At that time, copies of the draft economic analysis will be available for downloading from the Internet at <http://www.regulations.gov>, or by contacting the Arizona Ecological Services Field Office directly (see **FOR FURTHER INFORMATION CONTACT**). During the development of a final designation, we will consider economic impacts, public comments, and other new information, and areas may be excluded from the final critical habitat designation under section 4(b)(2) of the Act and our implementing regulations at 50 CFR 424.19.

**Exclusions Based on National Security Impacts**

Under section 4(b)(2) of the Act, we consider whether there are lands owned or managed by the Department of

Defense (DOD) where a national security impact might exist.

In preparing this proposal, we have determined that the lands within the proposed designation of critical habitat for the northern Mexican and narrow-headed gartersnakes are not owned or managed by the Department of Defense, and, therefore, we anticipate no impact on national security. Consequently, the Secretary does not propose to 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 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.

Land and Resource Management Plans, Conservation Plans, Agreements Based on Conservation Partnerships, or General Land Management That Favors a Native Biological Community

We consider a current land management or conservation plan (HCPs, as well as other types) to provide adequate management or protection if it meets the following criteria:

(1) The plan is complete and provides the same or better level of protection from adverse modification or destruction than that provided through a consultation under section 7 of the Act;

(2) There is a reasonable expectation that the conservation management strategies and actions will be implemented for the foreseeable future, based on past practices, written guidance, or regulations; and

(3) The plan provides conservation strategies and measures consistent with currently accepted principles of conservation biology.

We consider management plans that are designed for native fish as having nearly equal value to the northern Mexican or narrow-headed gartersnake because actions taken to protect or improve the status of native fish are commensurate with conservation of these gartersnakes. Native fish are sensitive to water availability, habitat modification, and harmful nonnative species in a similar manner as these gartersnakes; for the northern Mexican gartersnake, this also includes its rapid prey species. The commonality shared between the ecological needs and threats faced by all native riparian and aquatic species broadly supports the notion that what is good for one taxon is largely beneficial to another. This is particularly true for these two gartersnake species, where managing for native prey species not only provides conservation of important physical habitat elements, but also maintains an adequate prey base for the snakes themselves.

During the preparation of the 2007 critical habitat designation for spikedace and loach minnow (72 FR 13355; March 21, 2007), we received management plans from the White Mountain Apache Tribe, San Carlos Apache Tribe, and Freeport McMoRan (formerly Phelps Dodge). Additionally, a Tribal

Resolution was prepared by the Yavapai Apache Nation. These management plans were ultimately used to exclude areas under section 4(b)(2) of the Act from critical habitat designation for the spikedace and loach minnow (77 FR 10810; February 23, 2012). We also consider the San Rafael Ranch's safe harbor agreement for Gila topminnow in its potential benefits to the northern Mexican gartersnake in the San Rafael Valley. We will consider these materials and any other relevant information pertaining to these entities during the development of the final rule to determine if any of these areas should be excluded from the final critical habitat designation under section 4(b)(2) of the Act.

In addition, the Arizona Game and Fish Department has initiated candidate conservation planning for the northern Mexican gartersnake on its Horseshoe Ranch property and Bubbling Ponds and Page Springs State Fish Hatcheries. We have received and reviewed a draft management plan for the northern Mexican gartersnake for these properties. We also recognize our strong conservation partners in the Pima County's Cienega Creek Natural Preserve, the Appleton-Whittell Research Ranch, and various properties managed by The Nature Conservancy, all of whom manage exclusively for native species, which, by default, we recognize as managing specifically against harmful nonnative species, the primary threat to the northern Mexican and narrow-headed gartersnakes. In addition, we recognize the Arizona Game and Fish Department's management of Upper Verde River Wildlife Area, as also favoring native fish species, thereby benefitting both the northern Mexican and narrow-headed gartersnakes by improving their regional prey base.

Finally, a large portion of the Verde River and several of its perennial tributaries are included in the area covered by the Salt River Project's (SRP) Horseshoe-Bartlett HCP for operation of Horseshoe and Bartlett Dams. While implementation of the Horseshoe-Bartlett HCP will provide some indirect benefit for northern Mexican and narrow-headed gartersnakes from implementation of conservation measures for their prey species, the HCP does not involve all land owners within the covered area, and therefore does not allow for exclusion of the entire covered area under section 4(b)(2) of the Act. However, SRP has acquired property which they manage along the Verde and San Pedro Rivers as mitigation for their Horseshoe-Bartlett and Roosevelt HCPs. These properties are managed for the

promotion of riparian vegetation and provide direct benefits to resident gartersnake populations and their prey species. We will consider these properties and any other relevant information during the development of the final rule to determine if this area should be excluded from the final critical habitat designation under section 4(b)(2) of the Act.

#### Peer Review

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of peer review is to ensure that our critical habitat designation is based on scientifically sound data, assumptions, and analyses. We invite 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 we receive 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 the **FOR FURTHER INFORMATION CONTACT** section. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing.

#### Required Determinations

##### *Regulatory Planning and Review—Executive Orders 12866 and 13563*

Executive Order 12866 provides that the Office of Information and Regulatory Affairs 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 Executive Order 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. Executive Order 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 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.

The Service’s current understanding of recent case law is that Federal agencies are only required to evaluate the potential impacts of rulemaking on those entities directly regulated by the rulemaking; therefore, they are not required to evaluate the potential impacts to those entities not directly regulated. The designation of critical habitat for an endangered or threatened species only has a regulatory effect where a Federal action agency is involved in a particular action that may affect the designated critical habitat.

Under these circumstances, only the Federal action agency is directly regulated by the designation, and, therefore, consistent with the service’s current interpretation of RFA and recent case law, the Service may limit its evaluation of the potential impacts to those identified for federal action agencies. Under this interpretation, there is no requirement under the RFA to evaluate the potential impacts to entities not directly regulated, such as small businesses. However, Executive Orders 12866 and 13563 direct Federal agencies to assess costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Consequently, it is the current practice of the Service to assess to the extent practicable these potential impacts if sufficient data are available, whether or not this analysis is believed by the Service to be strictly required by the RFA. In other words, while the effects analysis required under the RFA is limited to entities directly regulated by the rulemaking, the effects analysis under the Act, consistent with the E.O. regulatory analysis requirements, can take into consideration impacts to both directly and indirectly impacted entities, where practicable and reasonable.

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, we 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. 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 proposed rule would not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, and includes both “Federal intergovernmental mandates” and “Federal private sector mandates.” These terms are defined in 2 U.S.C. 658(5)–(7). “Federal intergovernmental mandate” includes a regulation that “would impose an enforceable duty upon State, local, or tribal governments” with two exceptions. It excludes “a condition of Federal assistance.” It also excludes “a duty arising from participation in a voluntary Federal program,” unless the regulation “relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,” if the provision would “increase the stringency of conditions of

assistance” or “place caps upon, or otherwise decrease, the Federal Government’s responsibility to provide funding,” and the State, local, or tribal governments “lack authority” to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. “Federal private sector mandate” includes a regulation that “would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.”

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We lack the available economic information to determine if a Small Government Agency Plan is required. Therefore, we defer this finding until completion of the draft economic analysis is prepared under section 4(b)(2) of the Act.

#### *Takings—Executive Order 12630*

In accordance with Executive Order 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we will analyze the potential takings implications of designating critical habitat for the northern Mexican and narrow-headed gartersnakes in a takings implications assessment. The draft economic analysis will provide the foundation for us to use in preparing a

takings implication assessment. We will defer the preparation of the takings implication assessment until we have evaluated the comments on the draft economic analysis. 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.

#### *Federalism—Executive Order 13132*

In accordance with Executive Order 13132 (Federalism), this proposed rule does not have significant Federalism effects. A federalism summary impact 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 proposed critical habitat designation with appropriate State resource agencies in New Mexico and Arizona. The designation of critical habitat in areas currently occupied by the northern Mexican and narrow-headed gartersnakes imposes no additional restrictions to those currently in place and, therefore, has 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 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 are designating critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, the rule identifies the elements of physical or biological features essential to the conservation of the species. The designated areas of critical habitat are presented on maps, and the rule provides several options for the interested public to obtain more detailed location information, if desired.

#### *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 (NEPA; 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 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 northern Mexican and narrow-headed gartersnakes, 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 and notify the public of the availability of the draft environmental assessment for this proposal when it is finished.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes.

The tribal lands in Arizona included in this proposed designation of critical habitat are the lands of the White Mountain Apache Tribe, San Carlos Apache Tribe, and Yavapai Apache Nation. We used the criteria found in the Criteria Used To Identify Critical Habitat section to identify tribal lands that are occupied by the northern Mexican and narrow-headed gartersnakes that contain the features essential for the conservation of these species. We began government-to-government consultation with these tribes on November 29, 2011, in a pre-notification letter informing the tribes that we had begun an evaluation of the northern Mexican and narrow-headed gartersnakes for listing purposes under the Act. We will consider these areas for exclusion from the final critical habitat designation to the extent consistent with the requirements of section 4(b)(2) of the Act. We sent notification letters on March 12, 2013, to each tribe that described the exclusion process under section 4(b)(2) of the Act and invited them to meet to discuss the listing process and engage in conversation with us about the proposal to the extent possible without disclosing predecisional information. We will schedule meetings with these tribes and any other interested tribes as early as legally possible so that we can give them as much time as possible to comment.

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.

References Cited

A complete list of references cited in this rulemaking is available on the Internet at http://www.regulations.gov and upon request from the Arizona Ecological Services Field Office (see FOR FURTHER INFORMATION CONTACT).

Authors

The primary authors of this package are the staff members of the Arizona Ecological Services Field 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; 1531–1544; and 4201–4245, unless otherwise noted.

- 2. In § 17.95, amend paragraph (c) by adding entries for “Northern Mexican Gartersnake (Thamnophis eques megalops)” and “Narrow-headed Gartersnake (Thamnophis rufipunctatus),” in the same alphabetical order that the species appear in the table at § 17.11(h), to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

\* \* \* \* \*

(c) Reptiles.

\* \* \* \* \*

Northern Mexican Gartersnake (Thamnophis eques megalops)

(1) Critical habitat units are depicted for Greenlee, Graham, Apache, La Paz, Mohave, Yavapai, Navajo, Gila, Coconino, Cochise, Santa Cruz, Pima, and Pinal Counties in Arizona, as well as in Grant, Hidalgo, and Catron Counties in New Mexico, on the maps below.

(2) Within these areas, the primary constituent elements of the physical or biological features essential to the conservation of the northern Mexican gartersnake consist of:

- (i) Aquatic or riparian habitat that includes:
(A) Perennial or spatially intermittent streams of low to moderate gradient that possess appropriate amounts of in-channel pools, off-channel pools, or backwater habitat, and that possess a natural, unregulated flow regime that allows for periodic flooding or, if flows are modified or regulated, a flow regime that allows for adequate river functions, such as flows capable of processing sediment loads; or
(B) Lentic wetlands such as livestock tanks, springs, and cienegas; and
(C) Shoreline habitat with adequate organic and inorganic structural complexity to allow for thermoregulation, gestation, shelter, protection from predators, and foraging opportunities (e.g., boulders, rocks, organic debris such as downed trees or logs, debris jams, small mammal burrows, or leaf litter); and

(D) Aquatic habitat with characteristics that support a native amphibian prey base, such as salinities less than 5 parts per thousand, pH greater than or equal to 5.6, and pollutants absent or minimally present at levels that do not affect survival of any age class of the northern Mexican gartersnake or the maintenance of prey populations.

(ii) Adequate terrestrial space (600 ft (182.9 m) lateral extent to either side of bankfull stage) adjacent to designated stream systems with sufficient structural characteristics to support life-history functions such as gestation, immigration, emigration, and brumation.

(iii) A prey base consisting of viable populations of native amphibian and native fish species.

(iv) An absence of nonnative fish species of the families Centrarchidae and Ictaluridae, bullfrogs (Lithobates catesbeianus), and/or crayfish (Orconectes virilis, Procambarus clarki, etc.), or occurrence of these nonnative

species at low enough levels such that recruitment of northern Mexican gartersnakes and maintenance of viable native fish or soft-rayed nonnative fish populations (prey) is still occurring.

(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 the effective date of this rule.

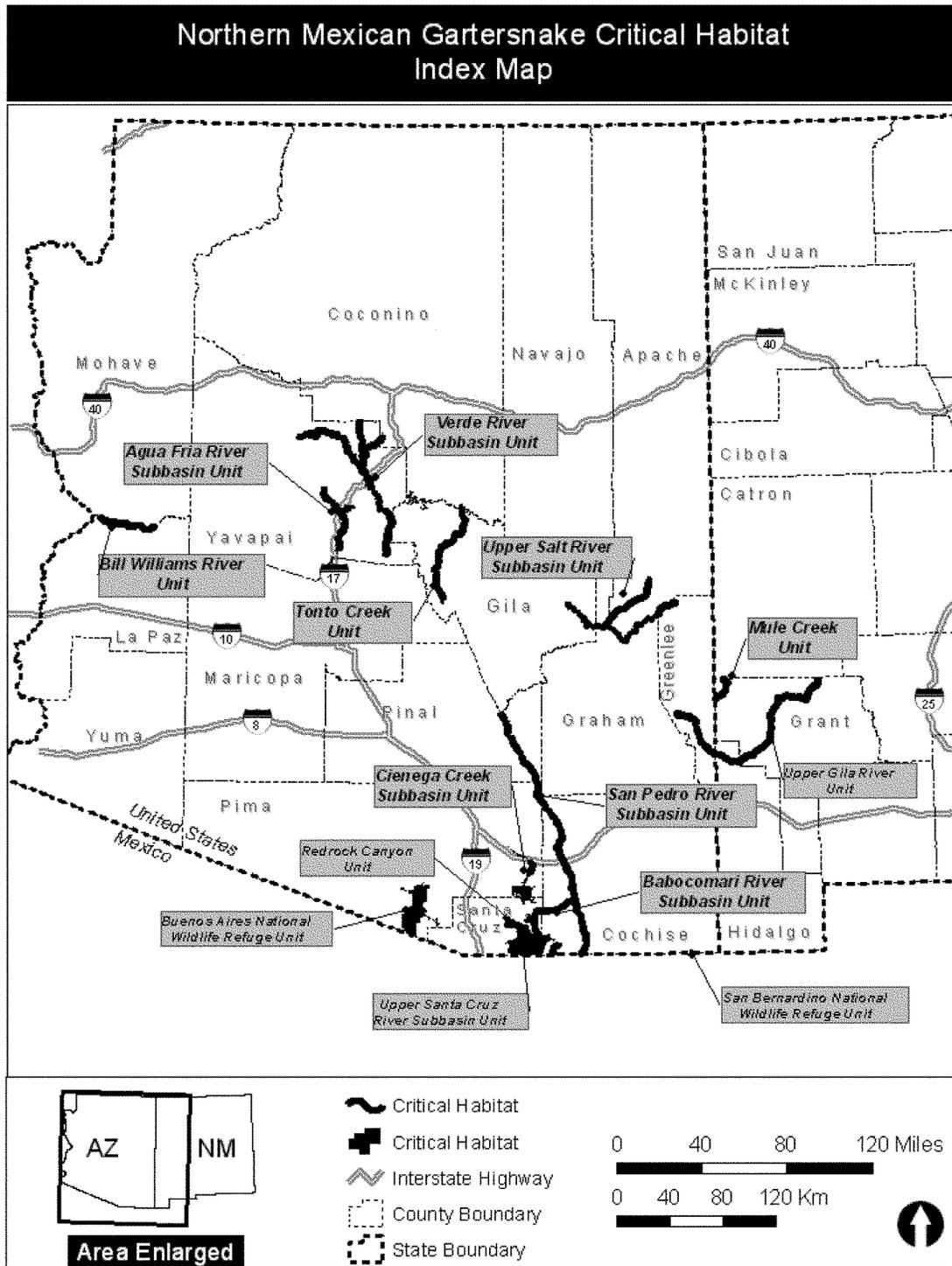
(4) *Critical habitat map units.* Data layers defining map units were created on a base of USGS 7.5' quadrangles, the

Service's online Lands Mapper, the U.S. Geological Survey National Hydrography Dataset, and imagery from Google Earth. Line locations for lotic streams (flowing water) and drainages are depicted as the "Flowline" feature class from the National Hydrography Dataset geodatabase. Administrative boundaries for Arizona and New Mexico were obtained from the Arizona Land Resource Information Service and New Mexico Resource Geographic Information System, respectively. This includes the most current (as of the effective date of this rule) geospatial

data available for land ownership, counties, States, and streets. Locations depicting critical habitat are expressed as decimal degree latitude and longitude in the World Geographic Coordinate System projection using the 1984 datum (WGS84). Information on northern Mexican gartersnake localities was derived from survey forms, reports, publications, field notes, and other sources, all of which reside in our files at the Arizona Ecological Services Field Office, 2321 West Royal Palm Road, Suite 103, Phoenix, AZ 85021.

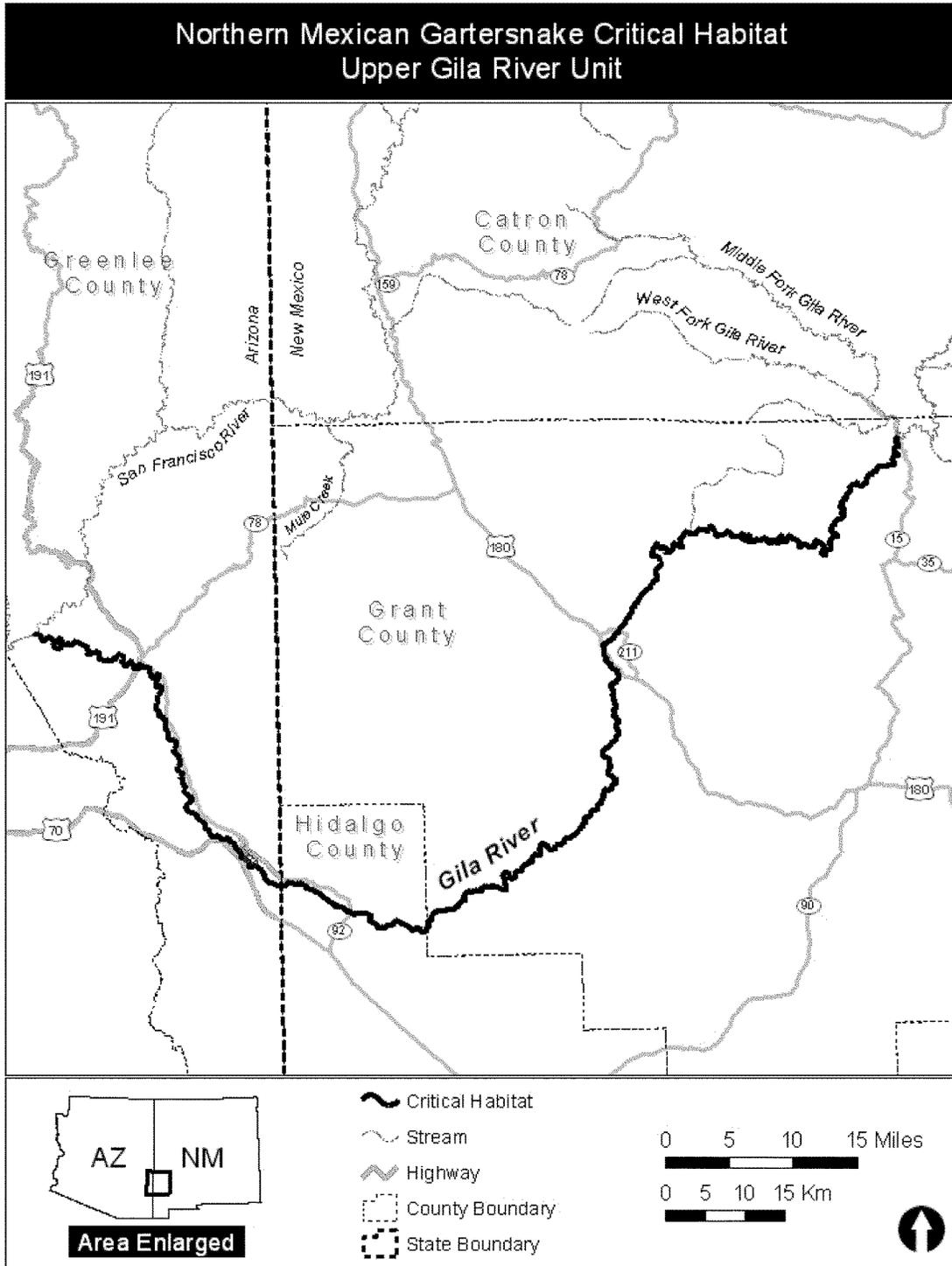
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(5) Index map follows:

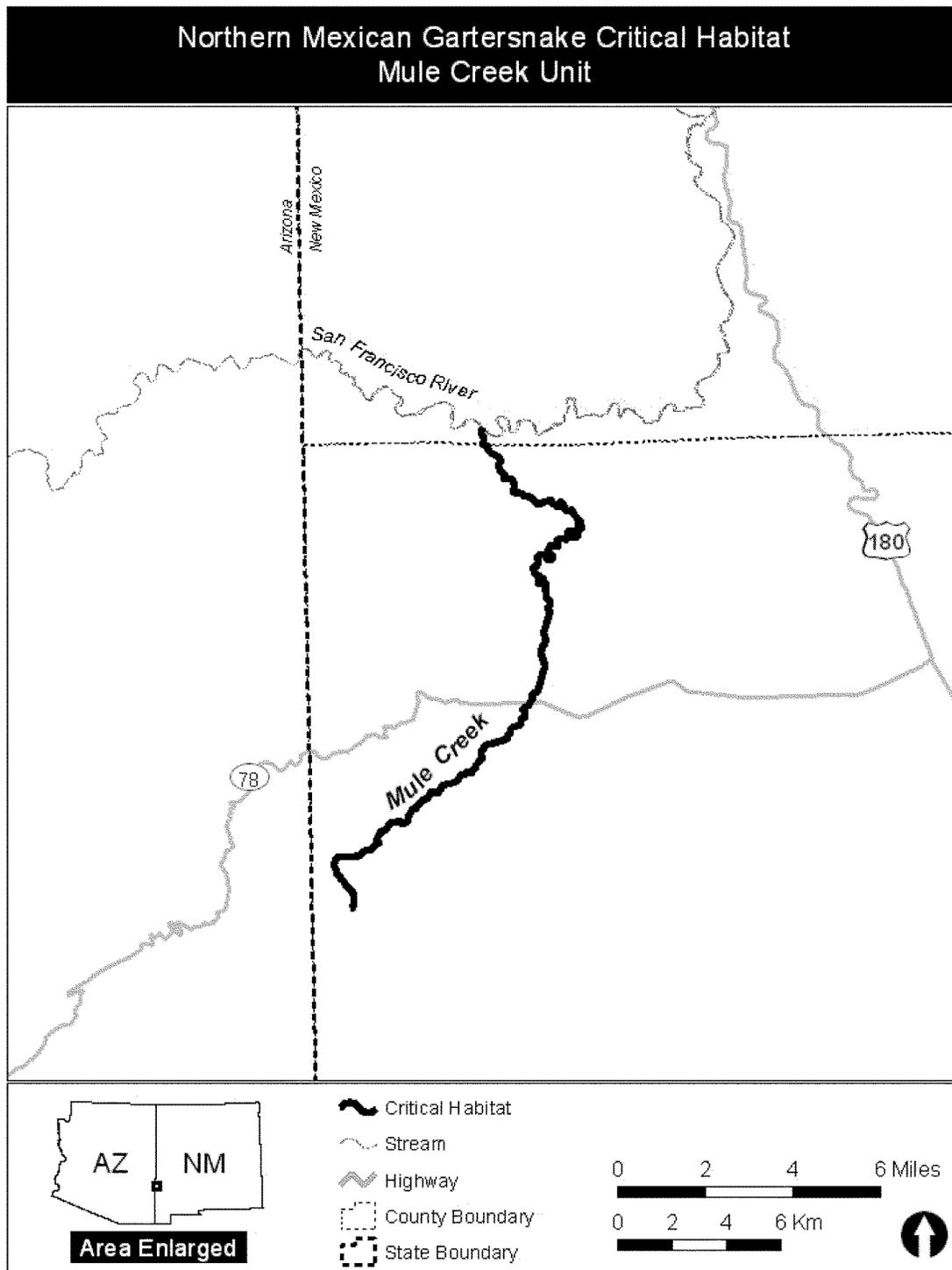


(6) Upper Gila River Unit: Hidalgo and Grant Counties, NM; Graham

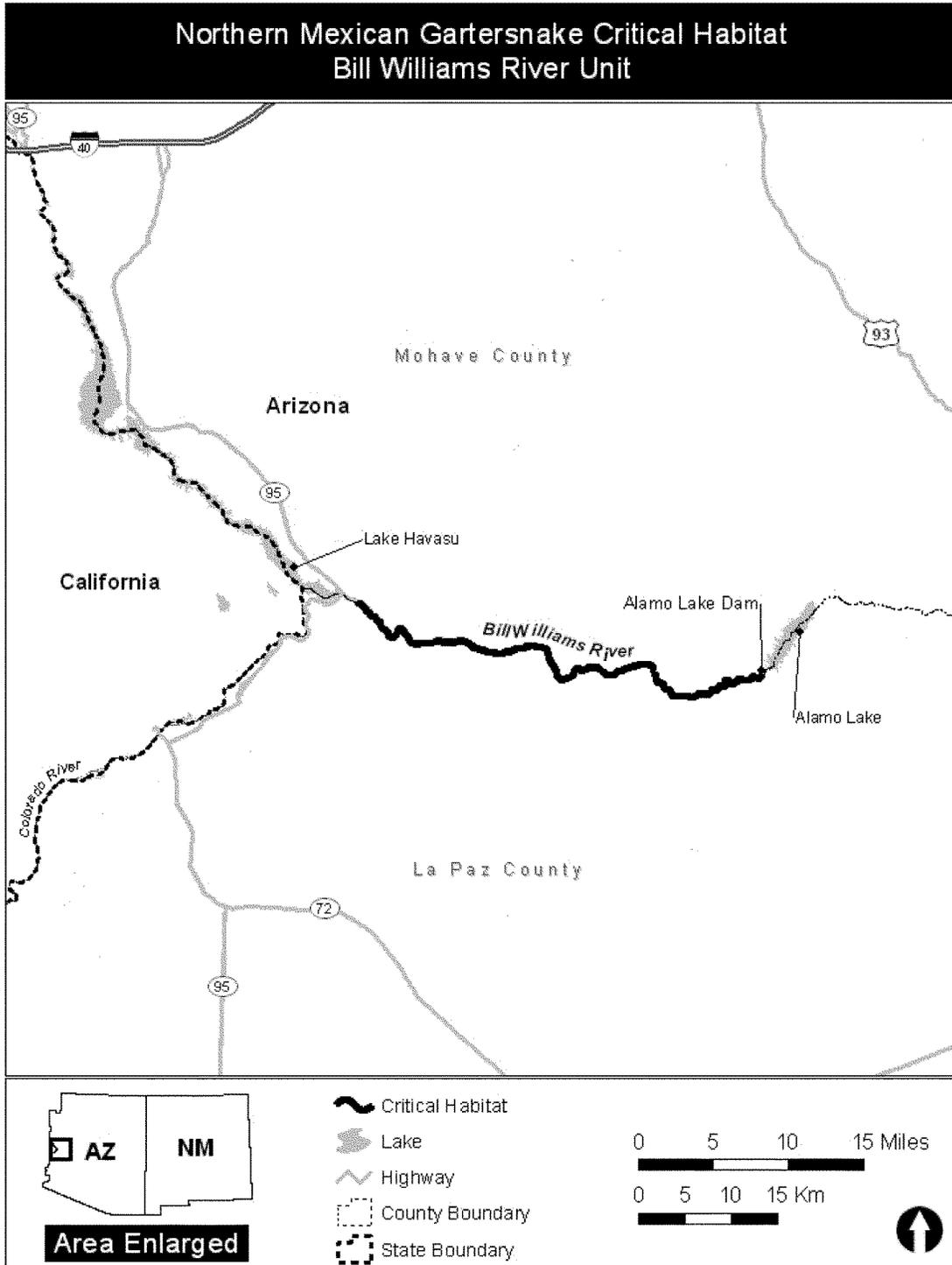
County, AZ. Map of the Upper Gila River Unit follows:



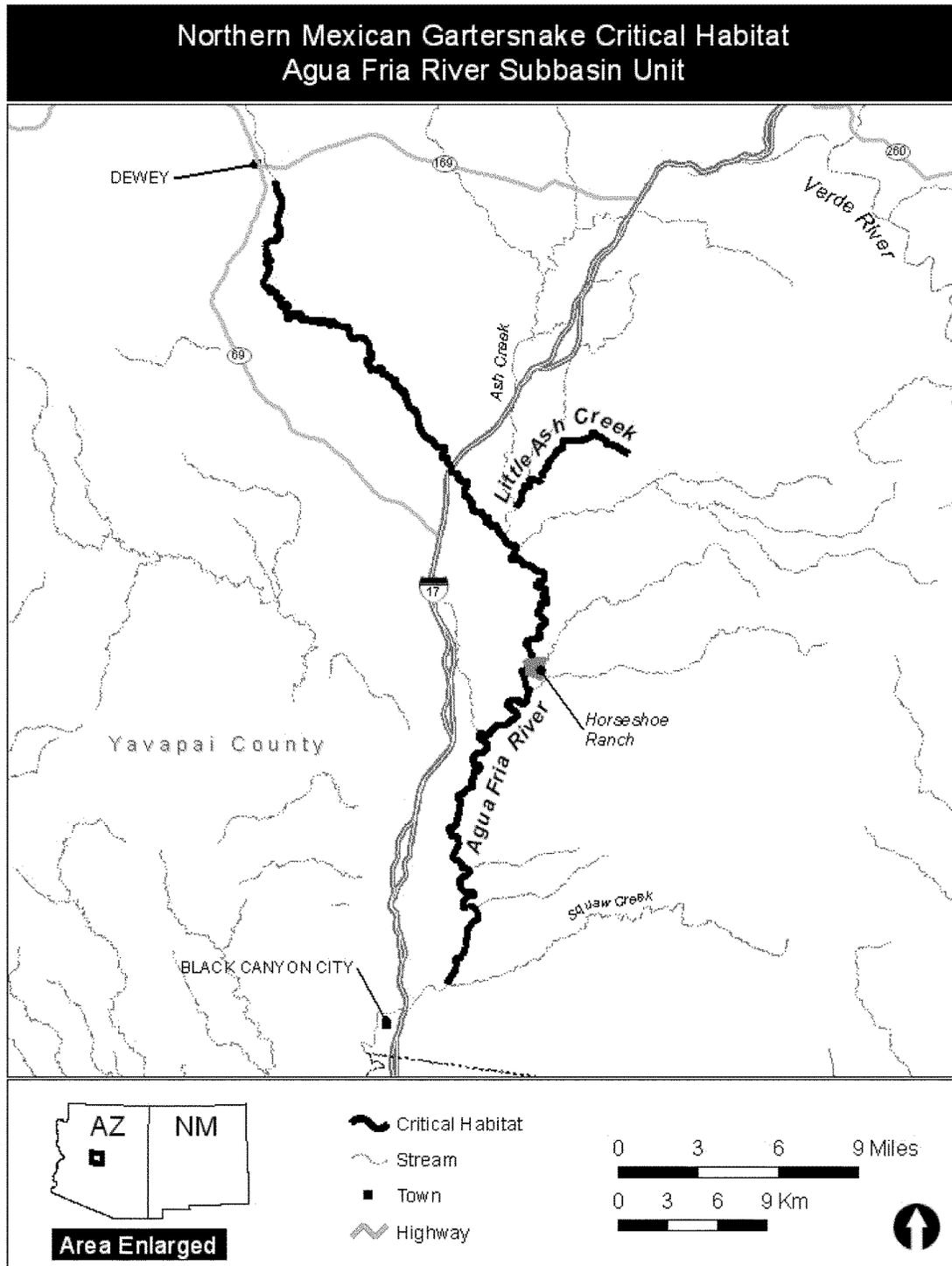
(7) Mule Creek Unit: Catron and Grant Counties, NM. Map of the Mule Creek Unit follows:



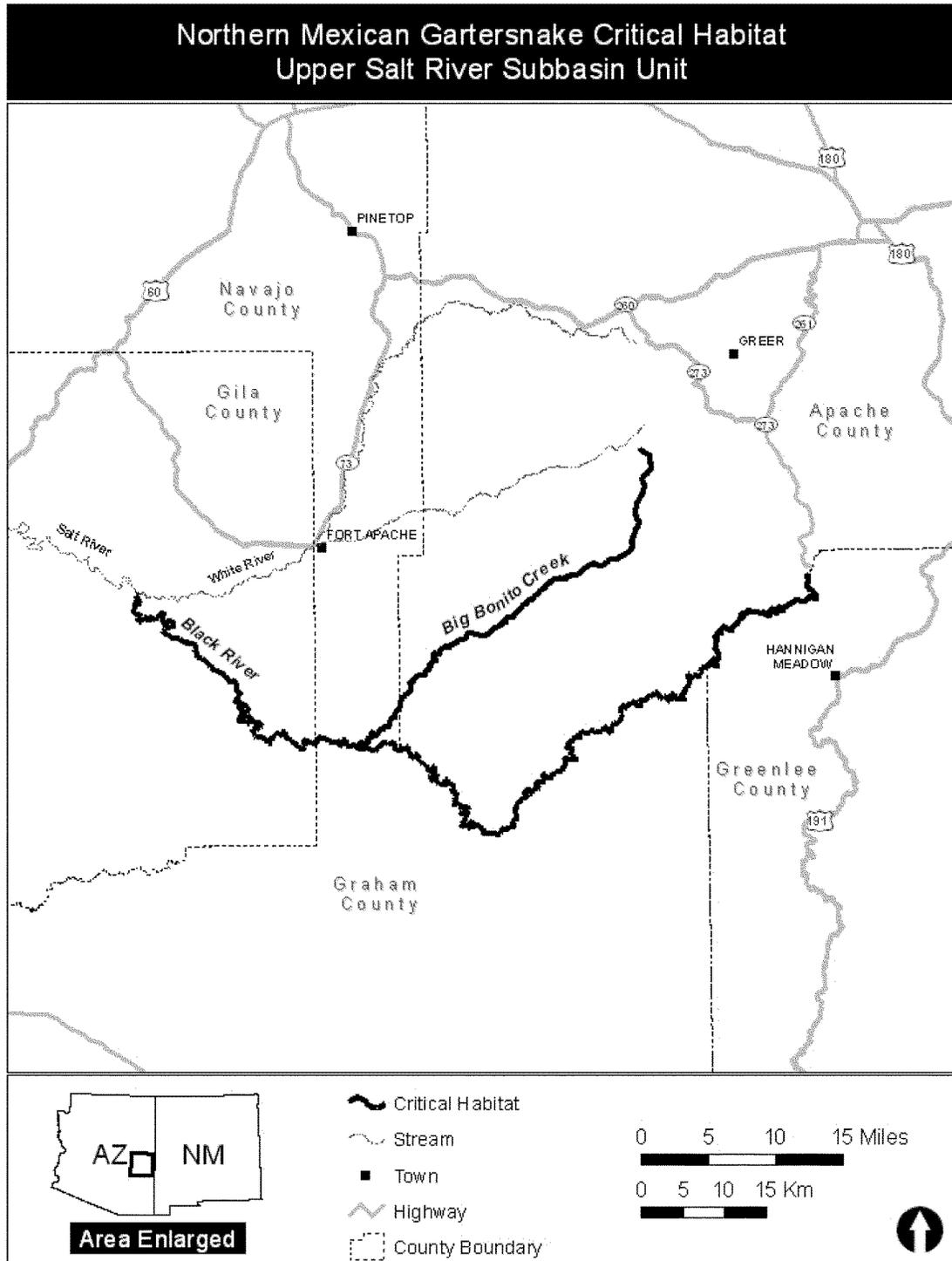
(8) Bill Williams River Unit: La Paz and Mohave Counties, AZ. Map of the Bill Williams River Unit follows:



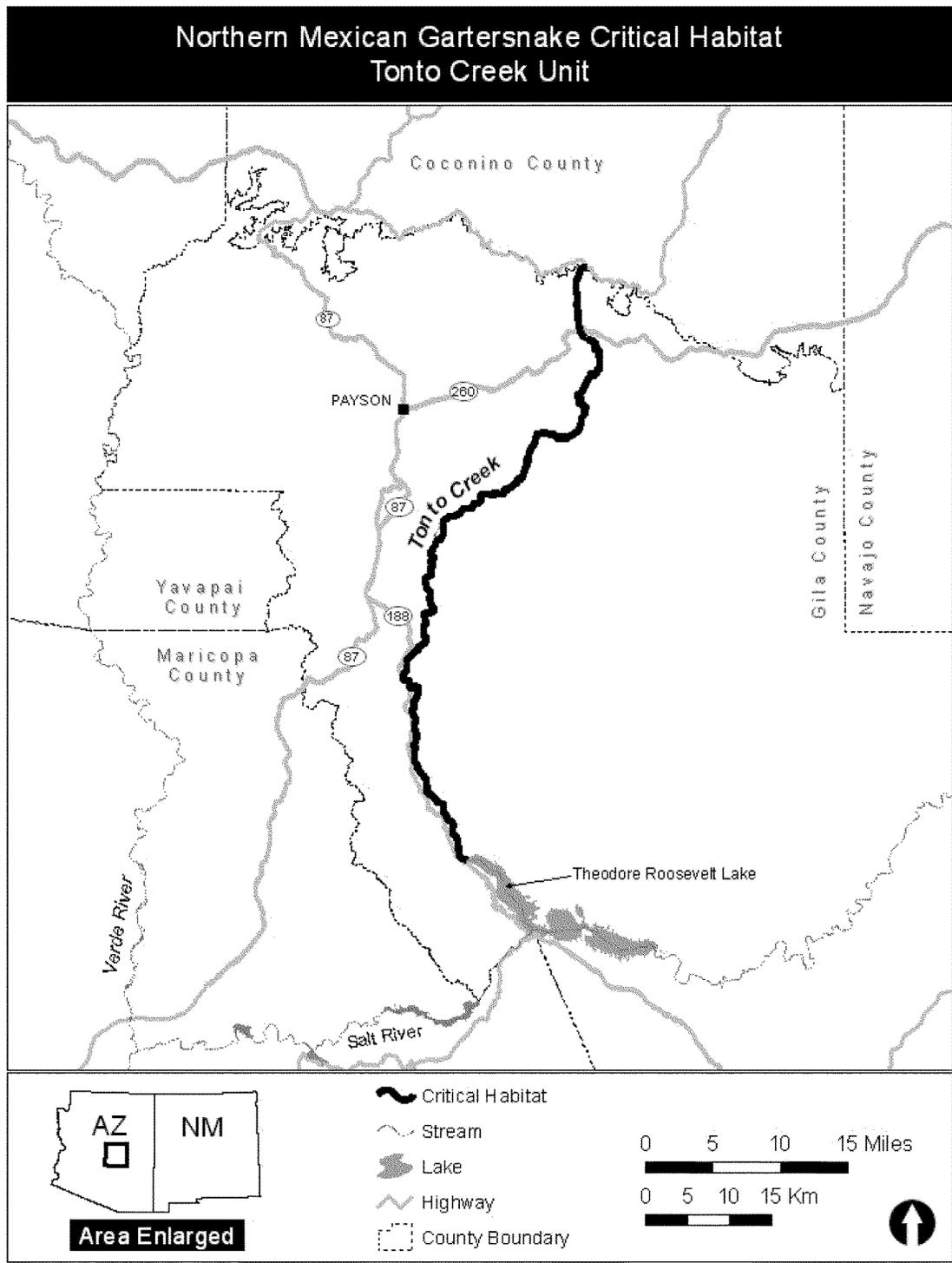
(9) Agua Fria River Subbasin Unit:  
Yavapai County, AZ. Map of the Agua  
Fria River Subbasin Unit follows:



(10) Upper Salt River Subbasin Unit: Greenlee Counties, AZ. Map of the  
Gila, Graham, Apache, Navajo, and Upper Salt River Subbasin Unit follows:

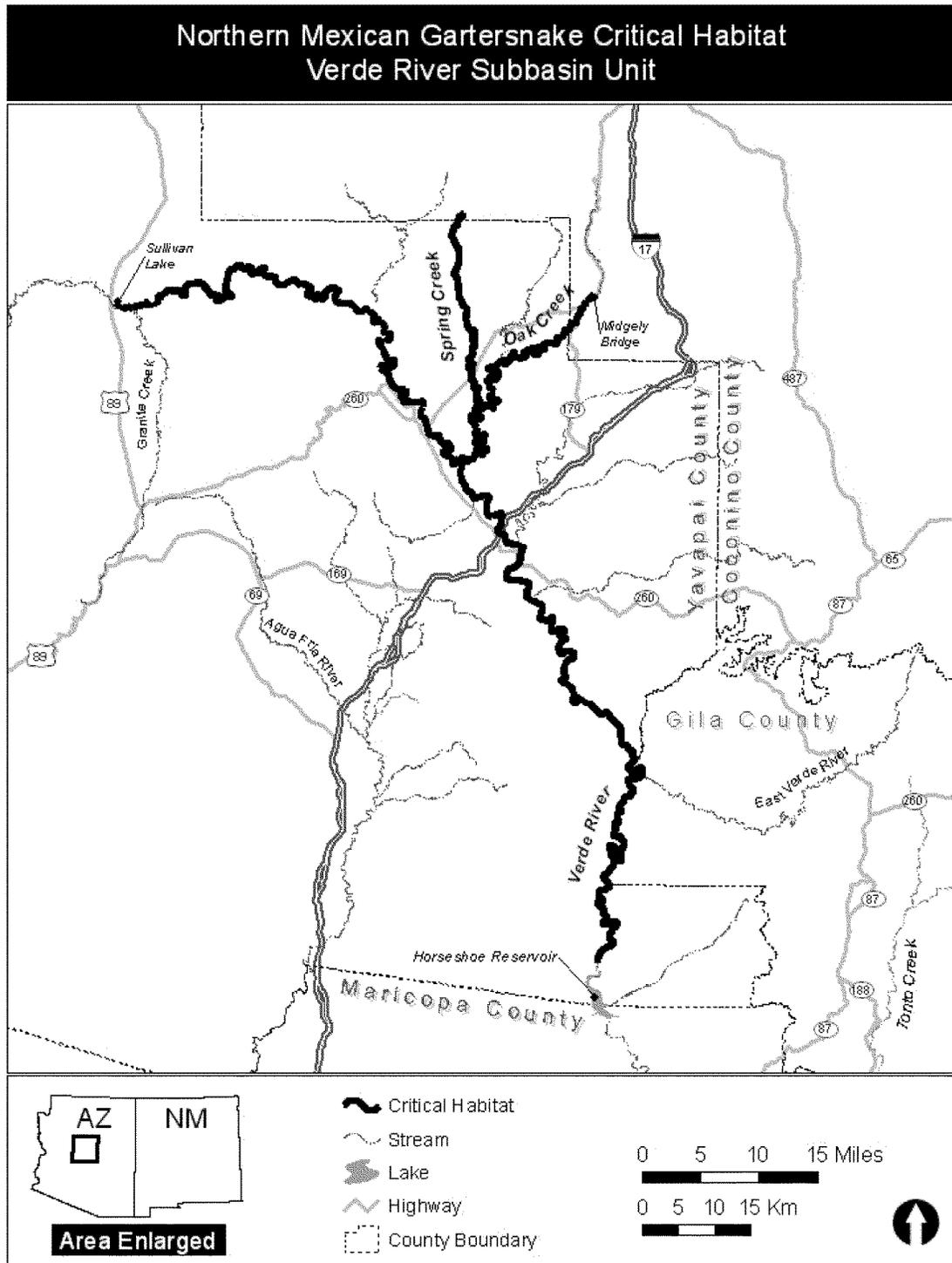


(11) Tonto Creek Unit: Gila County, AZ. Map of the Tonto Creek Unit follows:

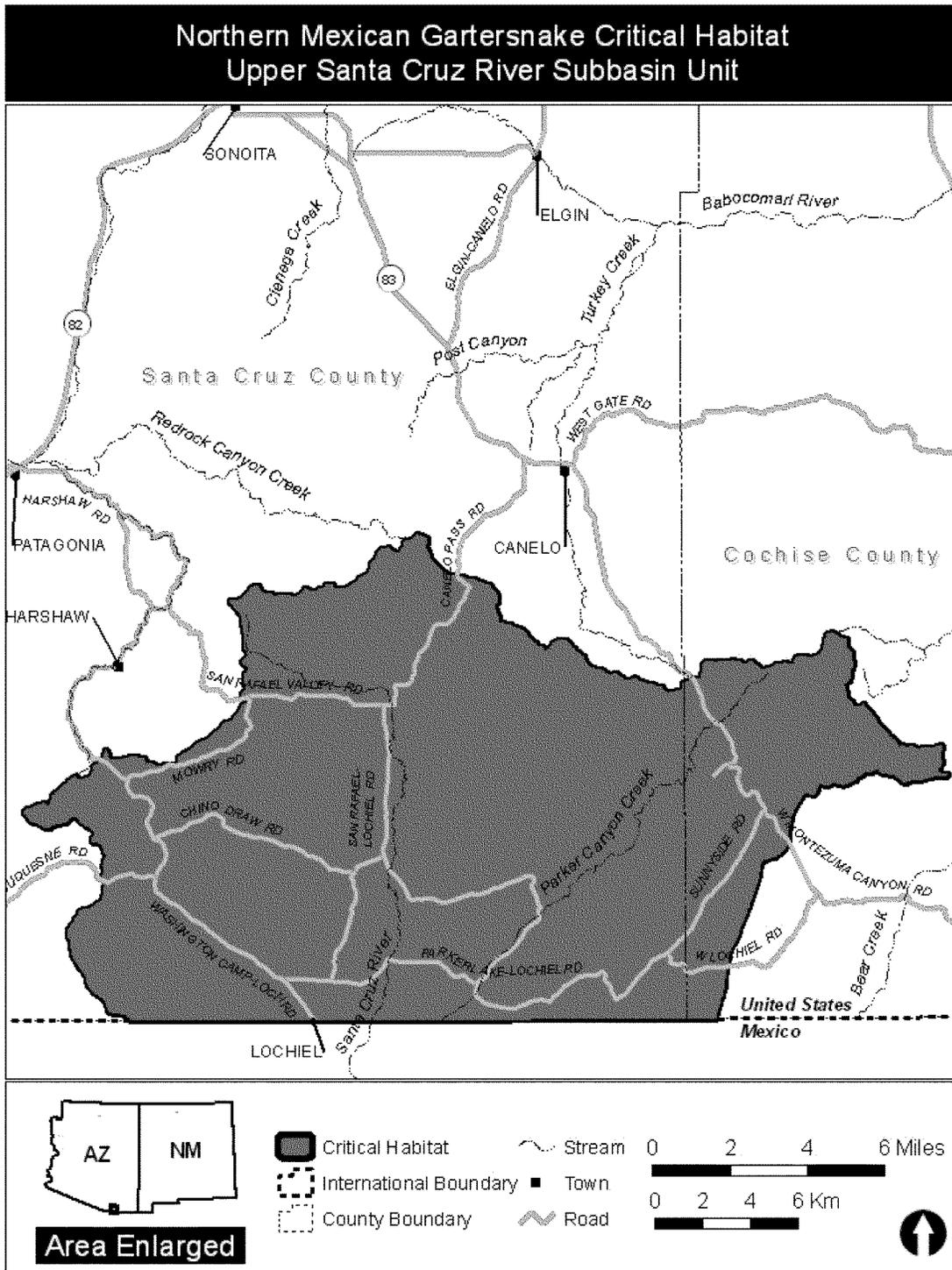


(12) Verde River Subbasin Unit:  
Coconino, Gila, and Yavapai Counties,

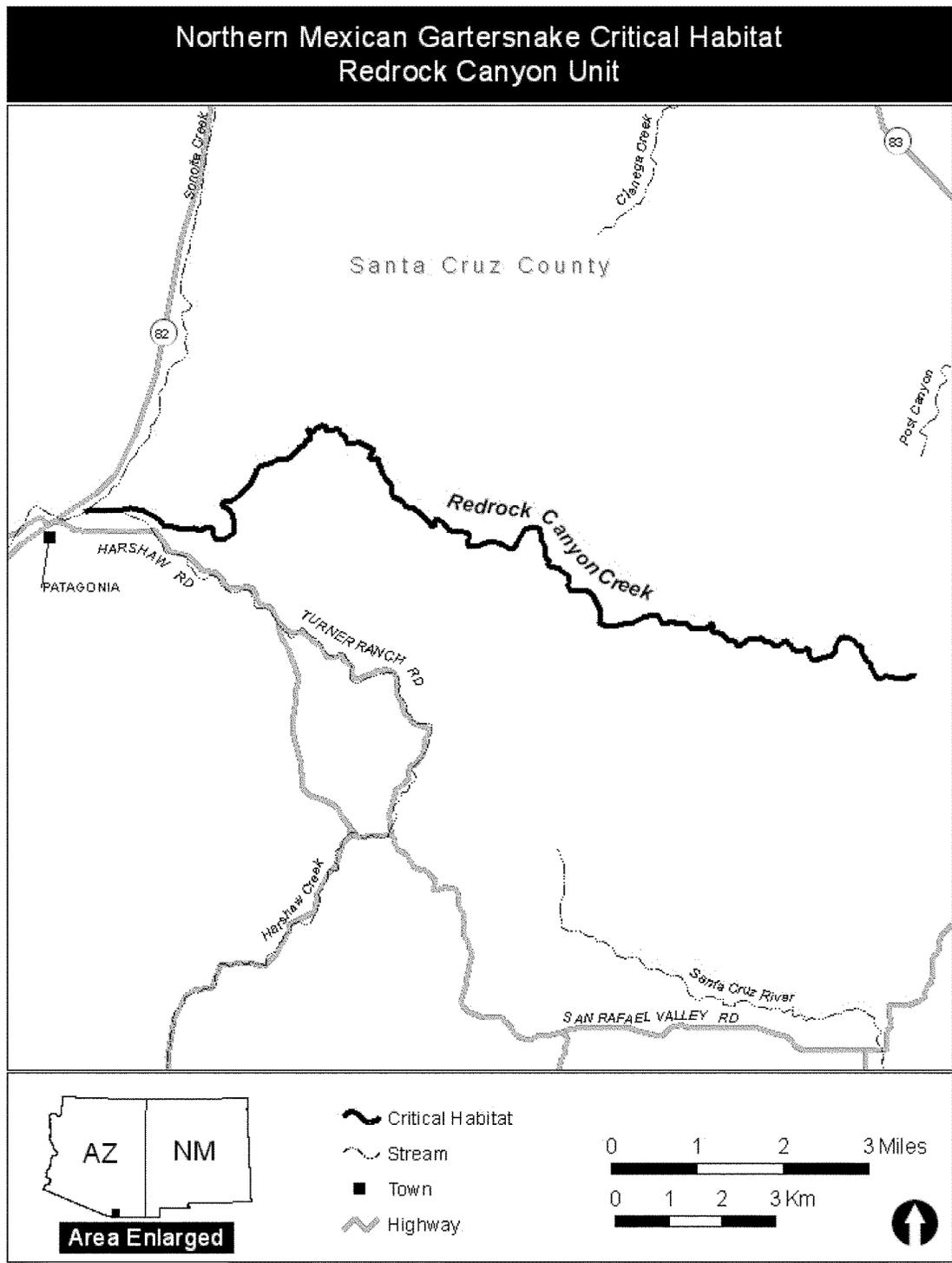
AZ. Map of the Verde River Subbasin  
Unit follows:



(13) Upper Santa Cruz River Subbasin AZ. Map of the Upper Santa Cruz River  
Unit: Santa Cruz and Cochise Counties, Subbasin Unit follows:

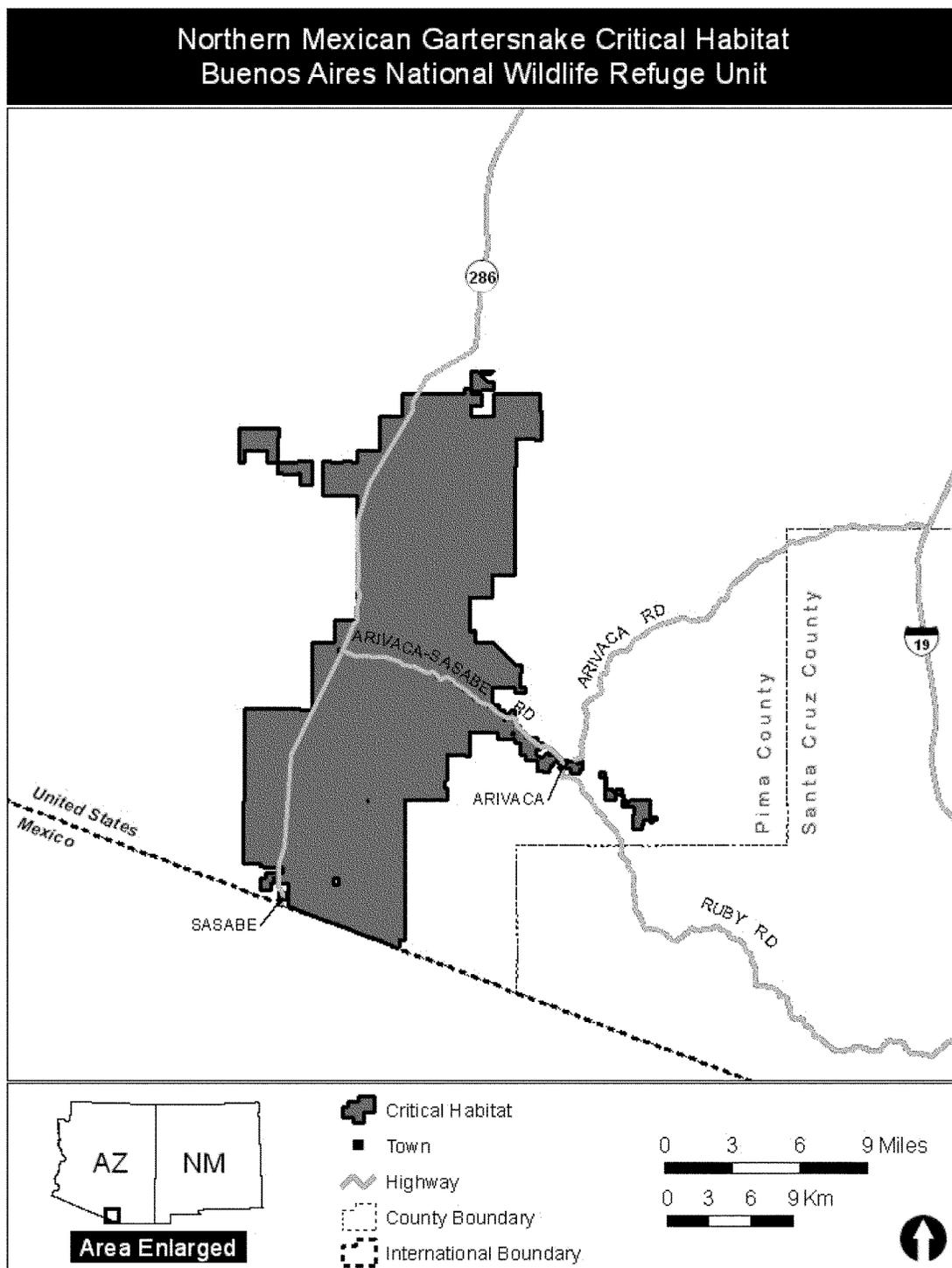


(14) Redrock Canyon Unit: Santa Cruz County, AZ. Map of the Redrock Canyon Unit follows:

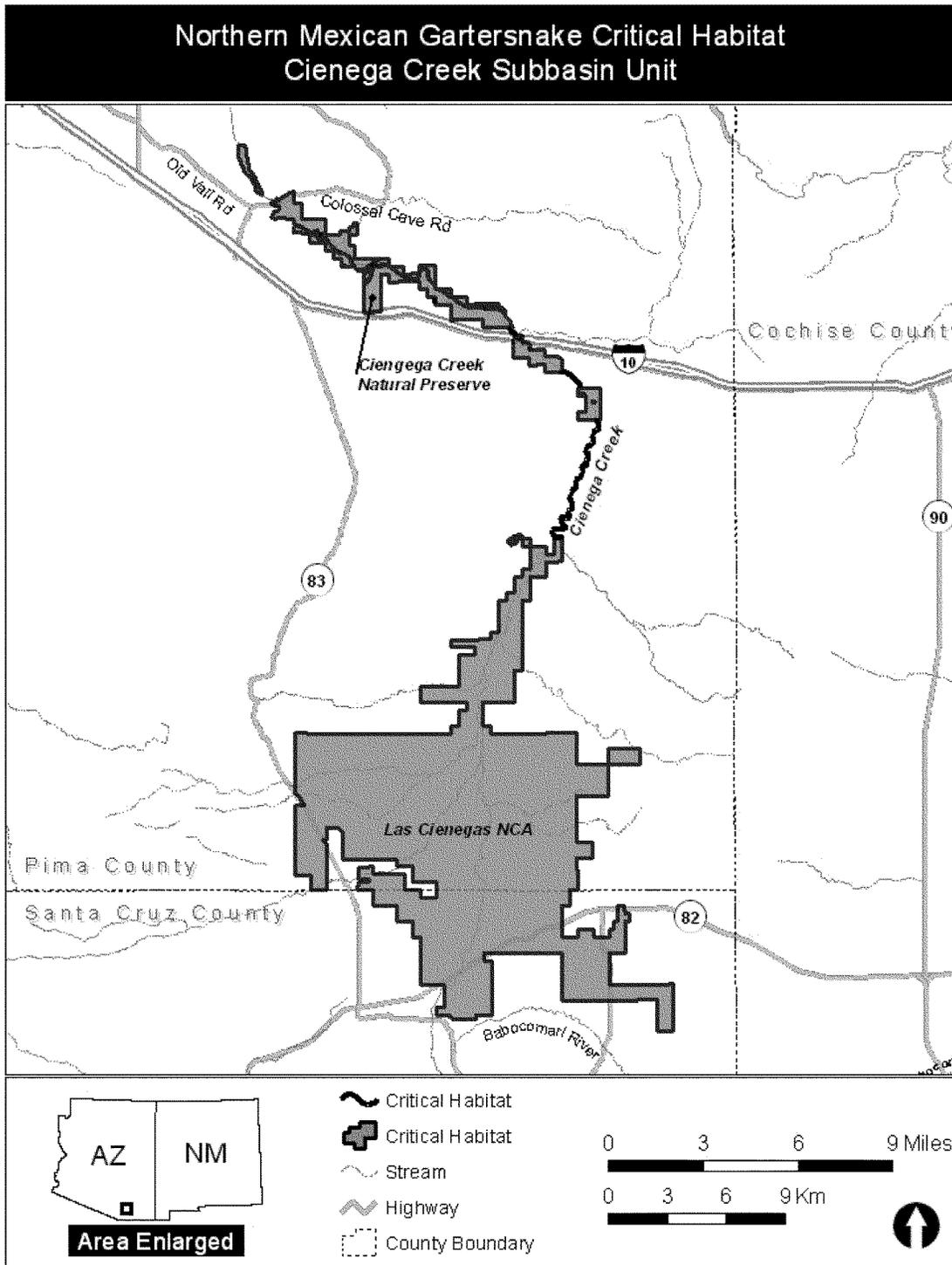


(15) Buenos Aires National Wildlife  
Refuge Unit: Pima County, AZ. Map of

the Buenos Aires National Wildlife  
Refuge Unit follows:

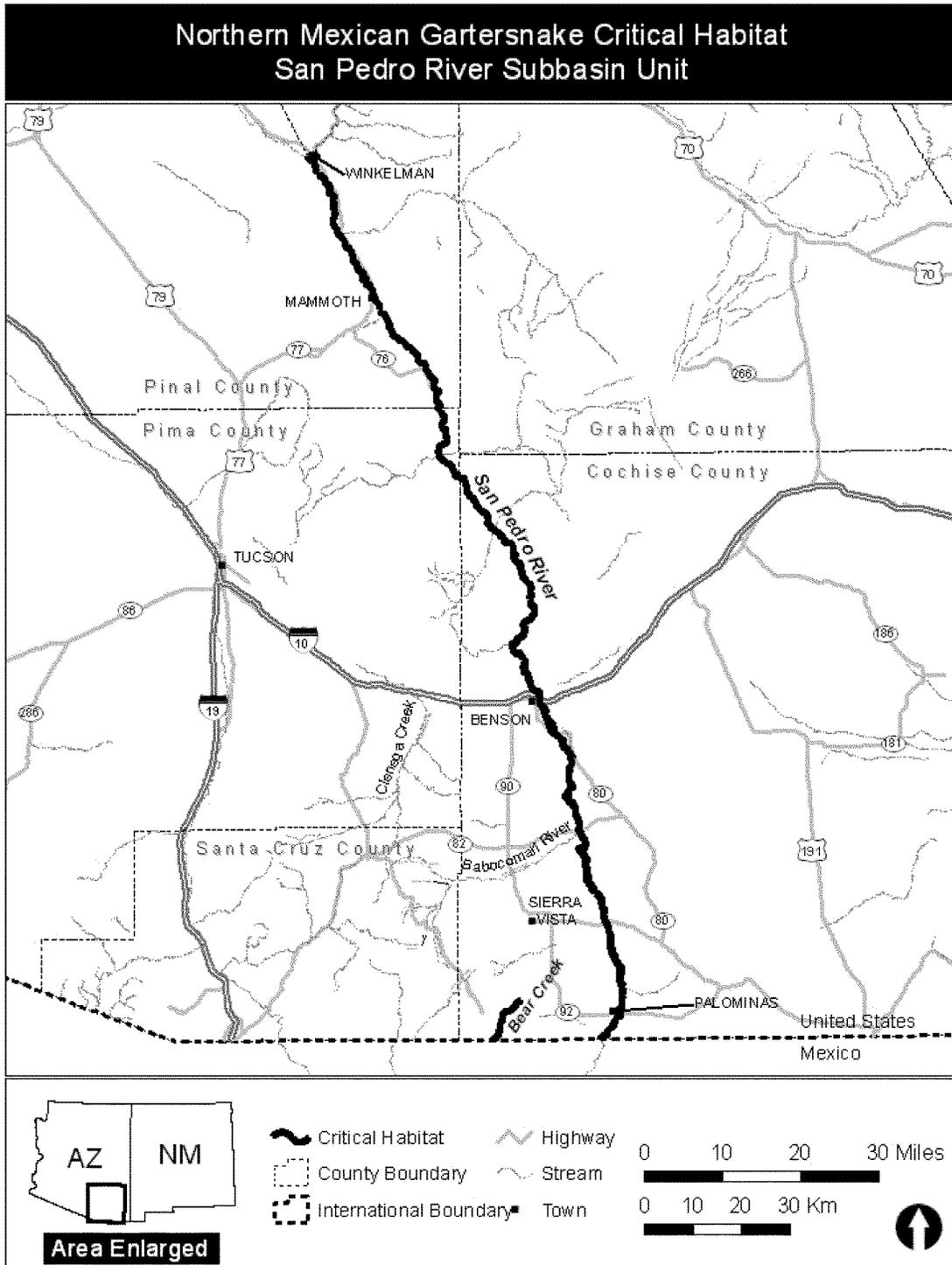


(16) Cienega Creek Subbasin Unit: of the Cienega Creek Subbasin Unit  
Pima and Santa Cruz Counties, AZ. Map follows:

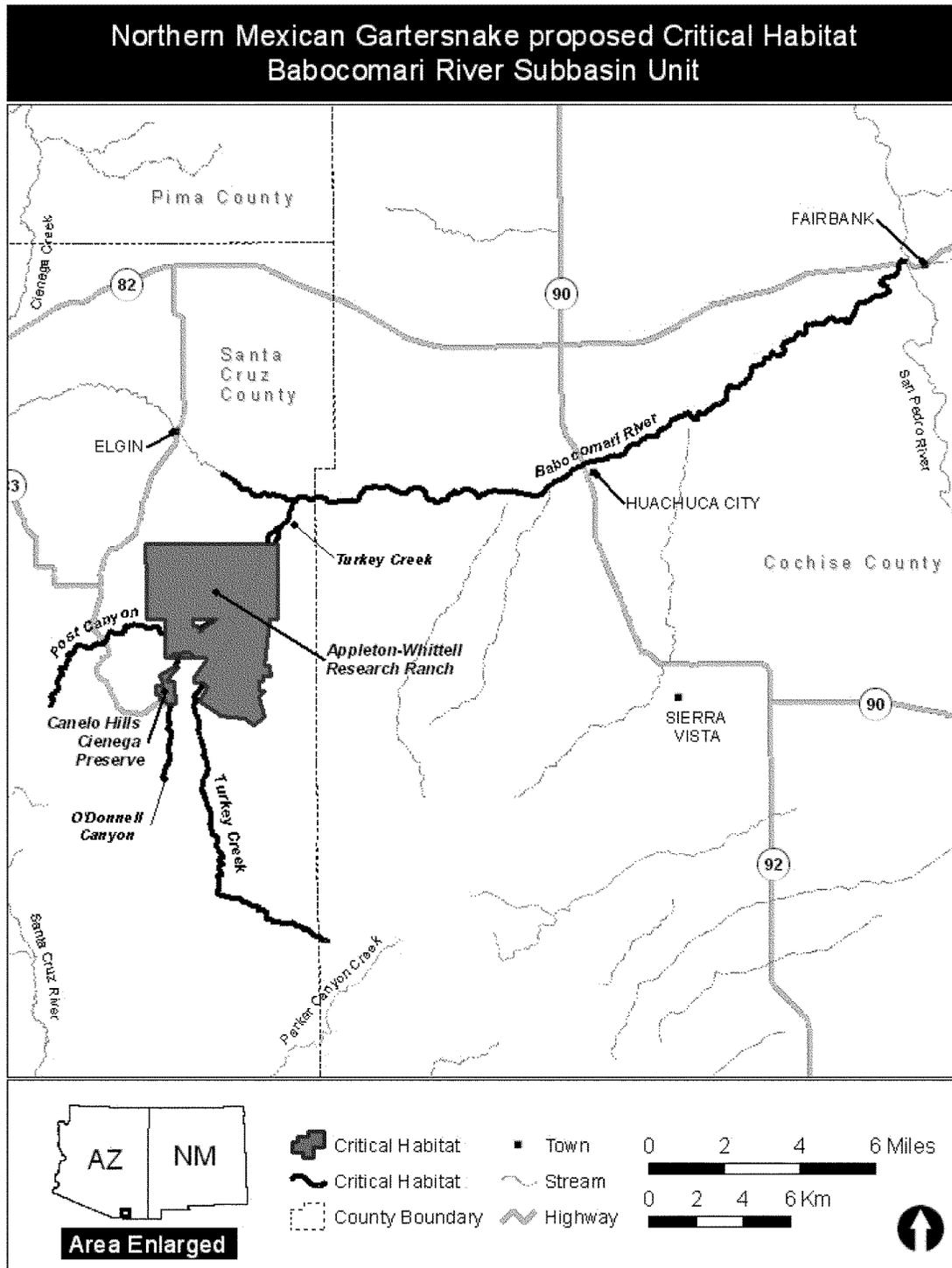


(17) San Pedro River Subbasin Unit:  
Cochise, Pima, and Pinal Counties, AZ.

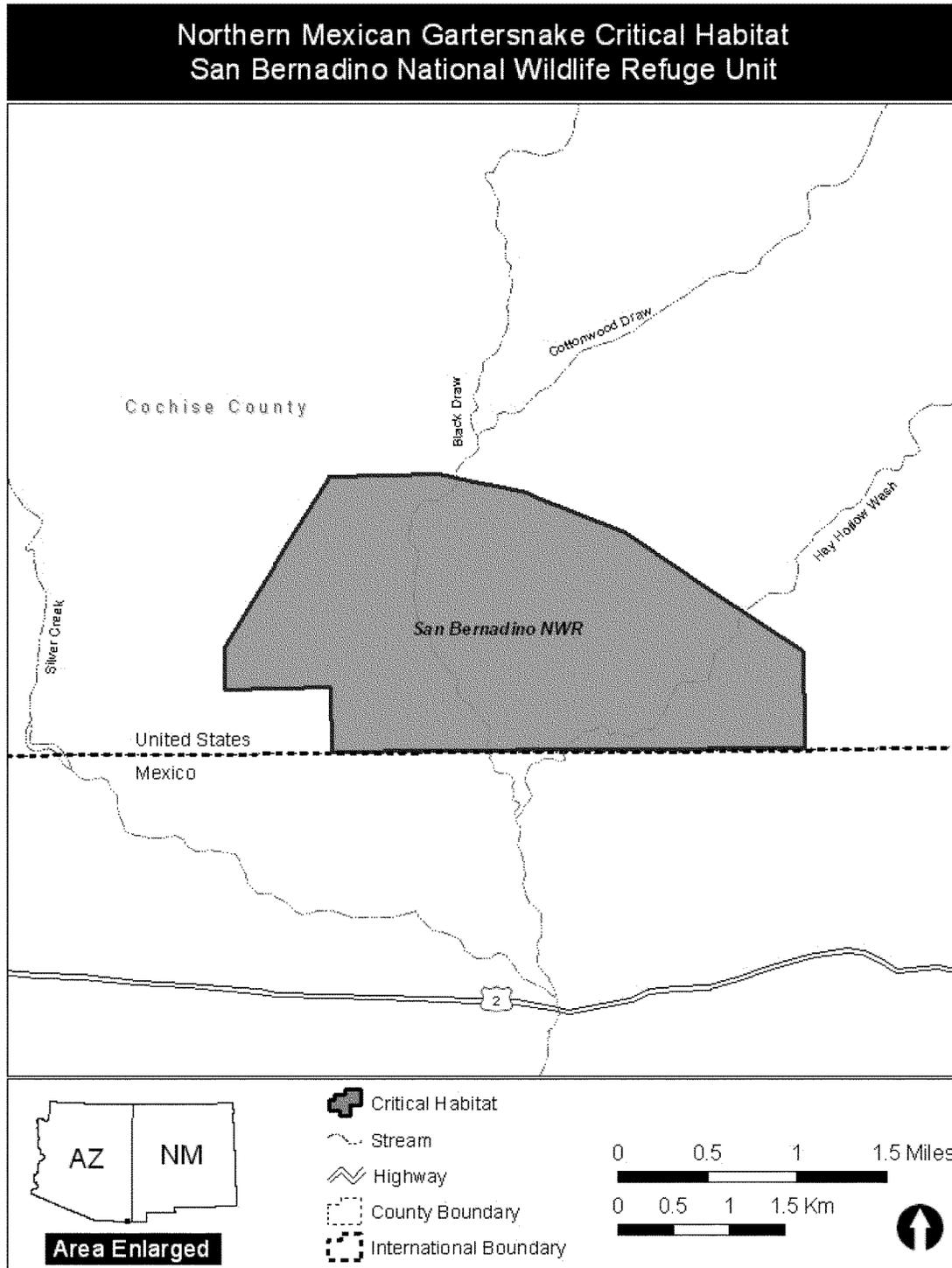
Map of the San Pedro River Subbasin  
Unit follows:



(18) Babocomari River Subbasin Unit: Map of the Babocomari River Subbasin  
 Santa Cruz and Cochise Counties, AZ. Unit follows:



(19) San Bernardino National Wildlife Refuge Unit: Cochise County, AZ. Map of the San Bernardino National Wildlife Refuge Unit follows:



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Narrow-Headed Gartersnake (Thamnophis rufipunctatus)

(1) Critical habitat units are depicted for Greenlee, Graham, Apache, Yavapai, Navajo, Gila, and Coconino Counties in Arizona, as well as in Grant, Hidalgo,

Sierra, and Catron Counties in New Mexico, on the maps below.

(2) Within these areas, the primary constituent elements of the physical or biological features essential to the conservation of the narrow-headed gartersnake consist of four components:

(i) Stream habitat, which includes:

(A) Perennial or spatially intermittent streams with sand, cobble, and boulder substrate and low or moderate amounts of fine sediment and substrate embeddedness, and that possess appropriate amounts of pool, riffle, and

run habitat to sustain native fish populations;

(B) A natural, unregulated flow regime that allows for periodic flooding or, if flows are modified or regulated, a flow regime that allows for adequate river functions, such as flows capable of processing sediment loads;

(C) Shoreline habitat with adequate organic and inorganic structural complexity (e.g., boulders, cobble bars, vegetation, and organic debris such as downed trees or logs, debris jams), with appropriate amounts of shrub- and sapling-sized plants to allow for thermoregulation, gestation, shelter, protection from predators, and foraging opportunities; and

(D) Aquatic habitat with no pollutants or, if pollutants are present, levels that do not affect survival of any age class of the narrow-headed gartersnake or the maintenance of prey populations.

(ii) Adequate terrestrial space (600 ft (182.9 m) lateral extent to either side of bankfull stage) adjacent to designated stream systems with sufficient structural characteristics to support life-history

functions such as gestation, immigration, emigration, and brumation.

(iii) A prey base consisting of viable populations of native fish species or soft-rayed nonnative fish species.

(iv) An absence of nonnative fish species of the families Centrarchidae and Ictaluridae, bullfrogs (*Lithobates catesbeianus*), and/or crayfish (*Orconectes virilis*, *Procambarus clarki*, etc.), or occurrence of these nonnative species at low enough levels such that recruitment of narrow-headed gartersnakes and maintenance of viable native fish or soft-rayed nonnative fish populations (prey) is still occurring.

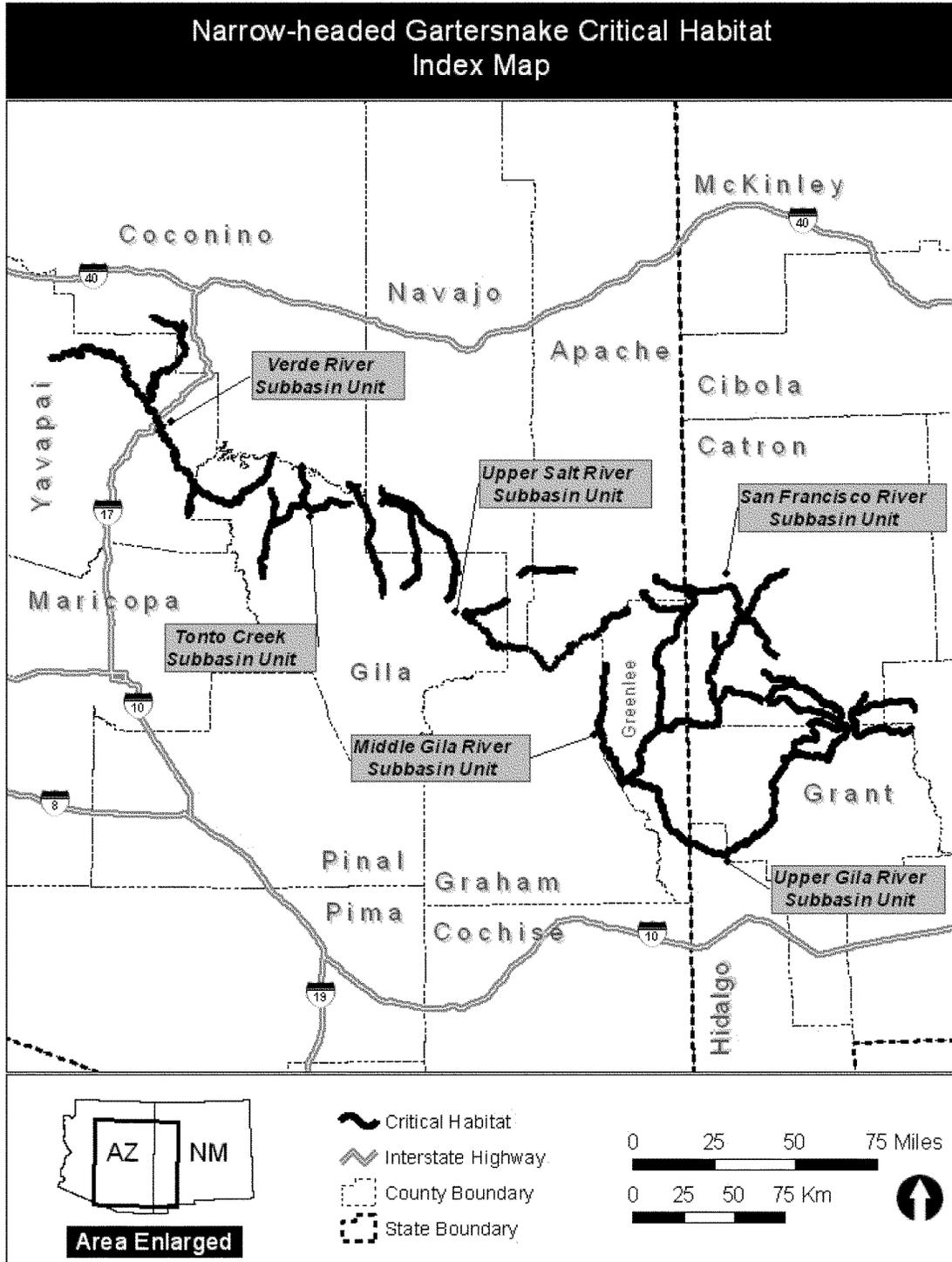
(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on the effective date of this rule.

(4) *Critical habitat map units*. Data layers defining map units were created on a base of USGS 7.5' quadrangles, the Service's online Lands Mapper, the U.S.

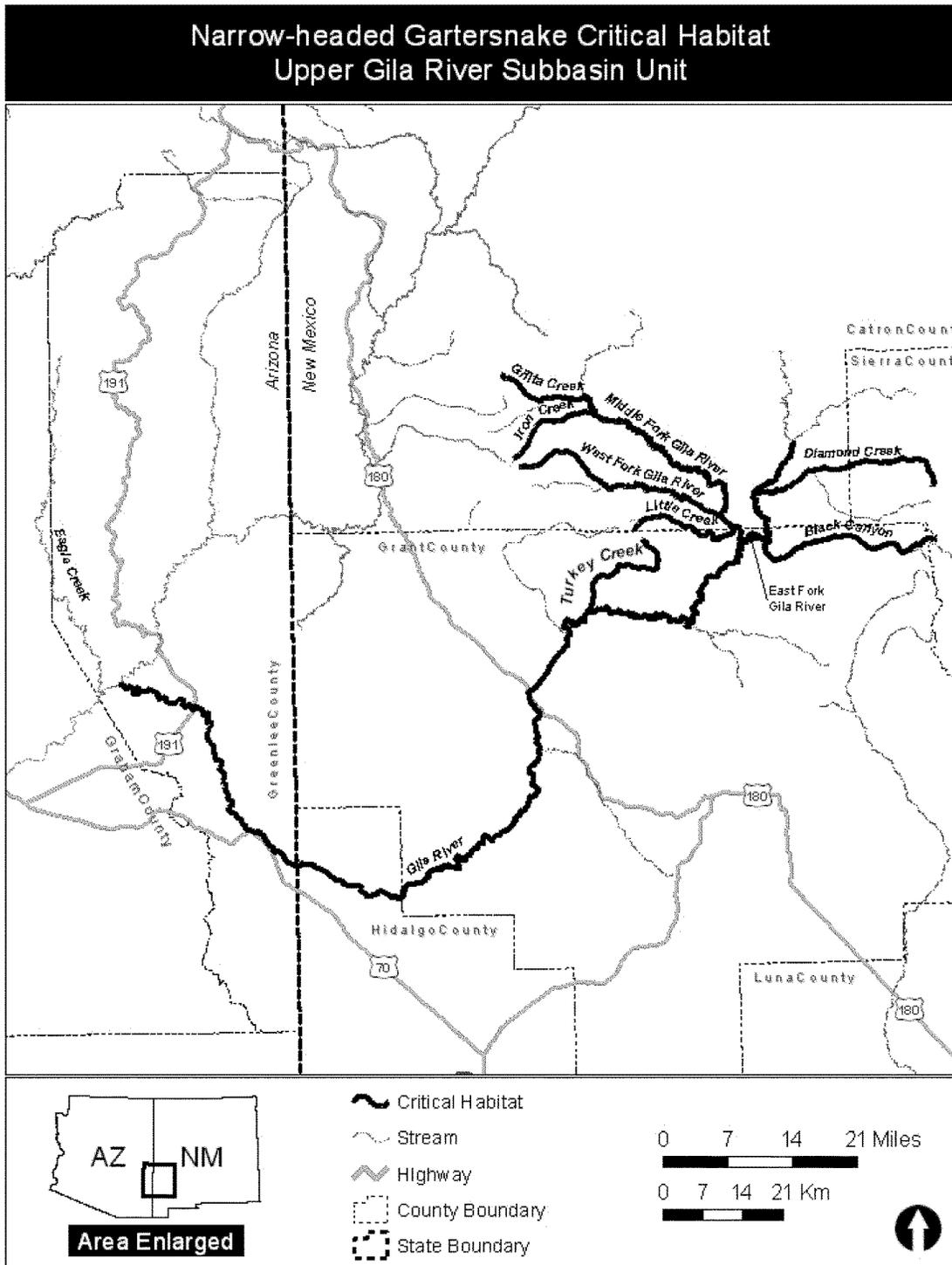
Geological Survey National Hydrography Dataset, and imagery from Google Earth. Line locations for lotic streams (flowing water) and drainages are depicted as the "Flowline" feature class from the National Hydrography Dataset geodatabase. Administrative boundaries for Arizona and New Mexico were obtained from the Arizona Land Resource Information Service and New Mexico Resource Geographic Information System, respectively. This includes the most current (as of the effective date of this rule) geospatial data available for land ownership, counties, States, and streets. Locations depicting critical habitat are expressed as decimal degree latitude and longitude in the World Geographic Coordinate System projection using the 1984 datum (WGS84). Information on narrow-headed gartersnake localities was derived from survey forms, reports, publications, field notes, and other sources, all of which reside in our files at the Arizona Ecological Services Field Office, 2321 West Royal Palm Road, Suite 103, Phoenix, AZ 85021.

(5) Index map follows:

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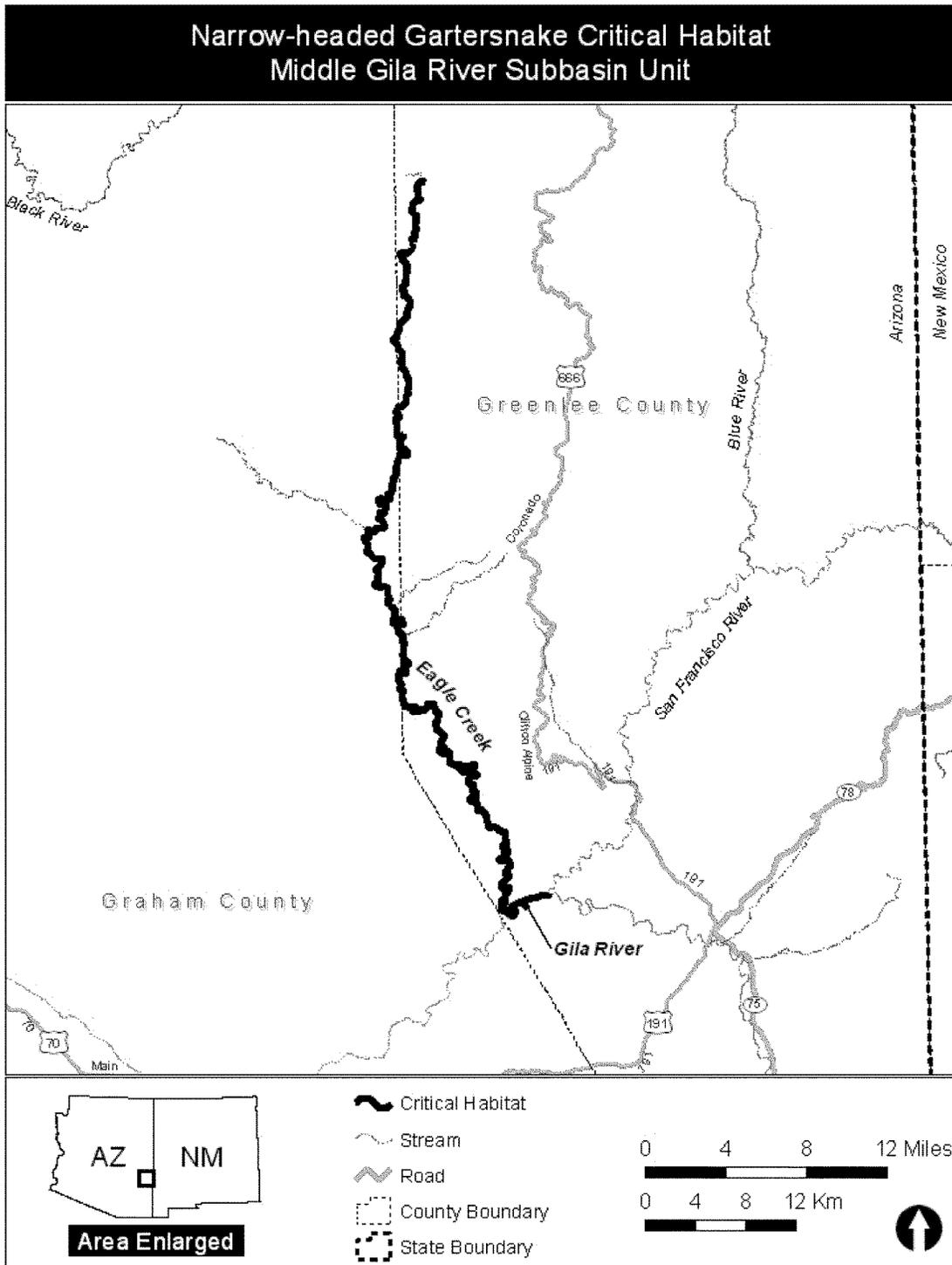


(6) Upper Gila River Subbasin Unit: County, AZ. Map of the Upper Gila River Subbasin Unit follows:  
 Catron and Grant Counties, NM; Graham



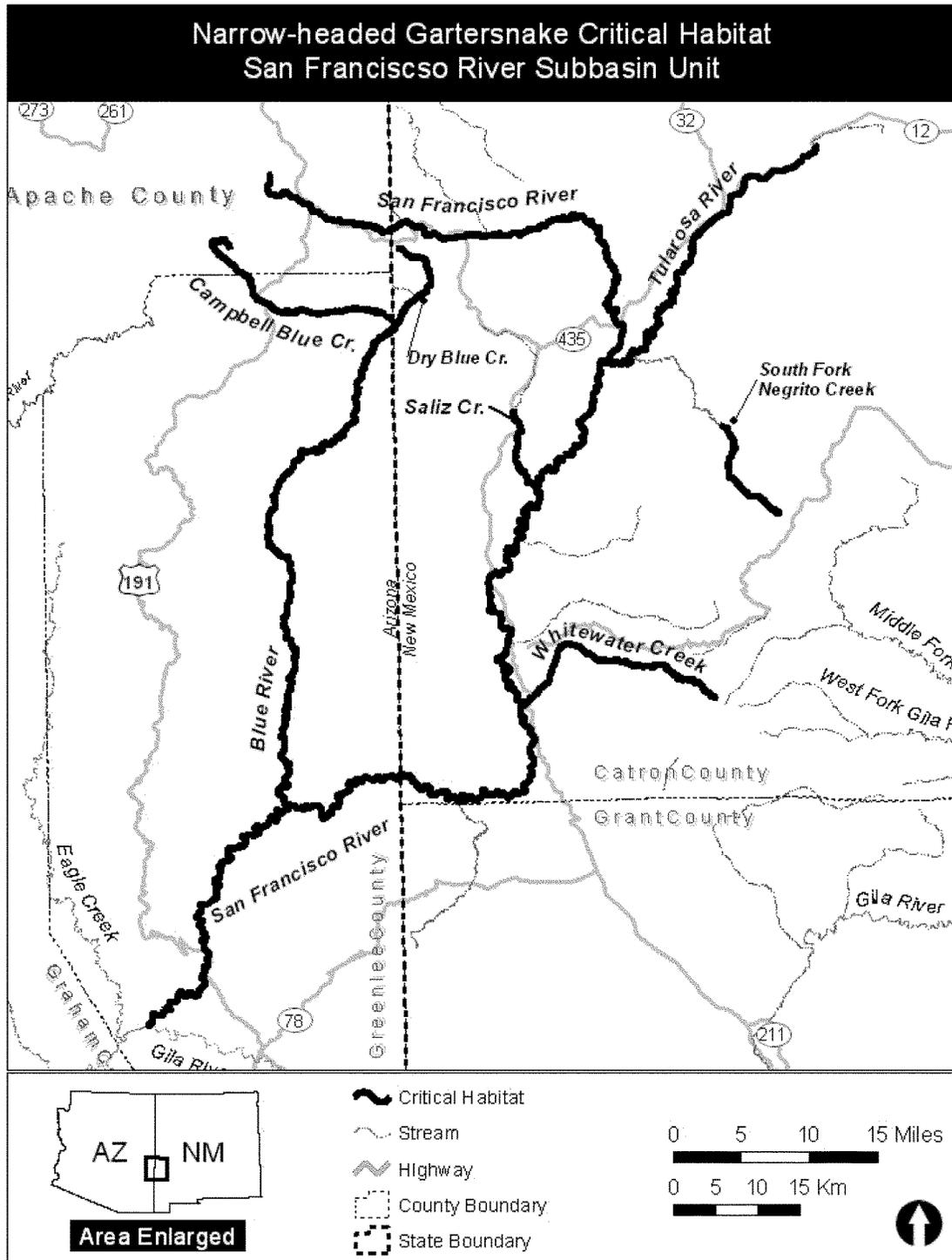
(7) Middle Gila River Subbasin Unit:  
Greenlee and Graham Counties, AZ.

Map of the Middle Gila River Subbasin  
Unit follows:



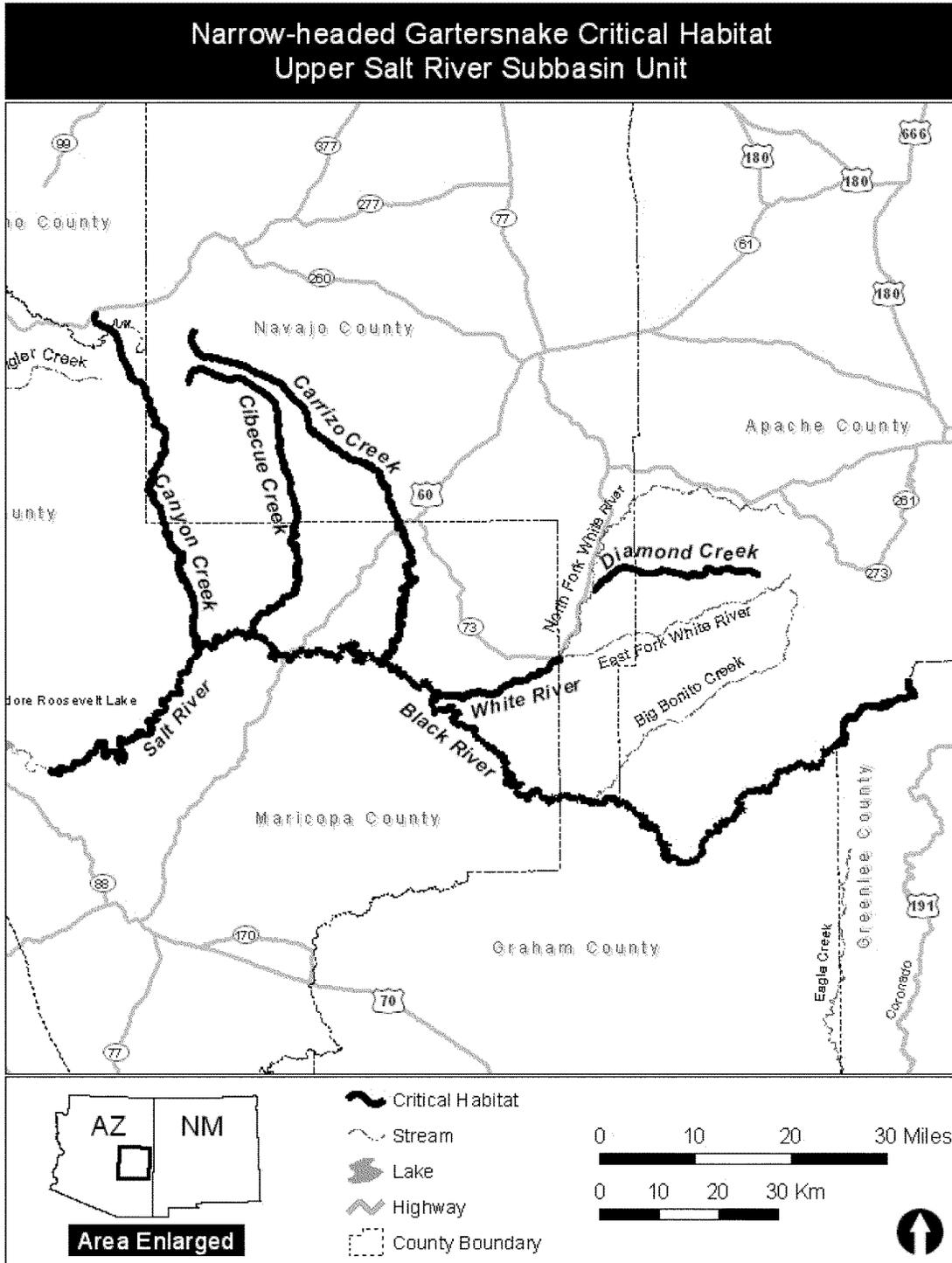
(8) San Francisco River Subbasin  
 Unit: Greenlee County, AZ; Catron

County, NM. Map of the San Francisco  
 River Subbasin Unit follows:

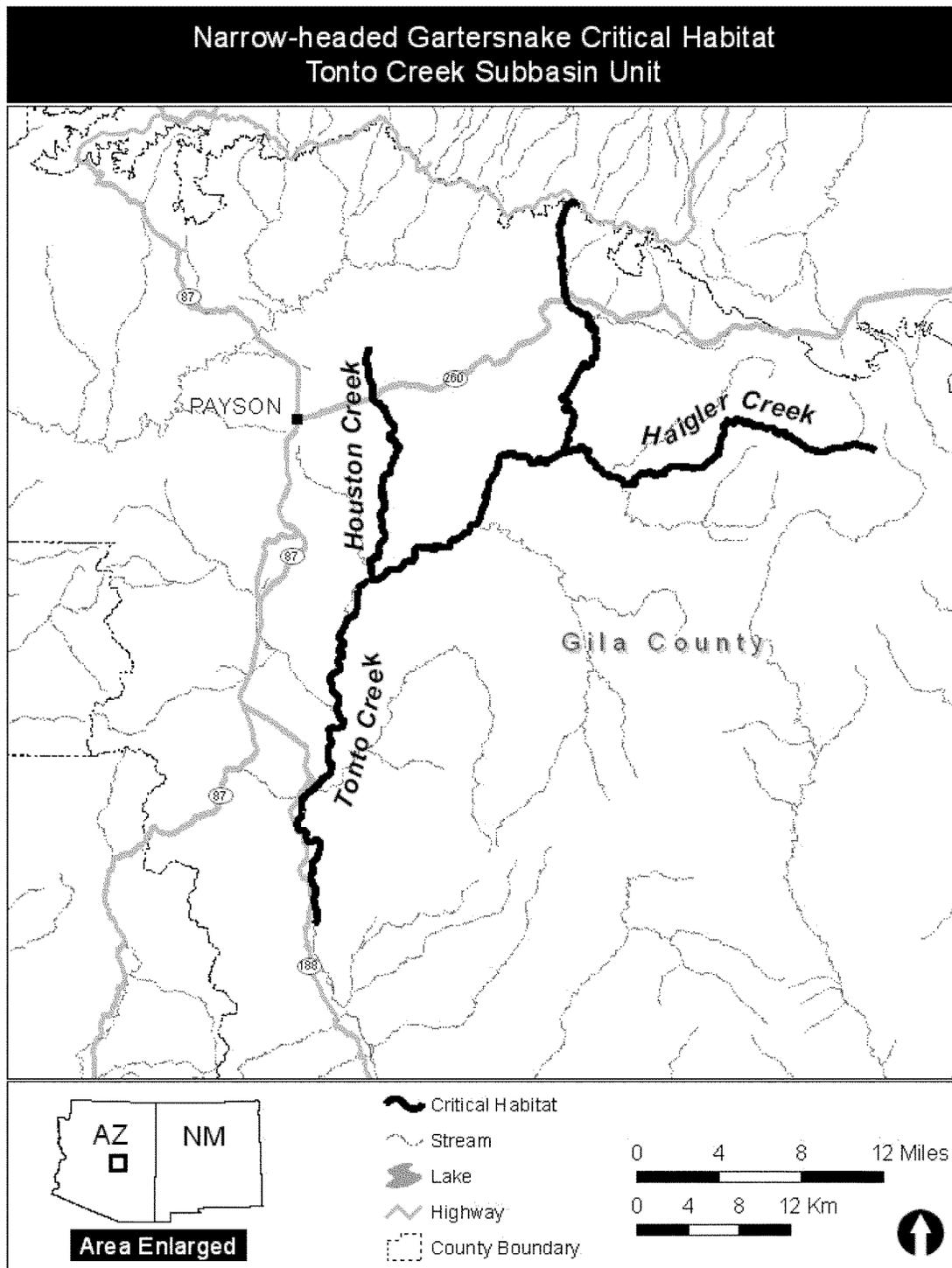


(9) Upper Salt River Subbasin Unit:  
Gila, Graham, Apache, Navajo,  
Greenlee, and Coconino Counties, AZ.

Map of the Upper Salt River Subbasin  
Unit follows:

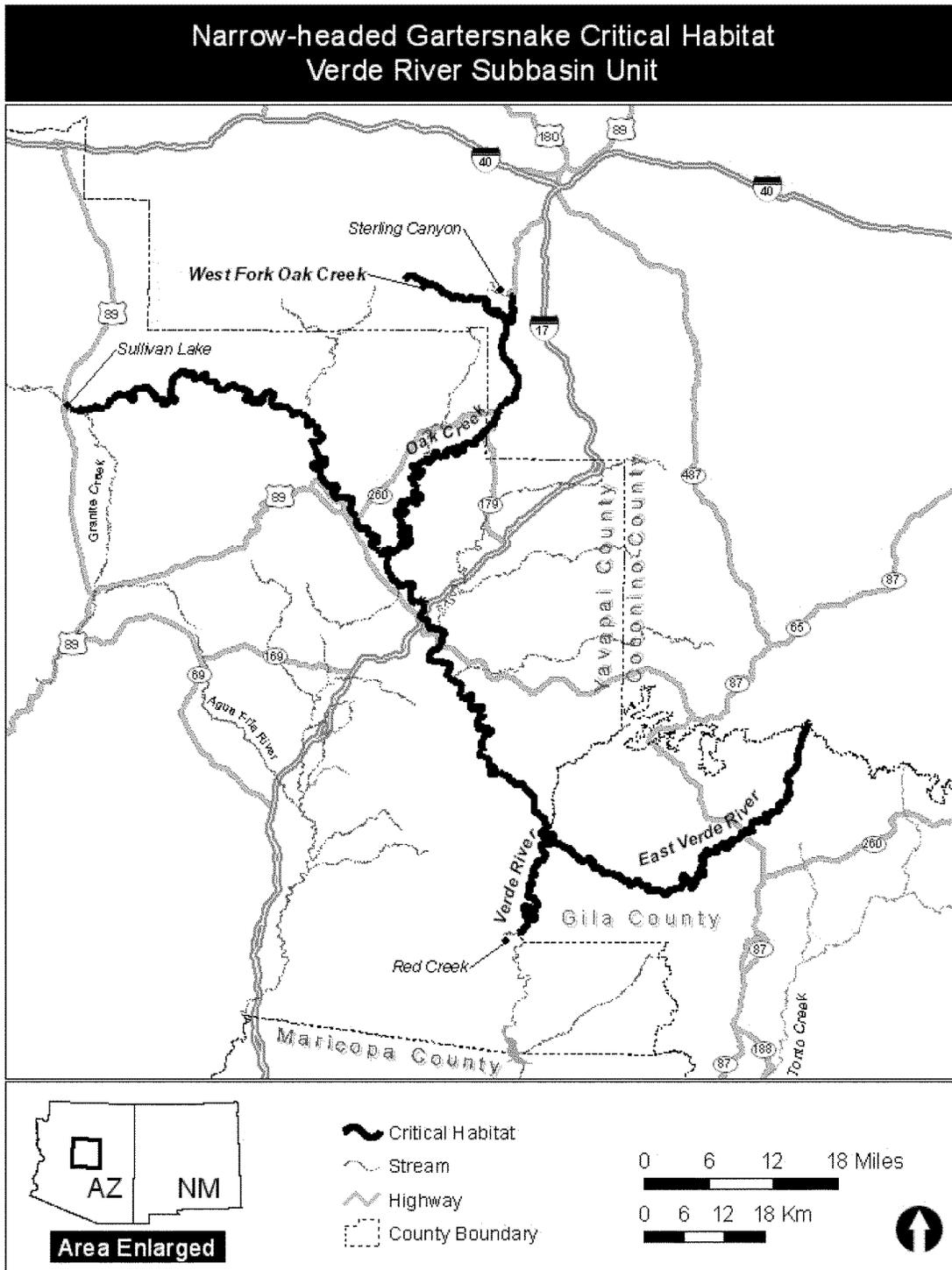


(10) Tonto Creek Subbasin Unit: Gila County, AZ. Map of the Tonto Creek Subbasin Unit follows:



(11) Verde River Subbasin Unit:  
Coconino, Gila, and Yavapai Counties,

AZ. Map of the Verde River Subbasin  
Unit follows:



\* \* \* \* \*

Dated: June 25, 2013.  
**Rachel Jacobsen,**  
*Principal Deputy Assistant Secretary for Fish  
and Wildlife and Parks.*  
[FR Doc. 2013-16520 Filed 7-9-13; 8:45 am]  
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Part IV

## Department of Energy

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10 CFR Parts 429 and 430

Energy Conservation Program for Consumer Products: Test Procedures for Refrigerators, Refrigerator-Freezers, and Freezers; Proposed Rule

**DEPARTMENT OF ENERGY****10 CFR Parts 429 and 430****[Docket No. EERE-2012-BT-TP-0016]****RIN 1904-AC76****Energy Conservation Program for Consumer Products: Test Procedures for Refrigerators, Refrigerator-Freezers, and Freezers****AGENCY:** Office of Energy Efficiency and Renewable Energy, Department of Energy.**ACTION:** Notice of proposed rulemaking and public meeting.

**SUMMARY:** The U.S. Department of Energy (DOE) today is issuing a notice of proposed rulemaking to amend the test procedures for refrigerators, refrigerator-freezers, and freezers that will be required for the testing of products starting September 15, 2014. DOE is proposing to amend the test procedure to address products with multiple compressors and to allow an alternative method for measuring and calculating energy consumption for refrigerator-freezers and refrigerators with freezer compartments. DOE is also proposing to amend certain aspects of the test procedure in order to ensure better test accuracy and repeatability. Additionally, DOE is soliciting comment on a potential test procedure to measure the energy use associated with making ice with an automatic icemaker. If adopted, that procedure would become effective in conjunction with any parallel energy conservation standards rulemaking that DOE would need to conduct pursuant to the six-year review process mandated under Federal law.

**DATES:** DOE will hold a public meeting on July 25, 2013, from 9 a.m. to 4 p.m., in Washington, DC. The meeting will also be broadcast as a webinar. See section V, "Public Participation," for webinar registration information, participant instructions, and information about the capabilities available to webinar participants. DOE will accept comments, data, and information regarding this notice of proposed rulemaking before and after the public meeting, but no later than September 23, 2013. See section V, "Public Participation," for details.

**ADDRESSES:** The public meeting will be held at the U.S. Department of Energy, Forrestal Building, Room 8E-089, 1000 Independence Avenue SW., Washington, DC 20585. To attend, please notify Ms. Brenda Edwards at (202) 586-2945. See section V, "Public Participation" for details.

Any comments submitted must identify the NOPR for Test Procedures for Refrigerators, Refrigerator-Freezers, and Freezers, and provide docket number EERE-2012-BT-TP-0016 and/or regulatory information number (RIN) number 1904-AC76. Comments may be submitted using any of the following methods:

1. *Federal eRulemaking Portal:* [www.regulations.gov](http://www.regulations.gov). Follow the instructions for submitting comments.

2. *Email:* #Res-Refrig-Freezer-2012-BT-TP-0016@ee.doe.gov. Include docket number EERE-2012-BT-TP-0016 and/or RIN 1904-AC76 in the subject line of the message.

3. *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE-2J, 1000 Independence Avenue SW., Washington, DC 20585-0121. If possible, please submit all items on a CD. It is not necessary to include printed copies.

4. *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza SW., Suite 600, Washington, DC 20024. Telephone: (202) 586-2945. If possible, please submit all items on a CD. It is not necessary to include printed copies.

For detailed instructions on submitting comments and additional information on the rulemaking process, see section V, "Public Participation".

The docket is available for review at [regulations.gov](http://regulations.gov), including **Federal Register** notices, public meeting attendee lists and transcripts, comments, and other supporting documents/materials. All documents in the docket are listed in the [regulations.gov](http://regulations.gov) index. However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure.

A link to the docket Web page can be found at: <http://www.regulations.gov/#!docketDetail;D=EERE-2012-BT-TP-0016>. This Web page will contain a link to the docket for this notice on the [regulations.gov](http://regulations.gov) site. The [regulations.gov](http://regulations.gov) Web page will contain simple instructions on how to access all documents, including public comments, in the docket.

For further information on how to submit a comment, review other public comments and the docket, or participate in the public meeting, contact Ms. Brenda Edwards at (202) 586-2945 or by email: [Brenda.Edwards@ee.doe.gov](mailto:Brenda.Edwards@ee.doe.gov).

**FOR FURTHER INFORMATION CONTACT:** Mr. Lucas Adin, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building

Technologies Program, EE-2J, 1000 Independence Avenue SW., Washington, DC, 20585-0121, 202-287-1317, email: [refrigerators\\_and\\_freezers@ee.doe.gov](mailto:refrigerators_and_freezers@ee.doe.gov) or Mr. Michael Kido, U.S. Department of Energy, Office of the General Counsel, GC-71, 1000 Independence Avenue SW., Washington, DC 20585-0121. Telephone: (202) 586-8145. Email: [Michael.Kido@hq.doe.gov](mailto:Michael.Kido@hq.doe.gov).

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**I. Background and Authority**

Title III of the Energy Policy and Conservation Act (42 U.S.C. 6291, *et seq.*; “EPCA” or “the Act”) sets forth a variety of provisions designed to improve energy efficiency. (All references to EPCA refer to the statute as amended through the Energy Independence and Security Act of 2007 (EISA 2007), Pub. L. 110–140 (Dec. 19, 2007).) Part B of title III (42 U.S.C. 6291–6309), which was subsequently designated as Part A for editorial reasons, establishes the “Energy Conservation Program for Consumer Products Other Than Automobiles.” Refrigerators, refrigerator-freezers, and freezers (collectively referred to below as “refrigeration products”) are all treated as “covered products” under this Part. (42 U.S.C. 6291(1)–(2) and 6292(a)(1)) Under the Act, this program consists essentially of three parts: (1) Testing, (2) labeling, and (3) Federal energy conservation standards. The testing requirements consist of test procedures that manufacturers of covered products must use (1) as the basis for certifying to DOE that their products comply with the applicable energy conservation standards adopted under EPCA, and (2) for making representations about the efficiency of those products. Similarly, DOE must use these test requirements to determine whether the products comply with any relevant standards promulgated under EPCA.

By way of background, the National Appliance Energy Conservation Act of 1987 (NAECA), Public Law 100–12, amended EPCA by including, among other things, performance standards for refrigeration products. (42 U.S.C. 6295(b)) On November 17, 1989, DOE amended these performance standards for products manufactured on or after January 1, 1993. 54 FR 47916. DOE subsequently published a correction to revise these new standards for three product classes. 55 FR 42845 (October 24, 1990). DOE again updated the performance standards for refrigeration products on April 28, 1997, for products manufactured starting on July 1, 2001. 62 FR 23102.

EISA 2007 amended EPCA by requiring DOE to publish a final rule determining whether to amend the energy conservation standards for refrigeration products manufactured starting in 2014. (42 U.S.C. 6295(b)(4)) Consistent with this requirement, DOE initiated an effort to consider amendments to the standards for refrigeration products. As part of this effort, DOE issued a framework document on September 18, 2008, that discussed the various issues involved with amending the standards and potential changes to the test procedure. 73 FR 54089. DOE later prepared preliminary analyses that examined in greater detail the impacts amended standards would be likely to have on a national basis. DOE published a notice of proposed meeting (NOPM) to initiate a discussion of these analyses, 74 FR 58915 (Nov. 16, 2009), and held a public meeting on December 10, 2009, to discuss its preliminary findings. At that meeting, and in submitted written comments, interested parties indicated that the energy conservation standards for refrigeration products should address the energy use associated with automatic icemakers. They added, however, that a test procedure to measure icemaking energy use had not yet been sufficiently developed to provide a basis for the standards. (Energy Conservation Standards for Refrigerators, Refrigerator-Freezers, and Freezers, Docket No. EERE–2008–BT–STD–0012; American Council for an Energy Efficient Economy (ACEEE), No. 46 at p. 1; California Investor Owned Utilities (IOUs), No. 39 at p. 2; LG, No. 44 at pp. 2–3; Natural Resources Defense Council (NRDC), No. 42 at p. 2; Northeast Energy Efficiency Partnership (NEEP), No. 41 at p. 1; Northwest Power and Conservation Council (NPCC), No. 36 at p. 1; Sub-Zero, No. 43 at pp. 2–3; Appliance Standards Awareness Project (ASAP), Public Meeting Transcript, No. 30 at pp. 28–29; Association of Home Appliance Manufacturers (AHAM), No. 37 at p. 2; General Electric, No. 40 at p. 1)

DOE also initiated a test procedure rulemaking to help address a variety of test procedure-related issues identified in the energy conservation standard rulemaking’s framework document. Taking these issues into account, DOE published a notice of proposed rulemaking (NOPR) on May 27, 2010. 75 FR 29824 (hereafter referred to as “the May 2010 NOPR”). The May 2010 NOPR proposed to use a fixed value of 84 kWh per year to represent the icemaking energy use for those refrigeration products equipped with

automatic icemakers. The NOPR also indicated that DOE would consider adopting an approach based on testing to determine icemaking energy use if a suitable test procedure could be developed. *Id.* at 29846–29847. A broad group of stakeholders<sup>1</sup> submitted a joint comment supporting DOE’s proposal to use a temporary fixed placeholder value to represent the energy use of automatic icemakers. It also urged DOE to initiate a rulemaking no later than January 1, 2012, and publish a final rule no later than December 31, 2012, to amend the test procedures to incorporate a laboratory-based measurement of icemaking energy use. The joint comment further recommended that DOE publish a final rule by July 1, 2013, amending the energy conservation standards scheduled to take effect in 2014 to account for the differences in energy use of icemakers measured using the new test procedure as compared with the 84 kWh per year fixed placeholder value. (Test Procedure for Refrigerators, Refrigerator-Freezers, and Freezers, Docket Number EERE–2009–BT–TP–0003; Joint Comment, No. 20 at 5–6)

In keeping with the timeline suggested in the comment, AHAM provided DOE in early January 2012 with a draft test procedure that could be used to measure automatic icemaker energy usage. (AHAM Refrigerator, Refrigerator-Freezer and Freezer Ice Making Energy Test Procedure, Revision 1.0–12/14/11,<sup>2</sup> No. 4) Subsequently, consistent with the suggestions made by commenters and DOE’s previously stated intentions, DOE initiated work to develop today’s notice. On July 18, 2012, AHAM provided DOE with a revised test procedure. (AHAM Refrigerator, Refrigerator-Freezer and Freezer Ice Making Energy Test Procedure, Revision 2.0–7/10/12,<sup>3</sup> No. 5) Today’s notice, which is based in part on the approach suggested by AHAM, is designed to help the agency improve the accuracy of certain aspects of the test procedure that it recently promulgated. To ensure that any potential technical issues are addressed, DOE is soliciting

<sup>1</sup> The signatories to these comments included the Association of Home Appliance Manufacturers, the American Council for an Energy-Efficient Economy, the Natural Resources Defense Council, the Alliance to Save Energy, the Alliance for Water Efficiency, the Appliance Standards Awareness Project, the Northwest Power and Conservation Council, the Northeast Energy Efficiency Partnerships, the Consumer Federation of America, the National Consumer Law Center, Earthjustice, and the California Energy Commission.

<sup>2</sup> Subsequently referred to as “AHAM Draft Test Procedure”

<sup>3</sup> Subsequently referred to as “AHAM Revised Draft Test Procedure”

comments from the public on the potential adoption of the icemaking energy use measurement test that is detailed in today's notice. The procedure would be added as a new and separate section to the test procedure. Based on the comments received, DOE may adopt this testing approach (along with any necessary modifications) as part of the overall procedure but would require its usage to occur in parallel with any energy conservation standards rulemaking that would result from the mandatory review required under EPCA. See 42 U.S.C. 6295(m).

DOE does not anticipate, based on collected preliminary data that its proposed changes to the current procedure would be likely to require an adjustment to those standards that manufacturers must meet starting in 2014. Additional details regarding these adjustments are detailed below and explain why an adjustment to the 2014 standards will not be necessary.

#### *General Test Procedure Rulemaking Process*

Under 42 U.S.C. 6293, EPCA sets forth the criteria and procedures DOE must follow when prescribing or amending test procedures for covered products. EPCA provides in relevant part that “[a]ny test procedures prescribed or amended under this section shall be reasonably designed to produce test results which measure energy efficiency, energy use . . . or estimated annual operating cost of a covered product during a representative average use cycle or period of use, as determined by the Secretary [of Energy], and shall not be unduly burdensome to conduct.” (42 U.S.C. 6293(b)(3))

In cases where DOE is considering amending a test procedure (or adding a new one), DOE publishes a proposal and offers the public an opportunity to present oral and written comments. (42 U.S.C. 6293(b)(2)) When considering amending a test procedure, DOE must determine the extent to which, if any, the proposal would alter the measured energy use of a given product as determined under the existing procedure. (42 U.S.C. 6293(e)(1)) If DOE determines that the amended test procedure would alter the measured energy use of a covered product, DOE must also amend the applicable energy conservation standard accordingly. (42 U.S.C. 6293(e)(2))

Today's rulemaking addresses amendments that, if adopted, would apply to the test procedures that manufacturers must use to demonstrate compliance with the energy conservation standards starting on September 15, 2014 (*i.e.*, 10 CFR part

430, subpart B, appendices A and B). DOE has determined that none of the amendments to the test procedures proposed in this notice would be likely to significantly change the measured energy use of refrigeration products. DOE's analyses demonstrate that the proposed amendments to Appendices A and B, along with the possible incorporation of an optional “triangulation” method, will not affect measured energy use to any significant extent that would necessitate a change to any of the energy conservation standards for the products that would be affected by today's proposal. (42 U.S.C. 6293(e)(2)) Further, the preliminary data indicate that if DOE were to adopt the icemaking energy measurement test procedure detailed in today's notice, an adjustment to the standards be unnecessary. To demonstrate the effects of these amendments under consideration, DOE has conducted a preliminary evaluation of the anticipated impacts presented by today's proposal. This evaluation is discussed in further detail in section D.II of this notice. DOE notes that the proposed icemaking energy measurement test procedure amendments, if adopted, would not be required for manufacturers to use unless DOE were to set new or amended standards for refrigeration products after September 2014. Until such standards are developed, manufacturers would continue following the method that is laid out in Appendices A and B.

#### *Refrigerators and Refrigerator-Freezers*

DOE's test procedures for refrigerators and refrigerator-freezers are found at 10 CFR part 430, subpart B, appendices A1 (currently in effect) and A (required for rating products starting September 15, 2014). DOE initially established its test procedures for refrigerators and refrigerator-freezers in a final rule published in the **Federal Register** on September 14, 1977. 42 FR 46140. Industry representatives viewed these test procedures as too complex and eventually developed alternative test procedures in conjunction with AHAM that were incorporated into the 1979 version of HRF-1, “Household Refrigerators, Combination Refrigerator-Freezers, and Household Freezers” (HRF-1-1979). Using this industry-created test procedure, DOE revised its test procedures on August 10, 1982. 47 FR 34517. On August 31, 1989, DOE published a final rule establishing test procedures for variable defrost control (a control type in which the time interval between successive defrost cycles is determined by operating conditions indicating the need for

defrost rather than by compressor run time) refrigeration products, dual compressor refrigerator-freezers, and freezers equipped with “quick-freeze” (a manually-initiated feature that bypasses the thermostat and runs the compressor continuously until terminated). 54 FR 36238. DOE amended the test procedures again on March 7, 2003, by modifying the test period used for products equipped with long-time automatic defrost (a control type in which defrost cycles are separated by 14 hours or more of compressor run time) or variable defrost. 68 FR 10957. The test procedures include provisions for determining the annual energy use in kilowatt-hours (kWh) (54 FR 6062, Feb. 7, 1989) and the accompanying annual operating costs. 42 FR 46140 (Sept. 14, 1977).

DOE further amended the test procedures in a final rule published on December 16, 2010. 75 FR 78810. These amendments helped clarify how to test products for compliance with the applicable standards. The amendments clarified certain elements in Appendix A1 to ensure that regulated entities fully understand how to apply and implement the test procedure. These changes included clarifying how refrigeration products equipped with special compartments and/or more than one fresh food compartment or more than one freezer compartment should be tested. The amendments also accounted for the various waivers granted by DOE, specifically with regard to variable anti-sweat heater controls. The final rule also modified the regulatory definition of “electric refrigerator-freezer” by requiring the storage temperatures in the fresh food compartment of such a product to be at a level that would effectively exclude the coverage of combination wine storage-freezer products. See 10 CFR 430.2. The definition for “electric refrigerator” had already been amended to clarify the characteristics that distinguish it from related products, such as wine storage products, as part of a final rule published on November 19, 2001. 66 FR 57845. However, the December 2010 final rule made additional refinements to the definition. 75 FR at 78817 (Dec. 16, 2010). DOE is considering further modifying its product definitions to cover wine storage products as part of a separate rulemaking. See 77 FR 7547 (Feb. 13, 2012) (announcing the availability of DOE's framework document regarding wine chillers and other miscellaneous refrigeration products).

In the December 16, 2010 notice, DOE also established a new Appendix A, via an interim final rule. The new

Appendix A included a number of comprehensive changes to help improve the measurement of energy consumption of refrigerators and refrigerator-freezers. These changes included, among other things: (1) New compartment temperatures and volume adjustment factors, (2) new methods for measuring compartment volumes, (3) a modification of the long-time automatic defrost test procedure to ensure that the test procedure measures all energy use associated with the defrost function, and (4) test procedures for products with a single compressor and multiple evaporators with separate active defrost cycles. DOE noted that the compartment temperature changes introduced by Appendix A would significantly impact the measured energy use and affect the calculated adjusted volume and energy factor (*i.e.*, adjusted volume divided by energy use) values. Lastly, the interim final rule also addressed icemaking energy use by including a fixed value for manufacturers to add when calculating the energy consumption of those products equipped with an automatic icemaker. Using available data submitted by the industry, this value was set at 84 kWh per year. See 75 FR 78810, 78859 and 78871 (Dec. 16, 2010) (specifying daily value of 0.23 kWh for products equipped with an automatic icemaker).<sup>4</sup> In light of stakeholders' strong recommendations that the test procedure and energy conservation standards incorporate the energy use associated with icemaking, AHAM's development efforts, and additional work performed by NIST and DOE, DOE is soliciting the public for feedback on a possible replacement for the "fixed value" approach by detailing a test procedure based on these collective efforts that relies on laboratory measurements to determine the energy use of automatic icemakers. Based on the comments received, DOE may adopt this approach or consider other alternatives.

#### Freezers

DOE's test procedures for freezers are found at 10 CFR part 430, subpart B, appendices B1 (currently in effect) and B (required for the rating of products starting in 2014). DOE established its test procedures for freezers in a final rule published in the **Federal Register** on September 14, 1977. 42 FR 46140. As with DOE's test procedures for refrigerators and refrigerator-freezers, industry representatives viewed the freezer test procedures as too complex and worked with AHAM to develop

alternative test procedures, which were incorporated into the 1979 version of HRF-1. DOE revised its test procedures for freezers based on this AHAM standard on August 10, 1982. 47 FR 34517. The subsequent August 31, 1989 final rule established test procedures for freezers with variable defrost control and freezers with the quick-freeze feature. 54 FR 36238. A subsequent amendment occurred to correct that rule's effective date. 54 FR 38788 (Sept. 20, 1989). The current test procedures include provisions for determining the annual energy use in kWh and annual electrical operating costs for freezers.

As with refrigerators and refrigerator-freezers, the December 16, 2010 notice also clarified compliance testing requirements for freezers under Appendix B1 and created a new Appendix B, the latter of which manufacturers are required to use starting in 2014. That new test procedure changed a number of aspects of the procedure detailed in Appendix B1, including, among other things: (1) The freezer volume adjustment factor, (2) methods for measuring compartment volumes, and (3) the long-time automatic defrost test procedure. In addition, Appendix B also addresses icemaking energy use by implementing for freezers the same procedure adopted for refrigerator-freezers in which a fixed energy use value is applied when calculating the energy consumption of freezers with automatic icemakers. 75 FR 78810.

#### *Finalization of the Test Procedure Rulemaking for Products Manufactured Starting in 2014*

The December 2010 interim final rule established comprehensive changes to the manner in which refrigeration products are tested by creating new Appendices A and B. In addition to the changes discussed above, these new appendices also incorporate the modifications to Appendices A1 and B1 that were finalized and adopted on December 16, 2010.

DOE provided an initial comment period on the interim final rule, which ended on February 14, 2011, and subsequently reopened the comment period on September 15, 2011 (76 FR 57612) to allow for further public feedback in response to the promulgation of the final energy conservation standards that were published on the same day. 76 FR 57516. This re-opening permitted interested parties to comment on the interplay between the test procedure and the energy conservation standards, and provided DOE with additional information to consider before making

any final changes to the test procedures of Appendices A and B prior to their use by manufacturers starting on September 15, 2014. 76 FR at 57612-57613. That comment period ended on October 17, 2011. DOE also considered comments related to a petition for a test procedure waiver that had a direct bearing on elements of the test procedures used in Appendix A. See 76 FR 16760 (March 25, 2011) (petition no. RF-018, Samsung Electronics America, Inc. (Samsung)).

During the comment periods that DOE provided, interested parties raised a number of issues for DOE to consider with respect to the test procedure. The submitted comments included suggestions that DOE modify the test procedure for multiple compressor systems to reduce test burden, modify the test period for the second part of the test for products with long-time or variable defrost to assure proper accounting of all energy use associated with defrost, develop separate test procedures and standards for products combining wine storage with fresh food compartments, allow use of an alternative three-test interpolation approach as an option to potentially improve measurement accuracy at the cost of greater test burden for those manufacturers choosing to use it, adjust the test procedure's anti-circumvention provisions, and adjust the default values of  $CT_L$  and  $CT_M$  (the longest and shortest duration of compressor run time between defrosts) to be used in the energy use equations for products that do not have defined values for these parameters in their control algorithms. (Test Procedure for Refrigerators, Refrigerator-Freezers, and Freezers, Docket Number EERE-2009-BT-TP-0003; Sub-Zero, No. 42; AHAM, No. 43, Whirlpool, No. 44) Stakeholders recommended that all but the last of these changes be adopted in the current test procedures (Appendices A1 and B1) as well as the test procedures that will be required for certification of compliance with the new energy standards starting September 15, 2014 (Appendices A and B). The recommendation for changing the default values of  $CT_L$  and  $CT_M$  applied only to the latter set of test procedures.

On January 25, 2012, DOE published a final rule setting out the test procedures for refrigerators and refrigerator-freezers (Appendix A) and freezers (Appendix B) that manufacturers must use starting in 2014. 77 FR 3559. In finalizing the test procedures, DOE considered the changes recommended by stakeholders, including recommendations for certain amendments to be made to the current test procedures found in 10 CFR 430.23

<sup>4</sup> Multiplying 0.23 by 365 days per year yields 84 kWh.

and in Appendices A1 and B1. DOE declined to make the recommended amendments for these appendices because the supplementary comment period DOE provided had explicitly focused solely on issues related to Appendices A and B. Aspects of Appendices A1 and B1 had already been settled and finalized with the December 2010 final rule. *Id.* at 3568–3571. Additionally, DOE declined to adopt certain changes recommended for Appendices A and B. DOE declined to adopt these suggestions because the nature of those recommendations had not, in DOE's view, been presented in a manner that would have afforded the public with a sufficient opportunity to adequately comment on those issues. *Id.*

Nevertheless, after finalizing the rule setting out Appendices A and B, DOE reviewed these various suggestions and weighed their possible inclusion as part of the test procedure framework for refrigeration products. As a result of this review, DOE has decided to propose the inclusion of some of these recommended amendments in today's NOPR, including modified test procedures for products with multiple compressor systems, use of an alternative method for measuring and calculating energy use consumption at standardized temperatures for refrigerator-freezers and refrigerators with freezer compartments, and the modification of the anti-circumvention language currently found in these appendices.

#### Waivers

DOE has granted a limited number of petitions for waiver from the test procedures for refrigeration products since the publication of the December 2010 final rule. On January 10, 2012, DOE published a decision and order (D&O) responding to two waiver petitions from Samsung addressing products with multiple defrost cycle types. 77 FR 1474. That notice prescribed a procedure to account for the energy use associated with the multiple defrost cycles of a single-compressor-based system. The approach is identical to the procedure established for Appendix A in the January 25, 2012, final rule that manufacturers will need to follow starting in 2014. 77 FR 3559. DOE also issued a Decision and Order (D&O) that granted a waiver to GE Appliances (GE) to use the same test procedure for similar products. *See* 77 FR 75426 (Dec. 20, 2012) (GE waiver). In effect, these waivers permit these companies to address certain products that cannot be readily tested or that otherwise would produce unrepresentative energy consumption

measurements under the currently required test in Appendix A1.

DOE also granted a waiver to Sub-Zero, Inc. (Sub-Zero) to address that company's multiple-compressor products. *See* 77 FR 5784 (Feb. 6, 2012) (Sub-Zero waiver). That waiver permitted Sub-Zero to use the same test procedure that AHAM had recommended that DOE adopt for both Appendix A1 and Appendix A. (Test Procedure for Refrigerators, Refrigerator-Freezers, and Freezers, Docket Number EERE–2009–BT–TP–0003; AHAM, No. 43 at pp. 2–3) Today's NOPR proposes to add a test procedure for multiple compressor products that is based on the Sub-Zero waiver procedure.

Finally, on August 16, 2012, DOE granted a waiver to Sanyo E&E Corporation (Sanyo) to address a hybrid refrigeration product, *i.e.*, a product combining wine storage compartments in a refrigerator. *See* 77 FR 49443 (Decision and Order granting Sanyo's petition (Sanyo waiver)). The waiver cites a guidance document that DOE published in February 2011, which indicates that products combining a wine storage compartment and a fresh food compartment are considered refrigerators and should be tested as such.<sup>5</sup> The waiver further explains that the Sanyo hybrid product cannot be tested with its wine storage compartment at the standardized temperature required for testing refrigerators using Appendix A1 (*i.e.*, 38 °F), and that doing so would result in a non-representative energy use measurement. Hence, DOE granted Sanyo's request that it be allowed to test the product using a standardized temperature of 55 °F for the wine storage compartment. *Id.*

After granting a waiver, DOE waiver provisions generally direct the agency to initiate a rulemaking to amend its regulations to eliminate the continued need for the waiver. 10 CFR 430.27(m). Today's notice addresses this requirement for the Sub-Zero waiver by proposing to amend Appendix A to include a test procedure for multiple compressor products that is based on the Sub-Zero waiver procedure. The Sub-Zero waiver would terminate on September 15, 2014, the same date that manufacturers must use the test procedures in Appendix A for testing. The Samsung and GE waivers have already been addressed by the January 2012 final rule for products manufactured starting September 15,

2014. DOE does not currently anticipate that additional products on the market with single-compressor-based systems using multiple defrost cycles will be introduced prior to 2014, since it is DOE's understanding that this is a system design unique to those manufacturers who are currently covered by these waivers. Hence, at this time, DOE does not believe amending Appendix A1 to include this particular alternative test procedure is necessary. As for hybrid products such as the one identified by Sanyo, DOE will consider developing appropriate test procedures for these and similar products in a separate rulemaking. *See* 77 FR 7547 (Feb. 13, 2012).

#### II. Summary of the Proposal

DOE's December 2010 and January 2012 notices made a number of changes to the previous versions of the test procedures. These changes included modifying the current procedure and creating a substantially revised procedure that manufacturers must begin to use when certifying and rating refrigeration products starting in 2014. While the final rules made a number of significant improvements to the test procedures, there remained some pending issues that DOE was unable to address. Today's notice attempts to address those remaining issues.

Some of the improvements proposed in this notice could be considered for implementation in the current test procedures as well as the procedures that will be required for certification starting in 2014. However, the current test procedures will continue to be used only for a limited time. Hence, DOE is not proposing to make any substantive amendments to these test procedures, which are contained in Appendices A1 and B1. (The proposal does, however, include amendments that would correct certain cross-references in these appendices to sections of 10 CFR 429). DOE requests comments on its proposed amendments to Appendices A and B, along with its tentative decision to refrain from applying this approach to the currently required Appendices A1 and B1.

The proposed amendments and issues on which DOE seeks public comment are summarized below.

First, DOE is soliciting comment on its proposal to incorporate laboratory-based test procedures for measuring energy use associated with automatic icemaking to replace the standardized value used to represent icemaking energy use that DOE adopted as part of the December 2010 test procedure interim final rule. *See* 75 FR at 78859 (Appendix A, sec. 6.2.2.1.) and 78871

<sup>5</sup> This guidance is posted in DOE's online Guidance and FAQ database, and is available for viewing at <http://www1.eere.energy.gov/guidance/default.aspx?pid=2&spid=1>

(Appendix B, sec. 6.2.1.1.). Responding to DOE's preliminary analysis in 2009, a broad group of stakeholders agreed that DOE should regulate icemaking energy use as part of the refrigeration product energy conservation standards. The commenters recognized, however, that suitable test procedures were not yet available to allow their introduction in time for use with the 2014 energy conservation standards. (See Energy Conservation Standards for Refrigerators, Refrigerator-Freezers, and Freezers, Docket No. EERE-2008-BT-STD-0012; ACEEE, No. 46 at p. 1; and AHAM, No. 37 at p. 2) With this understanding, many of these stakeholders collaborated to submit a joint comment recommending that DOE conduct a rulemaking in 2012 to amend its refrigeration product test procedures to incorporate icemaking energy use. (Test Procedure for Refrigerators, Refrigerator-Freezers, and Freezers, Docket Number EERE-2009-BT-TP-0003; Joint Comment, No. 20 at pp. 5-6) AHAM submitted to DOE a "draft" version of this test procedure in January 2012. Later, in July 2012, it submitted a revised version of this earlier draft and recommended that DOE adopt it. (AHAM Draft Test Procedure, No. 4; and AHAM Revised Draft Test Procedure, No. 5)<sup>6</sup>

Today's notice solicits comment on an approach that would measure the energy use of automatic icemaking. That approach is based in part on the suggested approach from AHAM. Depending on the nature of any submitted comments, DOE may modify this approach. At this time, DOE is proposing that manufacturers would not be required to use this procedure until DOE amends the energy conservation standards for refrigeration products as part of the mandatory review required under EPCA. By linking this new measurement method with a new standards rulemaking, DOE can better ensure that all of these new requirements are coordinated within the context of a standards rulemaking (which would include any potential impacts related to icemaking energy use) and avoid any potential labeling issues that may arise, particularly since the new standards that DOE promulgated in 2011 will not be

required for compliance purposes until 2014. See 76 FR 57516.

Further, DOE notes that manufacturers must base their written representations of energy usage on a new test procedure within 180 days of when the final rule for that procedure is published. See 42 U.S.C. 6293(c)(2). Given the upcoming transition to the new standards for 2014, it is possible that this requirement, if adopted, could lead to confusion as consumers attempt to understand the meaning of the reported values, particularly if the reported values differ between two identical models that may have been tested under different provisions. Additionally, manufacturers would need to adjust their testing and labeling to account for the new icemaking energy measurement protocol. In light of these concerns, it is DOE's tentative view that linking the timing of when manufacturers should begin using the icemaking energy use test method with the agency's statutorily-mandated review of the 2014 standards would reduce consumer confusion and minimize the overall burdens faced by manufacturers while ensuring that a viable procedure is in place for measuring the energy use from icemaking. DOE notes that if it should adopt this measurement procedure, it would use that procedure in evaluating potential adjustments to the energy conservation standards as part of the mandatory review. This two-step approach should help ensure a smoother transition to a potential new set of standards based on any icemaking energy use test that DOE may adopt. DOE also notes that if this procedure were adopted in the manner described above, a manufacturer seeking to use the new procedure earlier than required would need to obtain a test procedure waiver from DOE in advance of doing so.

Second, today's notice proposes to add test procedures for products with multiple compressor systems. These proposed procedures are based on the waiver granted to Sub-Zero on February 6, 2012. 77 FR 5784. They are proposed for inclusion only in Appendix A (i.e. procedures for these products required starting in 2014). The approach is not applicable to freezers and, hence, is not proposed for inclusion in Appendix B.

Third, the proposal would address two issues raised by commenters during the previous refrigeration product test procedure rulemaking. The first would make modest changes to the "anti-circumvention" language of 10 CFR 430.23, which is found in paragraph (a)(10) for refrigerators and refrigerator-freezers, and paragraph (b)(7) for

freezers. This proposed amendment would help clarify product design and control system issues to ensure that the measurements from testing are accurate and representative of expected consumer use. The second would allow the optional use of a new, alternative method for measuring and calculating the energy use of refrigerator-freezers and refrigerators with freezer compartments. This method, commonly known as "triangulation," may, for some products, provide a more accurate measure of energy use—notably, for products with control systems that are not balanced to simultaneously match the standardized temperatures of both the freezer and fresh food compartments at the same positions of the temperature controls for these compartments. Triangulation involves the use of an additional test conducted using a third temperature control setting. (Under Appendix A, only two temperature control settings are used to calculate the energy usage of a given refrigeration product.) The proposal would allow manufacturers to use this test as an alternative for certification if a manufacturer believed that the more comprehensive triangulation test would provide a more accurate measurement of energy use than the simpler, "two temperature-control-setting" method already provided in DOE's regulations. The proposal would also require that certification reports indicate whether triangulation has been used for testing. The NOPR proposes that triangulation be adopted in Appendix A. This test method is not applicable to freezers and, hence, is not proposed for inclusion in Appendix B. Additionally, while manufacturers would have the option of using either the two-part or triangulation test, DOE is proposing that it would use the triangulation test for assessment and enforcement testing in some cases.

Today's proposal also includes amendments associated with certification of compliance. First, it includes a proposal to eliminate the current requirement to report the height of refrigeration products in certification reports starting September 15, 2014. This information will no longer be necessary to classify products after this date, because the compact product classes will no longer have a height limit. See 76 FR 57515, 57538 (Sept. 15, 2011) and DOE Guidance (Oct. 6, 2011) regarding compact products, [http://www1.eere.energy.gov/buildings/appliance\\_standards/pdfs/refr-frz\\_faqs\\_2011-10-06.pdf](http://www1.eere.energy.gov/buildings/appliance_standards/pdfs/refr-frz_faqs_2011-10-06.pdf). This change in the certification report requirements of 10 CFR 429.14(b)(2) would, in DOE's

<sup>6</sup>DOE's proposal is more consistent with the revised AHAM test procedure than with AHAM's initial draft. However, it is instructive to consider the contrast between the initial and revised AHAM test procedures, since justification for certain complications present in the DOE proposal for testing products that cycle compressors during icemaking are best explained through comparison with the simpler, but potentially less accurate, method of the initial AHAM draft.

view, reduce the overall reporting burden faced by manufacturers. The proposal would also move the requirement to report whether a product has variable defrost or variable anti-sweat heaters from section 429.14(b)(3) to section 429.14(b)(2) to reflect that DOE intends for this information to be publicly available.

As a measure intended to reduce testing burden and potentially improve the accuracy of reported data, today's proposal would permit the use of volume calculations derived using computer aided design (CAD) tools in lieu of physical measurements of each basic model. To enable manufacturers to use this option, DOE is proposing changes to the requirements of Appendices A and B for measuring volume, adding a new section 429.72 establishing requirements applicable to volume measurement, and adding a process in a new section 10 CFR 429.134 for verifying the rated volume of a product. Finally, the references in section 5.1 of Appendices A and B to certification test reports would be corrected, changing references from 10 CFR 429.14 to 10 CFR 429.71.

The proposal also includes several clarifying amendments. These include: (a) Clarifying the term "incomplete cycling" as it applies to tested products and also modifying the test period for these products to ensure more accurate energy use measurement, (b) more specific instructions for setting mechanical temperature controls at their warmest and coldest settings, (c) clarifying the requirements for measuring ambient temperature and for maintaining ambient temperature gradients during testing, (d) establishing definitions for several commonly understood (but undefined) terms used in the test procedures, (e) a correction to the definition of the term "E" as used in section 6.2.2.2 of Appendix A to reference the proper section of the procedure, (f) required conditions for "connected" products during testing, (g) more specific instructions regarding the required clearance to the rear wall during testing, and (h) more specific instructions for relocation of interior components, such as shelving, to allow placement of temperature sensors in the required locations. In DOE's view, adopting these proposed amendments would improve test accuracy and would help ensure consistency when tests are carried out by different testing laboratories. These proposals, which are not expected to lead to any changes in

measured energy usage, would be adopted in Appendices A and B.

Today's proposal also includes corrections to the temperature setting tables—Tables 1 and 2 of Appendix A and Table 1 of Appendix B. These tables would be modified in the CFR to properly reflect the intended temperature-setting progression from the initial test through the final test. The proposal would eliminate some horizontal lines in these tables to clarify the temperature-setting logic.

Further, DOE is seeking comments on a specific aspect related to built-in products, namely, whether testing these products in their built-in conditions would provide more representative and accurate energy consumption measurements. Under the current procedures, manufacturers are not required to test these products in a built-in condition. However, data recently collected by DOE, described in section III.D.1, suggest that some built-in products may yield different energy use measurements depending on whether they are tested in a built-in condition.

Finally, DOE has proposed amendments to address issues that DOE has identified through product testing. The first involves products with variable defrost, which are tested using provisions in Appendices A and B that are designed to account for variation in compressor run time between defrost cycles. DOE has observed in some cases that the actual minimum time between defrosts during testing was less than the minimum value reported to DOE in the model's certification report. To ensure that measured values of energy use are representative of the actual operation of models with variable defrost, DOE proposes to require use of the minimum observed compressor run time between defrosts if it is less than the certified value. The second proposal is to include more specific instructions regarding loading of packages in freezers, as required by Appendix B, which DOE believes will result in more consistent performance of this aspect of the test procedure.

The proposed amendments discussed in this notice would, if adopted, take effect 30 days after issuance of the final rule. However, manufacturers would be required to use the modified versions of Appendices A and B for rating products starting on the compliance date for the 2014 standards, which is September 15, 2014. 76 FR 70865 (Nov. 16, 2011). With the exception of the proposed test method for icemaker energy use, which would be addressed separately from the

other proposed amendments to Appendices A and B, these changes either involve clarifications or provide alternatives to those methods that manufacturers already must use—or otherwise permit manufacturers to use a procedure that the industry has already largely developed and vetted. None of these amendments would, to DOE's knowledge, alter the measured energy use to any significant extent, and DOE does not anticipate that manufacturers will need to make substantial efforts to adjust to any of these proposed changes. With respect to the adoption of the proposed icemaker-related amendments for Appendices A and B, none of these changes would be required until DOE prescribes new or amended standards for refrigeration products. Until that time, manufacturers would continue using the fixed value approach prescribed in the regulations to account for icemaking energy use. Should these proposed amendments be adopted, manufacturers seeking to use this procedure prior to DOE's promulgation of new or amended standards would need to obtain a test procedure waiver in advance of doing so.

### III. Discussion

This notice contains a number of proposed modifications to the refrigerator, refrigerator-freezer, and freezer test procedures, and DOE encourages stakeholders to submit comments on any aspect of these proposals. Comments are especially encouraged if stakeholders wish to provide supporting data, propose alternate approaches, and express support for (or objections to) DOE's tentative views on the issues discussed in this notice.

The following section discusses in further detail the various issues addressed by today's notice. Table III-1 below lists the subsections of this section and indicates where the proposed amendments, along with the potential icemaking energy measurement test that DOE is considering, would appear in each appendix. Section A identifies the products covered by the proposal; section B specifies the compliance dates that would apply to the proposed amendments; section C discusses the test procedure amendments; section D discusses testing of built-in products and requests comment on the discussion without proposing a test procedure amendment; and section E discusses compliance of the proposal with other EPCA requirements.

TABLE III-1—DISCUSSION SUBSECTIONS

Section	Title	Affected appendices	
		A	B
III.A	Products Covered by the Proposed Rule	No proposed changes.	
III.B	Proposed Dates for the Amended Test Procedures	X	X
1	Icemaking Test Procedure	X	X
2	Multiple Compressor Test	X	
3	Triangulation	X	
4	Anti-Circumvention Language	*	
5	Incomplete Cycling	X	X
6	Mechanical Temperature Controls	X	X
7	Ambient Temperature Gradient	X	X
8	Definitions Associated with Defrost Cycles	X	X
9	Elimination of Reporting of Product Height	**	
10	Measurement of Product Volume ***	X	X
11	Corrections to Temperature Setting Logic Tables	X	X
III.C.12	Default Minimum Compressor Run-Time Between Defrosts for Variable Defrost Models	X	X
III.C.13	Treatment of "Connected" Products	X	X
III.C.14	Changes to Confidentiality of Certification Data	***	
III.C.15	Package Loading		X
III.C.16	Rear Clearance During Testing	X	X
III.C.17	Other Minor Corrections †	X	X
III.C.18	Relocation of Shelving	X	X
III.D.1	Built-In Refrigerators	No proposed changes.	
III.D.2	Products that are Operable as a Refrigerator or a Freezer		
1	Test Burden		
2	Changes in Measured Energy Use		
3	Standby and Off Mode Energy Use		

\* This amendment would appear in 10 CFR 430.23, but would affect testing using all four appendices.

\*\* This amendment would appear in 10 CFR 429.14, but would affect certification reporting for products tested using Appendices A and B.

\*\*\* This amendment includes proposed modifications to 10 CFR 429.14.

† This section also proposes an amendment to 10 CFR 430.2.

**A. Products Covered by the Proposed Rule**

Today's amendments cover those products that meet the definitions for refrigerator, refrigerator-freezer, and freezer, as codified in 10 CFR 430.2. The definitions for refrigerator and refrigerator-freezer were amended in the December 16, 2010 final rule. 75 FR at 78817 and 78848.

**B. Proposed Dates for the Amended Test Procedures**

This notice proposes amendments that would be made in sections 429.14 and 430.23 and in Appendices A and B.

The proposed amendments to sections 429.14 and 430.23 would be effective 30 days after publication of a final rule. Manufacturers would not be required to use the amended test procedures to rate their products until 180 days after issuance of the final rule. See 42 U.S.C. 6293(c)(2).

Some of the proposed amendments that aim to improve measurement accuracy by clarifying certain aspects of

the test procedures or to reduce test burden could potentially be considered for adoption in the current test procedures (i.e., Appendices A1 and B1). However, these appendices are scheduled to be obsolete after September 2014, so DOE is not proposing to amend them. DOE requests comments on this approach.

The proposed amendments that would apply to Appendices A and B would be effective 30 days after issuance of a final rule, but manufacturers would not be required to use this procedure prior to September 15, 2014. Once that date arrives, however, Appendices A and B will be mandatory for making representations regarding the energy use or operating costs of refrigeration products. Manufacturers would be permitted to use Appendices A and B before this 2014 date if they choose to do so, provided that they indicate in their certification submissions that their ratings are based on Appendix A or B

and that the products satisfy the 2014 standards.

As discussed in section I, this NOPR addresses the joint comments of a broad group of stakeholders who urged DOE to initiate a rulemaking to amend the test procedures for refrigeration products to incorporate a laboratory-based measurement of icemaking energy use. The joint comment further recommended that DOE publish a final rule by July 1, 2013, and amend the energy conservation standards scheduled to take effect in 2014 to account for the differences in measured energy use of icemakers when using the new test procedure as compared with the 84 kWh per year fixed placeholder value. (Test Procedure for Refrigerators, Refrigerator-Freezers, and Freezers, Docket Number EERE-2009-BT-TP-0003; Joint Comment, No. 20 at 5-6) However, as discussed in section 1, DOE has tentatively determined that its proposal to address icemaking energy use would not affect measured energy use to any significant extent. Hence,

DOE believes at this time that adjusting the energy conservation standards as suggested would not be necessary. Section 1 discusses DOE's preliminary assessment of the likely impact of the icemaking test procedure detailed in today's notice on energy consumption measurements. Supporting data are provided to help illustrate this impact.

As pointed out earlier, the proposed icemaking test procedure would not be required until DOE prescribes new or amended standards for refrigeration products. Until that time, manufacturers would continue using the fixed value approach currently prescribed in DOE's regulations to account for icemaking energy use. Should these proposed amendments be adopted, manufacturers seeking to use this procedure prior to DOE's promulgation of new or amended standards would need to obtain a test procedure waiver in advance of doing so.

### C. Proposed Test Procedure Amendments

The following discussion addresses aspects of DOE's proposal to amend 10 CFR 430.23 and Appendices A and B. DOE seeks comment on all aspects of its proposal as described below.

#### 1. Icemaking Test Procedure

Nearly all refrigerator-freezers currently sold either have a factory-installed automatic icemaker or are "icemaker-kitable"—*i.e.*, they are manufactured with the necessary water tubing, valve(s), and icemaker mounting hardware to allow quick installation of an automatic icemaker at any time after the product leaves the factory. Ice production increases the energy use of a refrigerator-freezer in two ways: (1) Some icemaker components (*e.g.*, the mold heater and the gear motor) consume energy, and (2) additional refrigeration is required to cool and freeze incoming water and to remove the heat generated by icemaker components (*e.g.*, the mold heater).

The current test procedure for refrigerators and refrigerator-freezers does not measure the energy use associated with ice production. Specifically, HRF-1-1979, section 7.4.2 (which is incorporated by reference into the current test procedures of Appendix A1) states, "Automatic icemakers are to be inoperative during the test".<sup>7</sup> In the

May 2010 NOPR, DOE indicated that energy use associated with automatic icemaking represents 10 percent to 15 percent of the rated energy use of typical refrigeration products. *See* 75 FR at 29846-29847 (May 27, 2010). As discussed in section I of this notice, stakeholders commented in response to DOE's presentation of its preliminary analysis supporting the recently completed energy conservation standard rulemaking that the test procedures and energy conservation standards for refrigeration products should address icemaking energy use (see, for example, Energy Conservation Standards for Refrigerators, Refrigerator-Freezers, and Freezers, Docket No. EERE-2008-BT-STD-0012; ACEEE, No. 46 at p. 1).

However, stakeholders also commented that a test procedure to measure icemaking energy use had not yet been sufficiently developed. (Energy Conservation Standards for Refrigerators, Refrigerator-Freezers, and Freezers, Docket No. EERE-2008-BT-STD-0012; AHAM, No. 37 at p. 2; General Electric, No.40 at p. 1) To avoid delaying the energy conservation standard rulemaking, DOE published the new Appendix A test procedure and related energy conservation standard with a fixed placeholder energy use value of 84 kWh/year for products with automatic icemakers, to represent the average amount of energy consumed in ice production. 75 FR at 78842-78843 (Dec. 10, 2010) and 76 FR at 57538 (Sept. 15, 2011). (The 84 kWh/year value is equivalent to the 0.23 kWh/day value found in Appendices A and B, Section 6.2.2.1. That 0.23 kWh/day value is multiplied by 365 (see, for example, 10 CFR 430.23(a)(1)), which yields an annual consumption of 84 kWh/year.)

As part of the 2010 industry and efficiency advocate consensus agreement, AHAM agreed to develop an icemaking test procedure before January 1, 2012. (Test Procedure for Residential Refrigerators, Refrigerator-Freezers, and Freezers, Docket No. EERE-2009-BT-TP-0003, Joint Comment, No. 20 at p. 5).

#### Summary of AHAM's Initial Draft and Revised Draft Icemaking Test Procedures

A key aspect to determining annual energy use associated with icemaking is the average daily ice production. AHAM presented some information to DOE in late 2009 regarding this value in a document summarizing the status of its test procedure development work, titled "AHAM Update to DOE on Status of Ice Maker Energy Test Procedure—

November 19, 2009".<sup>8</sup> (AHAM Ice Making Test Update, AHAM, No. 7 at p. 5). That document also included data suggesting that using a daily production rate of 1.8 pounds of ice per refrigeration product would be appropriate. This value was based on a total "sample size" of 155. However, the document did not elaborate further on the sample size other than to indicate that it had been derived using the combined data from three consumer surveys and three separate field tests.

In early January 2012, AHAM provided DOE with a draft of its icemaking test procedure, "AHAM Refrigerator, Refrigerator-Freezer, and Freezer Ice Making Energy Test Procedure, Revision 1.0—12/14/11". (AHAM Draft Test Procedure, No. 4) That draft indicated that it applies to refrigerators, refrigerator-freezers and freezers, as defined in 10 CFR 430.2, that were equipped with a single automatic icemaker (including non-icemaker-equipped models that could be readily retrofitted with an optional automatic icemaker).

In July 2012, AHAM provided DOE with a revision of its icemaking test procedure, "AHAM Refrigerator, Refrigerator-Freezer, and Freezer Ice Making Energy Test Procedure, Revision 2.0—07/10/12". (AHAM Revised Draft Test Procedure, No. 5) The AHAM Revised Draft Test Procedure applies to products that have one or more automatic icemakers. In addition, it includes several revisions to the AHAM Draft Test Procedure. The paragraphs below summarize the AHAM Revised Draft Test Procedure and highlight provisions from the AHAM Draft Test Procedure relevant to the detailed procedure on which DOE seeks comment.

The AHAM Revised Draft Test Procedure does not address the average ice production rate and does not include a value to apply when converting the measured icemaking energy use into a value of energy use per daily cycle. In contrast, the earlier AHAM Draft Test Procedure retained the current assumed 1.8-pound daily ice production rate through the use of an annual ice consumption value set at 657 pounds. Dividing this value by 365 days yields an ice production rate of 1.8 pounds per day. (AHAM Draft Test Procedure, No. 4 at pp. 7-8)

The AHAM Revised Draft Test Procedure would require an ambient test room temperature of 90 °F, which is consistent with the DOE procedures (*see, e.g.*, Appendix A, section 2.1). It

<sup>8</sup> Subsequently referred to as "AHAM Ice Making Test Update".

<sup>7</sup> DOE has published guidance documents clarifying how to render icemakers "inoperative" during a test. See, for example, "Additional Guidance Regarding Application of Current Procedures for Testing Energy Consumption of Refrigerator-Freezers with Automatic Ice Makers", [http://www1.eere.energy.gov/buildings/appliance\\_standards/residential/pdfs/rf\\_test\\_procedure\\_addl\\_guidance.pdf](http://www1.eere.energy.gov/buildings/appliance_standards/residential/pdfs/rf_test_procedure_addl_guidance.pdf).

would also require target compartment temperatures of 39 °F for fresh food compartments and 0 °F for freezer compartments. These temperatures match the standardized temperatures prescribed by the DOE energy tests (see Appendix A, section 3.2 for refrigerator-freezers and Appendix B, section 3.2 for freezers). While the AHAM revised draft test does not mention the freezer compartment standardized temperature for refrigerators, which the DOE test sets at 15 °F (see Appendix A, section 3.2), it does indicate that its scope would extend to refrigerators. See AHAM Revised Draft Test Procedure, section 2.1.

In view of the above, DOE requests comment on whether any refrigerators (*i.e.*, “electric refrigerator” as defined in 10 CFR 430.2, and not a refrigerator-freezer) are sold with automatic icemakers (including non-icemaker-equipped models that could be readily retrofitted with an optional automatic icemaker). (DOE’s review found none.) If so, DOE also seeks comment on whether test procedures for automatic icemakers should cover these “electric refrigerators” and to what extent, if any, the test procedure would need to be modified to accommodate the testing of these products. DOE is seeking comment on this issue in part to ascertain whether this aspect of today’s proposal should apply to refrigerators as opposed to only refrigerator-freezers. DOE is currently unaware of any refrigerator that is sold equipped with an automatic icemaker.

The AHAM Revised Draft Test Procedure also does not mention whether the test procedure would apply to refrigeration products with manual defrost. Such products are tested with frozen food packages in their freezer compartments (see, for example, Appendix B, section 2.2 and HRF-1–2008, sections 5.5.3 and 5.5.5.3). Any icemaking test procedure would likely require that such products be tested with the frozen food packages removed, since some of the test operations, such as removing ice from the ice bin, may be impossible if the freezer compartment is full of packages. DOE requests comment on whether any manual defrost refrigerator-freezers or freezers are sold with automatic icemakers and whether any test procedure modifications would be required to address such products.

The AHAM Revised Draft Test Procedure specifies the use of target compartment temperatures, equal to the standardized compartment temperatures already prescribed in Appendices A and B, for a baseline test involving no icemaking. However, rather than

following the DOE procedure of requiring tests to measure icemaking energy use at the median and cold (or warm) settings of the temperature controls and calculating energy use as a weighted average of the measurements at the two selected settings (see Appendix A, section 3.2.1), the AHAM Revised Draft Test Procedure, if adopted, would require that a single test be conducted with the temperature controls adjusted to achieve a compartment temperature within 2 °F of the target temperature. The temperature controls would not be adjusted further during the phases of the test in which the product is producing ice.

The AHAM Revised Draft Test Procedure would also require that the test setup be in accordance with the setup already prescribed by the DOE test procedure (or “DOE energy test”). It also specifies that the supply water for the icemaker must have a temperature range of 90 +/– 2 °F and a pressure range of 60 ±15 pounds per square inch gauge pressure (psig).<sup>9</sup> No further setup requirements are provided.

In calculating the energy use per pound of ice produced, the AHAM Revised Draft Test Procedure would require subtracting the average energy use per day (in kWh/day) measured during a baseline test (during which the product is not making ice) from the average energy use per day (in kWh/day) measured during an icemaking test, and dividing the difference between the results of the two tests by the average rate of ice production (pounds per hour) during the icemaking test. This calculation would yield a final value in kilowatt-hours per pound (kWh/lb). The energy use for both the baseline and icemaking tests would be measured under the proposed procedures during steady-state operation and not during a defrost.

The test period for the baseline test could consist of at least seven hours of operation equivalent to the procedure for confirming steady-state conditions during the DOE energy test (see Appendix A, section 2.9). For products with cycling compressors, this test period would include two periods of at least two hours each, both comprising a whole number of compressor cycles, separated by one period of at least three hours. Although this test period is used only to confirm steady-state conditions in the DOE test procedure, the AHAM Revised Draft Test Procedure would also use this period as the test period for

measuring energy use when the product is not making ice.

According to the AHAM Revised Draft Test procedure, the icemaking part of the test for products that do not cycle their compressors during icemaking would require a test period of at least 24 hours and consist of multiple complete icemaker cycles. If the test is interrupted by a defrost or if the ice storage bin fills before 24 hours have elapsed, the test period would be the maximum time between defrost cycles or the maximum time before the ice bin is filled with ice.

The AHAM Revised Draft Test Procedure would calculate icemaking energy use in products that cycle their compressors during icemaking differently from the initial AHAM Draft Test Procedure. Specifically, the AHAM Revised Draft Test Procedure would use a measurement of average ice production per hour that would be adjusted to account for differences in compressor run time of a first test period based on compressor cycles (which would be used to determine average energy use during icemaking) and a second test period based on icemaker cycles (which would be used as the basis for measuring the energy use per icemaking cycle and the mass of harvested ice). (AHAM Revised Draft Test Procedure, No. 5 at p. 8). The adjustment would be based on the two measurements of energy use associated with the two test periods. In contrast, the AHAM Draft Test Procedure relied on energy use and harvested ice mass measured for a single test period based on icemaker cycles, irrespective of whether the compressor cycles during icemaking (AHAM Draft Test Procedure, No. 4 at p. 7). The contrast between these two approaches is highlighted below, the approach DOE is considering would include the more comprehensive approach of the AHAM Revised Draft Test Procedure.

Under the AHAM Revised Draft Test Procedure, the final calculated result would be the incremental icemaking energy use per mass of ice in kilowatt hours per pound of ice. There would be no further conversion of this value into energy use per daily cycle or per year. In contrast, the AHAM Draft Test Procedure included a conversion calculation to yield an annual ice production rate. (AHAM Draft Test Procedure, No. 4 at p. 7–8)

#### Potential Approach Under Consideration

The approach DOE is considering for measuring icemaking energy use is based on the AHAM Revised Draft Test Procedure. It differs from that draft in

<sup>9</sup> Gauge pressure is absolute pressure minus barometric pressure, *i.e.*, the pressure that a pressure gauge connected to the water supply piping would indicate.

that the DOE approach would include greater detail to improve clarity and testing consistency. If adopted, DOE would likely add this icemaking energy measurement procedure as a new section 8 for both Appendices A and B. While this discussion touches on a number of key aspects related to the potential approach, DOE encourages interested parties to review it carefully and to comment on all of its aspects.

The key modifications DOE is considering compared with the AHAM test procedure would attempt to:

(1) Establish a definition for “ice piece” in addition to the definitions suggested by the AHAM Revised Draft Test Procedure.

(2) Clarify that the anti-sweat heater must be turned off during the icemaking test period, and that the water filter must be installed.

(3) Require that measurements be recorded during testing at time intervals not exceeding one minute.

(4) Clarify the points at which an icemaker cycle begins and ends. Many icemakers have mold heaters that are energized with 100W or more power input for more than a minute. This temporary increase in power is easily recognizable when evaluating the wattage data for a refrigerator test. Icemakers without mold heaters do not provide such an indication that one icemaking cycle has ended and the next has started. These icemakers would require the use of an alternative method to identify the beginning and end of icemaker cycles. The proposal would specify three alternative options: measuring the icemaker mold temperature, measuring the water supply temperature, or monitoring the activation of the water supply solenoid valve.

(5) Require that each compartment’s average temperature during the baseline part of the test be no more than 1 °F warmer than its standardized temperature

(6) Require that each compartment’s average temperature during icemaking be no more than 1°F (0.6 °C) warmer than its temperature during the baseline test, and require adjustment of temperature control settings if necessary to meet this temperature requirement. Also, the proposed test procedure would require products with a feature that automatically reduces the freezer compartment temperature setpoint or maintains compressor operation at an elevated duty cycle or speed during icemaking to be tested with this feature enabled.

(7) Prescribe the use of a baseline test period consistent with the test period specified in the DOE test procedure in

Appendix A, section 4.1, rather than using the stabilization test period as the test period for baseline energy use calculation.

(8) Prescribe the use of equations that are equivalent, but not identical to, those of the AHAM Revised Draft, making more direct use of values measured during the test and involving fewer intermediate calculations.

(9) Apply a temperature stability criterion to the icemaking test period.

(10) Specify that icemaking would be initiated earlier than specified in the AHAM Revised Draft after completion of defrost.

(11) Address refrigeration products with multiple icemakers by requiring that such units be tested with only one of these icemakers operating during the test, rather than all of them simultaneously. The approach DOE is considering would also specify which icemaker to operate.

(12) Specify a daily ice production rate of 1.8 pounds per day in order to allow calculation of the contribution of icemaking to annual energy use. DOE is also considering requiring that products that cycle their compressors during icemaking would have their energy use calculated in a manner similar to the AHAM Revised Draft Test Procedure (*i.e.*, calculate energy use both for test periods comprising a complete (whole) number of compressor cycles and for test periods comprising complete icemaker cycles). The two calculations would be performed using the data from the same single icemaking test, as recommended in the AHAM Revised Draft. Using this approach would, in DOE’s view, help improve measurement accuracy for the reasons described below.

#### Potential Icemaking Section

As noted above, DOE is considering incorporating an icemaking test based on AHAM’s Revised Draft Test Procedure into Appendices A and B (*i.e.* the test procedures manufacturers must use starting in September 2014) by adding a new Section 8 to both appendices. Separating this new method from the other sections would, in DOE’s view, help reduce the risk of confusion and improve the overall clarity of the procedures.

#### Icemaking Definitions

To help ensure clarity during testing, DOE proposes to add four definitions to provide background for the terminology that would be used in conjunction with whatever potential icemaking test procedure DOE adopts. Two of these definitions are identical to those used in the AHAM Revised Draft Test Procedure

and are commonly understood in the industry but are currently undefined:

“Harvest” means the process of freeing or removing ice pieces from an automatic icemaker.

“Ice Storage Bin” means a container in which ice can be stored.

In addition, DOE proposes to define “Ice Piece” as a piece of ice made by an automatic icemaker and that has not been reduced in size by crushing or other mechanical action. Although people often refer to ice pieces as ice “cubes”, DOE proposes to use “pieces” instead to (a) avoid the suggestion that ice pieces must have a specific shape, and (b) avoid confusion with DOE’s energy conservation standards for automatic commercial ice makers, which include a definition for “cube type ice”. (See 10 CFR 431.132) DOE also notes that the AHAM Revised Draft Test Procedure does not use the term “cube” and has established the precedent of using the term “ice piece”, as seen in the definition for “harvest” discussed above.

Finally, since neither the test procedures in Appendices A and B nor the HRF–1–2008 test procedure specifically define the term “through-the-door ice/water dispenser” and because this term or similar terms are used both in the sections addressing measurement of ice making energy use and in the volume calculation method, DOE proposes to incorporate a definition for this term in both Appendices A and B to read as follows: “Through-the-door ice/water dispenser” means a device incorporated within the cabinet, but outside the boundary of the refrigerated space, that delivers to the user on demand ice or water from within the refrigerated space without opening an exterior door. This definition includes dispensers that are capable of dispensing ice and water, ice only, or water only.

DOE requests comment on these proposed definitions.

#### Anti-Sweat Heater Operation

To minimize test variation and potential error, particularly for products with variable anti-sweat heater control, the proposed procedure would require all anti-sweat heater switches to be in the “off” position for the test. Variable anti-sweat heater control is a feature that energizes the anti-sweat heaters only as much as needed, depending on ambient humidity and other conditions, to prevent the condensation of water vapor on the door gaskets and cool surfaces near them.

This requirement is proposed for two reasons: (1) To avoid the random activation of variable anti-sweat heaters

during testing should the ambient humidity levels in the test room vary during the test and (2) to help clarify the power input measurement of the test by removing the power consumption associated directly with anti-sweat heaters. Because random activation of variable anti-sweat heaters could add extra power consumption to one part of the test and not the other, complete removal of anti-sweat heater power use from the measurement may ease the interpretation of power consumption signals measured during the test. Hence, DOE proposes that the heaters be turned off both to avoid change in anti-sweat heater energy between portions of the icemaking test and to allow for better evaluation of the power input measurements that will be used to define test periods and the number of icemaker cycles—these factors would improve the accuracy and repeatability of the test.

A potential issue with this proposal is that it may be susceptible to circumvention by products that have an anti-sweat heater switch if the icemaker's operation is modified once the switch is turned off. For example, a manufacturer may be able to reduce icemaking energy use at a lower ice production rate by reducing fan and/or compressor speed when the switch is turned off, which would violate the anti-circumvention provision. An alternative proposal to address the potentially random activation of variable anti-sweat heaters would be to require that icemaking tests be conducted with the anti-sweat heater switch turned on and the test chamber humidity level set sufficiently low to prevent heater activation—this proposed change would apply to products without anti-sweat heater switches, as described below. However, this approach would add more testing burden, since it would require that all refrigerators with variable anti-sweat heating be tested in this fashion, which requires using test facilities capable of reducing humidity levels as needed. Another approach would be to require that humidity levels in the test facility be maintained within a narrow range for which the variation in energy use of any variable anti-sweat heater would be insignificant. However, this could also add significantly to test burden, since many existing test facilities do not have the necessary equipment to control humidity levels. If it subsequently becomes clear that some manufacturers are exploiting this flexibility in a manner that would yield unrepresentative measurements of energy use, DOE may implement one of

the alternative proposals in a future rulemaking.

For products with variable anti-sweat heater control but with no anti-sweat heater switch, the proposal would require that the test be performed in an ambient condition with humidity levels sufficiently low to prevent the anti-sweat heater from being energized. The proposal would not specify the humidity level required to assure that the heater is not energized, which DOE expects would maximize testing flexibility and minimize the burden associated with meeting this requirement since not all variable anti-sweat heater control systems will start to energize the heaters at the same humidity level. Data regarding the humidity levels at which variable anti-sweat heater systems energize are provided to DOE by manufacturers of products with this feature in certification reports. (*See* 10 CFR 429.14(b)(3)) These data suggest that this threshold humidity level is close to 35 percent relative humidity. DOE may consider the possibility of specifying an ambient humidity level depending on the nature of the feedback it receives in comments to this proposal.

DOE is aware of potential issues with its proposal for products with variable anti-sweat heater control but without anti-sweat heater switches and may consider alternative options to ensure that the objectives of the proposal are met. One potential issue is that some test facilities may not have the capability to sufficiently control humidity levels to assure that variable anti-sweat heaters would not be energized during testing. Based on DOE's review of available refrigeration products, every product examined that is equipped with a variable anti-sweat heater control also uses an anti-sweat heater switch. As a result, it is DOE's belief that, in spite of the potential inability of some existing test facilities to reduce humidity sufficiently to avoid variable anti-sweat heater activation, all or nearly all variable anti-sweat heater products can be readily tested using the proposed procedure by turning off their anti-sweat heater switches, which would reduce or eliminate the need for upgrades to testing facilities. Accordingly, DOE does not anticipate any new burdens associated with its proposed humidity requirements.

DOE requests comments on whether there are other alternative approaches it should consider to help ensure that random activation of variable anti-sweat heaters will not affect the accuracy of the measurements. DOE also seeks comment on the testing approaches it

has proposed in today's notice to address this issue.

#### Setup for Icemaking

The test procedures in Appendix A and Appendix B do not require water lines or water filters to be connected or installed; they do, however, require the ice storage bin to be empty of ice. To properly execute the icemaking test that DOE is considering, DOE would revise sections 2.6(a) and 2.6(g) of Appendix A and sections 2.4(a) and 2.4(g) of Appendix B to read as follows:

(a) Connection of water lines and installation of water filters are required only when conducting the icemaking test described in section 8;

\* \* \* \* \*

(g) Ice storage bins shall be emptied of ice, except as required for the icemaking test described in section 8.

These modifications would ensure that testing would be conducted consistent with current practice when measuring the energy use not associated with icemaking, but would clarify that these requirements would change when conducting the icemaking test. Also, the new section 8 would indicate that water lines and water filters must be installed for the icemaking test.

DOE seeks comments on this approach.

#### Ambient Temperature and Water Inlet Specifications

Currently, DOE is considering requiring that the icemaking test be conducted in a 90 °F ambient condition, identical to the condition required by the current test. While this temperature is not a typical household condition, it is intended to account for the energy use associated with door openings and other thermal loads (e.g., cooling down warm food) that would occur during usage in a typical household environment (with an ambient temperature of approximately 70 °F), and its use in the DOE tests has been reaffirmed through rulemakings several times since DOE initially adopted the Appendix A1 and Appendix B1 test procedures in a final rule published August 10, 1982. 47 FR 34517. DOE would apply this condition to the icemaking test to reduce the complexity that would be incurred by imposing a different ambient temperature requirement. Using the same temperature will allow all tests to be conducted sequentially without waiting for the test chamber to adjust and stabilize at a different temperature.

Water inlet temperature affects the thermal load (*i.e.*, heat) that refrigeration systems must remove from the cabinet to make ice, and water inlet pressure could potentially affect the water

quantity that flows into the icemaker mold during each icemaker cycle. For the reasons that follow below, adopting the same inlet conditions specified in the AHAM Revised Draft Test Procedure (*i.e.*, 90±2 °F inlet water temperature and 60±15 psig inlet water pressure) is also under consideration.

DOE recognizes that the water inlet temperature noted above is not consistent with typical household water supply temperatures. However, due to the intermittent flow of water supplying an icemaker, and the relatively long periods between successive fillings of the icemaker mold with water, the temperature of water entering the refrigeration product's water supply system will always be very close to the ambient temperature since most of the supply line is located outside the refrigerated cabinet. For example, the ice production rate of automatic

icemakers in refrigeration products tested by DOE ranged from 4 to 5.5 pounds per day, with icemaker cycle times of an hour or more. Unless there is significant use of water for features other than icemaking, such as the water dispenser of a product with through-the-door ice and water dispensing, the water that will be supplied to the cabinet at the start of each icemaker cycle will have been stagnant in the supply tube of the product for at least one hour. This is sufficient time for the temperature of the supply water to equilibrate (*i.e.*, achieve balance) with the ambient air temperature, and the same equilibration will occur during an icemaking test.

Supplying water to the cabinet at any temperature other than ambient would require using a water temperature conditioning system located adjacent to the cabinet, or a recirculating loop to ensure that the supply temperature at

the cabinet water inlet remains at a specified temperature other than the ambient temperature. DOE believes that requiring such a system would represent an undue test burden because specifying an inlet water temperature equal to a typical household ambient condition rather than 90 °F would have a limited impact on the overall test result. The heat that must be removed from the water to make ice at 0 °F (*i.e.*, "Q") is equal to the sum of three separate components: (a) The heat capacity of water (1 Btu/lb – °F) multiplied by the temperature reduction from the supply temperature down to 32 °F, (b) the heat of fusion of water (144 Btu/lb), and (c) the heat capacity of ice (0.5 Btu/lb – °F) multiplied by the temperature reduction from 32 °F to 0 °F. This value equals 218 Btu/lb for testing with a water inlet temperature of 90 °F—see below.

$$\begin{aligned}
 Q &= [C_{\text{water}} * (90^\circ\text{F} - 32^\circ\text{F})] + [\Delta H_{\text{fus}}] + [C_{\text{ice}} * (32^\circ\text{F} - 0^\circ\text{F})] \\
 &= \left[ \frac{1\text{Btu}}{\text{lb}^\circ\text{F}} * (90^\circ\text{F} - 32^\circ\text{F}) \right] + \left[ \frac{144\text{Btu}}{\text{lb}} \right] + \left[ 0.5 \frac{\text{Btu}}{\text{lb}^\circ\text{F}} * (32^\circ\text{F} - 0^\circ\text{F}) \right] \\
 &= \frac{[58 + 144 + 16]\text{Btu}}{\text{lb}} = 218 \frac{\text{Btu}}{\text{lb}}
 \end{aligned}$$

In contrast, requiring an inlet water temperature of 72 °F, which would occur in 72 °F ambient conditions more typical for a household, the heat removed during icemaking would be 200 Btu/lb, only 8 percent less. Because the impact of using a 90 °F water supply temperature is modest and because the test burden associated with attempting to simulate a more typical household water supply temperature would be significant, the DOE proposal retains the water inlet temperature requirement, 90±2 °F, as specified in the AHAM Revised Draft Test Procedure.

DOE also recognizes that the pressure range under consideration is broad. However, refrigeration products are designed to be used in settings that can have a wide range of water supply pressures. For example, the installation instructions for a typical refrigeration product indicate that it can be used with water supply pressures ranging from 20 to 125 psig. See Typical Water Line Installation Instructions, No. 3 at p. 1 (providing instructions for installing the water dispenser line for a typical refrigeration product, including indication of the acceptable water pressure range). The quantity of water supplied for each icemaker cycle is

regulated by the product to be within a narrow range regardless of the water supply pressure. Because these products are designed to operate consistently with a relatively wide range of water supply pressures, and because allowing the proposed range will reduce the potential need for test facilities to boost or reduce the pressure of the supply water, DOE may adopt the same wide range of allowable pressures as suggested in the AHAM Revised Draft Test Procedure. Adopting this approach would minimize the testing burden faced by manufacturers when compared with an equally viable alternative that would require testing facilities to fine-tune water pressure during testing.

DOE seeks comment on the approach discussed above regarding water temperature and pressure conditions.

#### Frequency of Measurement

DOE is considering requiring that the temperature, input power, and energy use measurements needed to evaluate steady-state conditions and calculate energy use be recorded at intervals not exceeding one minute. DOE is aware that most test facilities record data for refrigeration product energy tests at a frequency of once per minute. The

current DOE test procedures allow a recording interval of up to four minutes (see, for example, Appendix A1, section 5.1.1). Because the icemaking test involves multiple recurring events (*i.e.*, icemaker cycles and compressor cycles) that are not synchronized, a shorter recording interval would improve the accuracy of the measurements. Additionally, updating the requirements to reflect the increased accuracy of the equipment routinely employed by test facilities would ensure that the procedure adequately accounts for the improved technology already used in the field. DOE believes that the test burden associated with this requirement, if any, would be insignificant since most, if not all, test facilities already use one-minute recording intervals during testing.

DOE requests comment on the requirement for this proposed limit on the data acquisition time interval and its assumptions.

#### Icemaker Cycle Indication

Determining the start and end of icemaker cycles is essential for the icemaking test in order to properly correlate ice production with the energy used to produce the ice. Most automatic

icemakers used in refrigeration products have a mold heater (or harvest heater) that is used to release ice from the mold. The input power measurements for the cabinet can readily be used to determine when this heater is energized, thus allowing for easy identification of the start and end of icemaker cycles.

The AHAM Revised Draft Test Procedure indicates that the icemaker harvest cycle test period starts and ends upon the initiation of harvest. (AHAM Revised Draft Test Procedure, No. 5 at p. 7) In contrast, DOE would define the icemaking cycle as starting and ending when the icemaker mold heater shuts off. DOE is considering this delineation between icemaker cycles to ensure that both the energy used to freeze the ice (which occurs prior to the harvest) and to operate the harvest heater are associated with the harvested ice for purposes of calculating overall energy use. DOE requests comment on this specification for icemaker harvest cycles.

DOE notes that icemakers in some refrigeration products use harvesting methods that do not involve mold heaters. One example is the "twist tray" icemaker, which has a plastic ice mold and employs a motor that rotates one end of the ice mold at slow speed, turning the mold upside-down, and then twisting the mold as the rotation is stopped by a catch at the mold's other end, thus releasing ice into the ice storage bin. To address icemakers of this type, and future designs that may be able to harvest ice without mold heaters, DOE would require one of three alternative methods to be used to determine when ice is harvested, since the examination of the power input data may not reliably reveal the time of harvest.

The three alternative methods under consideration are: (1) measuring mold temperature, (2) measuring water supply temperature, or (3) detecting actuation events of the icemaker water supply solenoid valve. Each of these methods would provide an equally reliable and readily identifiable indication of when water for the next batch of ice flows into the mold. Hence, DOE would define icemaker cycles for these methods based on when the given method indicates that water starts flowing or has entered the mold.

In addition, each of these methods has certain practical advantages that readily lend themselves to being appropriate indicators of ice harvesting. The ice mold temperature can reliably indicate the occurrence of ice harvesting because it rapidly rises when the solenoid valve dispenses warm water into the ice mold. Similarly, the water supply temperature

can reliably indicate ice harvesting because the solenoid valve must dispense water into the ice mold for every round of ice production. Although water supply temperatures must remain in the  $90 \pm 2$  °F range at all times during the test, the temperature of water in the inlet tube typically may change slightly during the filling of the icemaker mold due to temperature gradients within the test laboratory. If this change in water supply temperature is large enough, for example greater than 0.5 °F, this temperature change could be used to indicate the start of an icemaker cycle. NIST test data show a shift in water inlet temperature of roughly 0.9°F (0.5 °C) when the solenoid valve opens during testing of a refrigerator that has an icemaker without a mold heater. (NIST Technical Note 1759, No. 6 at p. 22–23) Finally, monitoring of the solenoid valve input voltage, current, or power will indicate that a new harvest cycle has started because the solenoid valve must be energized to supply water to the icemaker mold. To accommodate differences in individual product design or laboratory instrumentation capabilities which may favor one method over another, and because DOE sees no apparent difference in precision among these three methods, DOE proposes to include these three approaches and require that one of them be used if the icemaker has no mold heater. Further, the approach would require that the test report state in these cases which of these methods is used.

DOE requests comment on the proposed requirement to monitor harvest cycles if the product does not have a mold heater, the details of the three proposed alternate methods to accomplish this monitoring, and the proposed requirement that the test report indicate which one of these three methods was used. DOE further requests comment on whether other alternative methods could be used and/or should be allowed in the test procedure, including details of these alternative methods. DOE also seeks comment on whether it should specifically identify when one of these three alternative approaches must be used.

DOE's method would also clearly specify the start and end points of icemaker cycles for icemakers without mold heaters. As mentioned above, under the proposal, these time periods would occur when the mold heater is de-energized for products with mold heaters. For products without mold heaters, the proposed test procedure would indicate that the start and end points would occur when frozen ice drops into the ice storage bin and/or at the initiation of water flow into the

icemaker mold. DOE requests comment on this proposed specification.

#### Control Settings

DOE would adopt generally the AHAM Revised Draft Test Procedure's requirement to use a single compartment temperature setting for the baseline test and the icemaking test, rather than specifying separate tests at median and warm or cold settings. Following this approach would limit the overall test burden faced by manufacturers.

However, DOE is concerned that significant differences in compartment temperatures between the baseline and icemaking tests could result in unrealistic indications of icemaking energy use. In particular, if the temperature of either compartment rises significantly during the icemaking test, the portion of the measured energy use associated with maintaining compartment temperatures would decrease significantly, which could potentially result in a value of energy use associated with icemaking that is lower than the actual amount. The AHAM Revised Draft Test Procedure approach would treat any such deviation in temperature between baseline and icemaking operation for fixed positions of the temperature control settings as typical for operation in the field, since homeowners are not expected to adjust temperature control settings when the icemaker starts making ice. (AHAM Revised Draft Test Procedure, No. 5 at p. 5)

However, DOE notes that there are some distinct differences between icemaking in the laboratory and icemaking in the field that weigh in favor of making temperature adjustments in some circumstances. First, the icemaking test would be conducted with no load in either the freezer or fresh food compartment, while a refrigerator in the field would generally be stocked with food. This load in a typical refrigerator, acting as a thermal mass, significantly dampens variations in compartment temperatures during icemaking. In an icemaking test conducted in a refrigeration product without any loaded food products, the compartment temperature could respond much more rapidly to the added load associated with icemaking.

Second, the icemaking test would be conducted with the icemaker operating at full capacity, meaning that for the entire icemaking test period, it would continually produce successive batches of ice without stopping. In contrast, in the field, continuous icemaking would typically occur only for the initial filling of the bin, and successive icemaker

cycles would occur after a portion of ice has been withdrawn from the ice bin. The comparison of daily ice production with the ice production rate of tested refrigerators discussed in the following paragraph helps illustrate this point.

AHAM's ice production value of 1.8 pounds per day represents typical daily average ice production (AHAM Ice Making Test Update, No. 7 at p. 5). DOE compared this value to measured icemaking production rates when typical refrigerators operate continuously. The production rates measured by the National Institute of Standards and Technology (NIST) for four tested residential refrigerator-freezers ranged from 3.7 to 10.6 lb/day, at least double AHAM's average daily production rate. (NIST Technical Note 1697, No. 6). Hence, even the icemaker of this test with the lowest production rate would operate less than half a day to produce the amount of ice specified by the AHAM estimate (1.8 lb/day). This means that the product does not continually make ice and would have time to recover compartment temperatures between icemaker cycles. As a result, even if the compartment temperatures rise slightly during icemaking, they could recover to their "baseline" levels before the next icemaker cycle starts.

The tendency of the food product thermal mass to limit the compartment temperature rise that could occur during icemaking and the ability of the system to recover to steady state temperatures

between icemaking cycles suggests that the average increase in cabinet temperatures during icemaking in the field may be significantly less than would occur for a laboratory test of continuous icemaking in an empty cabinet. This observation casts significant doubt on the premise of the AHAM position that the compartment temperature rise in the field would be comparable to that in the test, and likewise casts doubt on AHAM's suggestion that allowing the temperature to rise in this fashion during the test would lead to energy use measurements for icemaking that are representative of field operation. For these reasons, DOE believes that a laboratory-based icemaking energy use measurement for a product whose temperatures drift upwards during icemaking would be more representative of field energy use if an adjustment were made during the icemaking portion of the test to ensure that the compartment temperatures are no warmer than their temperatures measured during the baseline test, perhaps within a 1 °F allowance. Hence, DOE's approach would require controls to be adjusted to cooler settings during the icemaking portion of the test, if necessary, to ensure that the compartment temperatures are no warmer than 1 °F above their averages during the baseline test.

DOE selected this 1 °F maximum compartment temperature rise between the baseline and icemaking tests by

considering the one percent maximum threshold for uncertainty discussed in the section above and reviewing the results of icemaking tests conducted by NIST (NIST Technical Note 1697, No. 6; NIST Technical Note 1759, No. 8). Test Samples 3 and 4 of NIST Technical Note 1697 and Test Samples 1 and 2 of NIST Technical Note 1759 were tested using an icemaking test procedure consistent with the approach under consideration but using three sets of temperature control settings for the baseline and for icemaking portions of the test rather than the single set being proposed. The results obtained using the three temperature control settings permit one to calculate the results that would be expected for any desired combination of compartment temperatures close to those measured during the tests—these results can be calculated using the triangulation approach. See section III.C.3. DOE used this approach to calculate total annual energy use, including the energy use associated with icemaking for the tested samples, for compartment temperature conditions matching the standardized temperatures (0 °F in the freezer and 39 °F in the fresh food compartment), and for conditions in which either the fresh food or freezer compartment temperature shifts 1 °F or 2 °F from its standardized temperature during the icemaking test. (Assessment of Icemaking Test Temperature Control Setting Tolerance, No. 9). The results of the calculations are summarized in Table III–2 below.

TABLE III–2—IMPACT ON ENERGY USE OF SHIFT IN COMPARTMENT TEMPERATURE DURING ICEMAKING

Product class	Change in annual energy use			
	2011 Sample 3	2011 Sample 4	2012 Sample 1	2012 Sample 2
	5A (percent)	5A (percent)	5 (percent)	5 (percent)
<b>Fresh Food Compartment Temperature Change</b>				
–2 °F .....	+0.4	+0.3	+0.1	+13.5
–1 °F .....	+0.2	+0.1	+0.1	+6.6
+1 °F .....	–0.2	–0.1	–0.1	–6.3
+2 °F .....	–0.4	–0.3	–0.1	–12.3
<b>Freezer Compartment Temperature Change</b>				
2 °F .....	+1.2	+3.5	+1.8	–1.5
–1 °F .....	+0.6	+1.7	+1.0	–0.8
+1 °F .....	–0.6	–1.5	–1.0	+0.9
+2 °F .....	–1.3	–2.9	–2.1	+1.8

"2011" samples are those discussed in NIST Technical Note 1697, while "2012" samples are those discussed in NIST Technical Note 1759.

The calculations reflected in the above table show that the 1 °F shift in compartment temperature during icemaking can change the annual energy use measurement by as much as 6.6

percent. However, this extreme case occurred for the one test sample among the group of four that is not typical of most products in the U.S. market. (NIST Technical Note 1759, No. 8 at p. 20) The

calculated annual energy use results for the other three products showed little sensitivity to temperature shifts in the fresh food compartment during the icemaking test. One of the test samples

showed a calculated change in annual energy use as high as 1.7 percent when the freezer compartment temperature shifted 1 °F. This change would yield a variation of 11 kWh over an entire year—the annual energy use of this product was calculated to be 671 kWh assuming all compartment temperatures match their standardized temperatures during all tests. This analysis shows that even the 1 °F compartment temperature tolerance that DOE has considered for the icemaking test leads to overall measurement uncertainty larger than the desired one percent threshold discussed in the section above.

On the other hand, limiting compartment temperature variation to less than 1 °F between the baseline and icemaking tests could pose considerable test burdens because of the potential difficulty of achieving such tight control for both compartments of a refrigeration product. To mitigate these burdens, DOE would allow an increase in compartment temperatures of no more than 1 °F between the two tests, and would not impose a lower limit on the compartment temperatures for the icemaking test. In cases where the compartment temperature increases for the icemaking test, DOE would require adjustment of the temperature control to the warmest settings for which the compartment temperature is no more

than 1 °F warmer than measured during the baseline test.

DOE's method would not allow disabling of "quick freeze" operation during icemaking for products that use this feature to accelerate icemaking. Quick freeze is an operating mode that, when selected by the user, runs the compressor without stopping for a specified interval in order to rapidly reduce the compartment temperature (see Appendix B1, section 1.9). DOE tested a product with a control system that automatically activated a "quick freeze" operation whenever the product was making ice. Such a product clearly would be incurring additional energy use associated with continuous compressor operation during icemaking in the field. Hence, DOE would require that such control features remain active (not disabled) during the icemaking test.

Additionally, the AHAM Revised Draft Test Procedure contained a requirement that compartment temperatures be within 2 °F of their standardized temperatures for the baseline test, and that if both the freezer and fresh food compartments cannot be maintained in this range, then the freezer compartment must be maintained in this range and the fresh food compartment must be maintained as close to this range as possible (AHAM Revised Draft Test Procedure, No. 5 at

p. 5). DOE conducted an analysis using the NIST icemaking test data discussed above to determine the impact of deviation in compartment temperatures from their standardized temperatures for the baseline test. The analysis, summarized in Table III–3, shows that the 2 °F allowance can result in an increase in the total annual energy use measurement of 2 percent or more. (Assessment of Icemaking Test Temperature Control Setting Tolerance, No. 9) Hence, DOE considered proposing a tighter tolerance of 1 °F, which, for most products, would limit the variation on the total annual energy use measurement to roughly one percent. However, DOE recognizes that the precision with which compartment temperatures can be set during testing may be insufficient to use a 1 °F tolerance. In recognition of this limitation, DOE would require temperature controls to be set during baseline testing in the warmest settings for which the compartment temperatures are no more than 1 °F warmer than their standardized compartment temperatures. Using this approach would mean that the fresh food and freezer compartment temperatures would be no warmer than 40 °F and 1 °F, respectively, during the baseline test.

TABLE III–3—IMPACT ON ENERGY USE OF DEVIATION IN COMPARTMENT TEMPERATURE FROM STANDARDIZED TEMPERATURES

Product class	Change in annual energy use			
	2011 Sample 3	2011 Sample 4	2012 Sample 1	2012 Sample 2
	5A (percent)	5A (percent)	5 (percent)	5 (percent)
<b>Fresh Food Compartment Temperature Deviation from 39 °F</b>				
–2 °F .....	–0.1	–0.1	–0.4	+1.5
–1 °F .....	–0.1	0.0	–0.2	+0.7
+1 °F .....	+0.1	0.0	+0.2	–0.7
+2 °F .....	+0.1	+0.1	+0.4	–1.4
<b>Freezer Compartment Temperature Deviation from 0 °F</b>				
2 °F .....	+0.7	+2.3	+0.4	–0.6
–1 °F .....	+0.4	+1.1	+0.2	–0.3
+1 °F .....	–0.4	–1.0	–0.2	+0.4
+2 °F .....	–0.7	–1.9	–0.5	+0.8

"2011" samples are those discussed in NIST Technical Note 1697, while "2012" samples are those discussed in NIST Technical Note 1759.

As discussed above, DOE is considering using the warmest temperature control settings that satisfy the compartment temperature requirements for the baseline and icemaking tests. By preventing the use of excessively cold settings, this approach would help to ensure consistency between tests conducted by

different laboratories. For products with mechanical temperature controls, DOE proposes requiring that the temperature settings be those for which the temperature setting indicator aligns with a control symbol. This provision will prevent setting the indicator at undefined positions between the symbols and thus will also help to

ensure consistency between tests conducted by different laboratories.

DOE requests comment on all aspects of its approach regarding temperature settings.

**Test Periods**

DOE is considering using an approach that would modify the test periods

suggested in AHAM's Draft Test Procedure in two key ways. The proposal would include: (a) A test period for the baseline test that is more consistent with the existing DOE test procedure and (b) an energy use calculation based upon two test periods for products that undergo compressor cycles during icemaking. The first of these proposed changes diverges also from the AHAM Revised Draft Test Procedure, while the latter one is consistent with the more recent AHAM approach.

#### Baseline Test Period

The AHAM Revised Draft Test Procedure would allow use of the stabilization test period for measuring baseline energy use. In contrast, DOE is proposing that the stabilization and energy measurement test periods be defined as they are in the DOE test procedure (see, for example, Appendix A, sections 2.9 and 4.1). However, in order to minimize testing burden, DOE is proposing to permit the overlap of these test periods in order to avoid the three or more hours of additional test time that would be required if no overlap were allowed. The proposal would permit this overlap only if the baseline test period ends no later than the stabilization test period ends.

#### Icemaking Test Period

For products that do not cycle their compressors during icemaking, there is no potential distinction between compressor cycles and icemaker cycles. For such products, DOE is considering adopting the same icemaking test period suggested in both the initial and revised AHAM Draft Test Procedures. This test period would incorporate a complete (whole) number of icemaker cycles, beginning when the first of these cycles starts and ending with the completion of the last cycle.

On the other hand, for products that cycle their compressors during icemaking, DOE considered whether energy use measurements should be based on compressor cycles or icemaker cycles. The initial AHAM Draft Test Procedure suggested a test period based on icemaker cycles for the icemaking portion of the test, but AHAM later altered this approach in its revised draft, suggesting instead that both compressor

and icemaker cycles be part of the test period. NIST reviewed several icemaking test procedure approaches and concluded that average power input is a much stronger function of compressor cycles than icemaker cycles. (NIST Technical Note 1759, No. 8 at p. 48) Hence, when subtracting the average power of the baseline test from the average power of the icemaking test, as is done to determine the energy use associated with icemaking (AHAM Draft Test Procedure, No. 4 at p. 7), a much more stable and repeatable result is attained if the average power is calculated for a test period based on compressor cycles.

In contrast to the average power input during icemaking, the ice mass must be correlated with the icemaker cycles rather than with compressor cycles because ice production occurs in batches that are harvested at the end of icemaker cycles. Furthermore, the NIST work shows that, assuming the product is in stable operation during icemaking, the energy use per icemaker cycle stays relatively constant, even though the time between harvests may vary. NIST recommended an approach that calculates average power based on compressor cycles and average energy use per pound of ice produced using the same test data. Without increasing test time, the approach improves accuracy and repeatability in determining the energy use associated with ice production, as compared to the use of the same calculation based only on icemaker cycles. NIST's suggested calculation of energy use expended per pound of ice produced, abbreviated as EIM, in kilowatt-hours per pound, can be expressed as follows:

$$EIM = \frac{(PI3 - PI1) \times (EPI2)}{PI3 \times M_{ICE\_CYC} \times N_{CYC}}$$

Where:

PI3 is the icemaking test average power input in Watts, measured based on compressor cycles;

PI1 is the baseline test average power input in Watts;

EPI2 is the energy use in kilowatt-hours, measured based on icemaker cycles;

M<sub>ICE\_CYC</sub> is the mass of ice in pounds produced per icemaker cycle; and

N<sub>CYC</sub> is the number of icemaker cycles in the test period associated with the energy measurement EPI2.

This equation uses the icemaking test average power based on compressor cycles (the more stable test period for measuring average power) when subtracting the average power of the baseline test. This approach of using the more stable power measurement based on compressor cycles in the calculation helps to minimize the potential error associated with the measurement, since any variation in the measurement of PI3 is amplified by subtracting the baseline test average power PI1. However, to maximize accuracy, the calculation must also use the measurement based on the icemaker cycles, since the energy use measurement based on compressor cycles is not correlated to the ice production. The improvement in accuracy afforded by this approach is illustrated in Table III-4 below, which shows test data for an icemaking test for a 22 cu. ft. refrigerator-freezer with a bottom-mounted freezer and no through-the-door ice service. The table compares successive icemaker cycles from results based on the AHAM Draft Test Procedure against those results obtained using the NIST-recommended approach of the AHAM Revised Draft Test Procedure. The data show that it takes more than roughly 15 icemaker cycles for the results of the two tests to be consistently close to each other.

The data also indicate that test results using the AHAM Draft Test Procedure fluctuate between icemaker cycles during testing, indicating that this test method's accuracy depends on whether the test period ends on a cycle that happens to experience no fluctuations—an extremely unlikely event based on the inherent variability built into the AHAM Draft Test Procedure. In cases where the test must terminate early due to the filling of the ice storage bin or initiation of a defrost, the test would end and the error would not be corrected by the additional icemaker cycles exhibited for this test. Because of its significantly improved accuracy over the AHAM Draft Test Procedure, and the absence of any increase in testing time, DOE is considering the approach recommended by NIST that the AHAM Revised Draft Test Procedure ultimately adopted for products with cycling compressors during icemaking.

TABLE III-4—COMPARISON OF DRAFT AHAM AND NIST ICEMAKING TEST RESULTS

Icemaker cycle No.	Cumulative energy use per ice produced (kWh/lb)	
	AHAM Draft Test	NIST recommended test (AHAM revised draft)
1	0.010	0.165
2	0.151	0.186
3	0.192	0.189
4	0.148	0.191
5	0.177	0.191
6	0.194	0.192
7	0.169	0.192
8	0.186	0.193
9	0.196	0.193
10	0.178	0.193
11	0.189	0.193
12	0.194	0.193
13	0.180	0.192
14	0.188	0.192
15	0.194	0.192
16	0.182	0.192
17	0.189	0.192
18	0.194	0.192
19	0.184	0.192
20	0.191	0.193
21	0.193	0.193

In light of these recorded data, DOE seeks comment on whether the NIST approach it is considering would be reasonably sufficient for purposes of assessing icemaking energy use.

**Icemaking Test Stability**

The AHAM Revised Draft Test Procedure does not require temperature stability during the icemaking portion of the test. DOE has tested a product that significantly reduces its freezer temperature during icemaking, from 0 °F to roughly -12 °F. This reduction in temperature requires three to four icemaker cycles to occur. During the initial reduction in freezer compartment temperature, the energy use per icemaker cycle was much higher than after the compartment temperature stabilized, starting at 0.28 kWh/lb and dropping to 0.20 kWh/lb. A test that included the initial icemaker cycles, during which the compartment temperature was dropping significantly, would have resulted in a significantly higher measurement of icemaking energy use. The data also showed that selecting a temperature stability threshold of 3 °F (i.e. the maximum allowable variation for the freezer compartment temperature from its average during the selected test period) is sufficient to reduce the potential error to less than one percent of the product's overall energy use. (Examination of Icemaking Test Period Stability, No. 10)

These test data show that a stability requirement for the icemaking test is important in order to obtain repeatable results. Hence, DOE is weighing whether to include a requirement that the temperature for the freezer compartment remain within 3 °F of the compartment's temperature average for the full test period for the icemaking part of the test. For products with non-cycling compressors, the proposal would apply this requirement by comparing the freezer compartment temperatures for complete icemaker cycles. For products with cycling compressors, the requirement would be applied by comparing average temperatures for complete compressor cycles and would also be applied to the freezer compartment.

DOE seeks comment on this potential approach.

**Duration of the Icemaking Test Period and Initiation of Icemaking**

The AHAM Revised Draft Test Procedure would require test periods lasting 24 hours, if this is possible during steady icemaking operation between defrost cycles, and that the ice storage bin be able to hold 24 hours of ice production. The AHAM Revised Draft Test Procedure also specifies that if 24 hours of icemaking operation are not possible between two defrost cycles, the icemaker would be enabled after the product has recovered from a defrost.

DOE would adopt nearly identical requirements for the test duration and initiation of test, except that the DOE approach would specify that icemaking should be initiated shortly after the start of compressor operation following a defrost cycle. The DOE approach would reduce the overall testing time compared to the AHAM Revised Draft Test Procedure approach because the AHAM approach may lead to the start of a second "recovery" period after the initiation of icemaking, since the cabinet temperatures may shift after icemaking starts. The shifting of these temperatures would require additional time for the unit under test to reach the new steady operating condition.

DOE seeks comment on these potential durations and initiation periods.

**Ice Mass**

Measuring the ice mass produced by a test sample is a necessary prerequisite to determine the energy use required per pound of ice produced. The AHAM Revised Draft Test Procedure requires that the amount of ice produced during the test be determined by weighing the ice storage bin with the ice in it and subtracting the weight of the empty ice storage bin. It would also provide that the weight measurement must not include the ice harvested prior to the test period or after the initiation of the

last harvest cycle. (AHAM Revised Draft Test Procedure, No. 5 at p. 8)

To properly correlate total ice production with the test period used for the energy use measurement, DOE's approach would require calculating the mass of ice produced per icemaker cycle in pounds. This value would be multiplied by the number of icemaker cycles within the test period in the equation used to calculate energy use per pound of ice produced (see the equation for EIM above). This approach would enhance test accuracy by explicitly assuring proper correlation of ice production with the test period used for measuring energy use.

DOE seeks comment on its potential approach.

#### Products with Multiple Ice makers

DOE is aware of very few refrigerator models with multiple ice makers. The only such products of which DOE is aware are French Door refrigerator-freezers with one icemaker serving a through-the-door ice dispenser and a second icemaker located in the bottom-mounted freezer compartment. The AHAM Draft Test Procedure did not address multiple icemaker products. (AHAM Draft Test Procedure, No. 4 at p. 4) However, the AHAM Revised Draft Test Procedure included methods for testing products with multiple ice makers. Specifically, the test would require that all ice makers make ice during the icemaking part of the test. (AHAM Revised Draft Test Procedure, No. 5 at p. 10) The icemaking test would continue for 24 hours, until interrupted by a defrost, or until all ice bins are full.

For products with one icemaker serving a through-the-door dispenser and another that does not, DOE is considering requiring that manufacturers account for icemaking energy use by measuring the energy consumption only for the icemaker serving the through-the-door dispenser. This approach would minimize the testing burden while providing a measurement of energy use that should be reasonably representative of actual usage since the icemaker serving the through-the-door dispenser would likely be more frequently used. This expectation of more frequent use of the through-the-door icemaker is based on the fact that this ice is much more convenient for consumers to access. Taking this approach would also make the test simpler to perform. As discussed above, one of the complications of measuring the energy use associated with icemaking is the lack of coordination between icemaker and compressor cycles. The test approach described above is a

compromise that balances the need for accuracy and the need to limit test burden by using two test periods based on the same icemaking test. If two ice makers were operating, the test procedure would have to address the non-synchronized cycles of two ice makers and the compressor. The AHAM Revised Draft Test Procedure does not fully address how this issue should be handled other than indicating that icemaking for both ice makers would be initiated after recovery from defrost and that the test may continue until *both* ice bins are full. Because of these unresolved complications and DOE's expectation that most of the ice would be produced by the icemaker serving the through-the-door feature, DOE's approach would involve testing only this icemaker. DOE seeks comment on its tentative approach and expectations.

Additionally, DOE's approach would not address other configurations of products with multiple ice makers. As a result, DOE seeks comment on (a) whether any such products exist or are likely to exist, (b) what their configuration details might be, and (c) what test procedure modifications should be developed to address these products.

#### Ice Production Rate

DOE initially obtained ice production rate information from AHAM, based on available survey data it reviewed. That data indicated that 1.8 pounds per day would be a representative ice production rate. (AHAM Ice Making Test Update, No. 7 at p. 5). DOE used this production rate as the basis for the fixed icemaking energy use placeholder it adopted in the Appendix A and B test procedures. 75 FR at 78842-3 (Dec. 16, 2010).

Subsequently, NEEA sponsored a field study that monitored daily refrigerator energy use, kitchen ambient temperature, and the number of icemaking harvest cycles for refrigerators at 80 sites. (NEEA Ice Making Field Study Data Summary Spreadsheet, No. 11). The study showed that the average number of icemaking cycles per day for the field test sites was 3.3 cycles/day. The spreadsheet did not include data indicating the mass of ice produced per icemaking cycle for any of the test sites. Hence, calculating the average ice production per refrigerator per day requires applying a representative value of ice production per icemaking cycle to the NEEA data. Values of this parameter measured during tests conducted by DOE and NIST are summarized in Table III-5 below. The average of these

measurements is 0.21 lb/cycle. Multiplying the 3.3 cycles/day of the NEEA study by this average gives an average daily ice production rate of 0.7 lb/day.

TABLE III-5—ICE PRODUCTION PER ICEMAKING CYCLE

Data Source	Product class	Ice production (lb) per cycle
NIST 2011 Sample 1 .....	3	0.31
NIST 2011 Sample 2 .....	7	0.21
NIST 2011 Sample 3 .....	5A	0.15
NIST 2011 Sample 4 .....	5A	0.12
NIST 2012 Sample 1 .....	5	0.2
NIST 2012 Sample 2 .....	5	0.15
DOE Sample 1	7	0.19
DOE Sample 2	3	0.26
DOE Sample 3	5A	0.26
	Average	0.21

"NIST 2011" samples are those discussed in NIST Technical Note 1697, "NIST 2012" samples are those discussed in NIST Technical Note 1759, and "DOE" samples are those tested by DOE.

The NEEA data suggest that daily ice consumption rate may be half of the 1.8 lb/day initially selected for the test procedure. However, the field study was limited to sites in the northwest region of the United States and its representativeness as a national average ice production rate is not certain. The 1.8 lb/day value was initially proposed by AHAM as a representative value based on its own testing, and DOE has insufficient information about the details of its development to question its validity. Hence, DOE is considering retaining the 1.8 lb/day production rate for use in the test procedure.

#### Impact of the Ice making Test Procedure on Energy Consumption Measurement

DOE conducted testing to validate the feasibility of its potential icemaking test procedure. The test results can be examined to determine if they suggest that icemaking energy measurements using the proposed test procedure would differ significantly from the 84 kWh/year fixed value currently used in Appendices A and B. As noted above, this annual energy use is based on a daily production rate estimate of 1.8 lb/day (1.8 lb/day multiplied by 0.128 kWh per pound of ice multiplied by 365 days per year). The section above discusses the daily ice production rate. This section examines data currently available to DOE regarding icemaking energy use per pound of ice and

calculations of annual energy use based on these data.

Table III–6 summarizes the icemaking energy test results conducted by DOE and NIST. Measured icemaking energy consumption per pound values range from 0.092 kWh/lb to 0.192 kWh/lb, with an average of 0.139 kWh/lb. Note that this average includes the measurement for DOE test 3B but not 3A (see Table III–6, below), since these measurements were made for separate icemakers of a single product. In DOE’s

view, the product used in tests 3A and 3B is not sufficiently representative of icemaking in refrigeration products, in large part because it has two automatic icemakers, an uncommon feature currently. As a result, DOE sought to prevent double-counting (*i.e.*, results from both icemakers of this one unit which may not be representative of the market) when calculating the average energy usage measurements and, therefore, DOE included only one of its measurements in the average. Consistent

with the approach contained in today’s notice, DOE included only the measurement for the ice maker serving the through-the-door dispenser of this product to determine the average for the tested samples. DOE requests additional data indicating the energy use associated with icemaking, using test methods as nearly identical as possible to the test method detailed in today’s notice.

TABLE III–6—ICEMAKING TEST RESULTS

ID No.	Product class	Through-the-door (TTD) ice delivery?	Ice mold heater?	Icemaking energy use (kWh/lb)	Icemaking energy use (kWh/year)
<b>NIST</b>					
2011–1 .....	3	No .....	Yes .....	0.143	94
2011–2 .....	7	No .....	Yes .....	0.150	99
2011–3 .....	5A	TTD .....	Yes .....	0.170	112
2011–4 .....	5A	TTD .....	Yes .....	0.113	74
2012–1 .....	5	No .....	Yes .....	0.125	82
2012–2 .....	5	No .....	No .....	0.092	60
<b>DOE</b>					
1 .....	7	TTD .....	Yes .....	0.134	88
2 .....	3	No .....	Yes .....	0.134	88
3A .....	5A	No .....	No .....	0.169	111
3B .....	5A	TTD .....	Yes .....	0.192	126
Averages				0.139	92

**Note:** The averages include data for DOE icemaker 3B but not icemaker 3A (both are part of the same test sample refrigerator-freezer).

The test data show that the initial icemaking energy use estimate of 0.128 kWh per pound of ice is a very good approximation, as is the 84 kWh annual energy use. The samples tested by NIST and by DOE were selected to provide a range of icemaker styles with which to evaluate the icemaking test procedure, rather than to provide the actual average of the icemaking performance of refrigeration products currently on the market. Hence, DOE does not consider the 8 kWh difference in annual energy use measurement (84 kWh as compared with 92 kWh) to be significant. Given the closeness of these values, DOE may also consider, as an alternative to the test procedure detailed in today’s notice, retaining the 84 kWh/year value to denote the energy usage stemming from icemaking.

DOE requests comments and alternative data addressing the energy use expended for production of a pound of ice, and DOE’s tentative conclusion that the impact of the proposed test procedure changes on energy use measurements is not significant.

**2. Multiple Compressor Test**

Refrigerator-freezers combine a fresh food compartment and a freezer compartment in a single cabinet. Most refrigerator-freezers use a single-

compressor refrigeration system that directly cools the freezer compartment; cooling for the fresh food compartment is achieved by circulating air between the two compartments. This approach cools the fresh food compartment with cold freezer air and allows the freezer-located refrigeration system to remove heat gained by the fresh food compartment. However, some refrigerator-freezers have a separate refrigeration system serving each individual compartment. This approach has been adopted by some manufacturers to improve food preservation in the fresh food compartment. By preventing the introduction of dry freezer air into the fresh food compartment, its humidity can be maintained at higher levels, which can improve food preservation. (See, e.g., Sub-Zero Dual Refrigeration User Manual Excerpt, No. 2 at p. 1)

DOE first recognized that testing products with more than one compressor requires different test procedures from those that apply to single compressor system-based products as early as 1989. See 54 FR 36238 (introducing a dual compressor system test procedure). The 1989 proposal introduced a two-part procedure that separately measures each compressor system’s energy use. The

first part measures the energy use during stable operation between defrosts, while the second, conducted separately for each defrost, measures the energy use contribution of the defrost cycle for each compressor system. This second part of the test, like the second part of the test for products with long-time or variable defrost, measures total energy use during the defrost cycle. See 10 CFR part 430, subpart B, appendix A1, section 4.2.3.

In order to determine the amount of energy use associated with defrost using the measurements for the second part of the test, the test procedure requires that the average energy use for stable operation for a period of time exactly equal to the elapsed time of the second part of the test be subtracted from the total energy use measured for the second part of the test. This difference is then adjusted by the defrost frequency in order to calculate its contribution for each 24-hour daily cycle (see, e.g., Appendix A1, section 5.2.1.2).

However, when measuring the defrost energy use for one of the compressors of a dual-compressor system, the second compressor continues to operate. If its average energy use per unit of time during the second part of the test exactly matches its average energy use per unit of time expended during the

first part of the test, this compressor's energy use cancels out in the equation, and the calculation provides an accurate indication of the first compressor's defrost energy use. The timing of cycles of the two compressors generally is not synchronized. If the average duty cycle (i.e. the fraction of time the compressor runs) of the second compressor is different during the second part of the test than it was during the first part of the test, the equation does not properly cancel out its energy use, which would create an error in the calculated defrost energy use. As an example, the second compressor may have completed a whole number of compressor cycles during the first part of the test, but may have completed 4.5 compressor cycles during the second part of the test. The additional half compressor cycle may represent the time period when the second compressor is not running. Hence, the average duty cycle for the second part of the test would be less than for the first part of the test, and the defrost energy use for the first compressor would not be correctly calculated.

The same issue applies during the first part of the test. Each of the two compressors has an average duty cycle and a cycle time, which are not likely identical. In order to ensure that the single time period selected to measure the energy use of both compressors reflects the average duty cycle for both, this time period must be equal to a whole number of compressor cycles for both. However, this is not generally possible unless the cycle times of the two compressors are identical or are perfect multiples of each other. If they are not, a portion of one of the compressor's last cycles is cut from the test period, resulting in a "truncated" test period. If the average energy use of this compressor for this truncated time is different from its average duty cycle, the result is a truncation error. This error can either increase or decrease the energy use measurements of either part of the test.

By requiring the energy use of the two compressor systems to be separately measured, the current procedure eliminated the truncation error, since the measurements focus on each individual system rather than the combined unit. Because the energy use of each compressor is evaluated and calculated separately, different test periods equal to whole compressor cycles can be selected for each compressor system, thus avoiding truncation error.

As part of the most recent rulemaking to address the test procedures for refrigeration products, DOE amended

the dual compressor system equation definitions. See 75 FR at 78830. These amendments clarified two areas of the procedure. First, DOE modified the text in section 4.1.2.4 of Appendix A1 to explicitly include the compressor and defrost heater in the list of components associated with each system that must have their energy use separately measured. Second, DOE corrected errors in the energy use equation that addresses this class of products (section 5.2.1.4 of Appendices A1 and A). *Id.*

AHAM had expressed concerns during that prior rulemaking about the continued test burden associated with separately measuring the energy used by the two systems, as well as the problem that some of the components of existing dual compressor products are shared by the two compressor systems. As a result of the shared nature of these components, their energy use cannot be readily assigned to one system or the other as required by the test. (See Test Procedure for Residential Refrigerators, Refrigerator-Freezers, and Freezers, Docket No. EERE-2009-BT-TP-0003; AHAM; No. 16 at p. 7; No. 43 at pp. 2-3) Sub-Zero, a manufacturer of dual-compressor products also expressed similar concerns and supported AHAM's views (Test Procedure for Residential Refrigerators, Refrigerator-Freezers, and Freezers, Docket No. EERE-2009-BT-TP-0003; Sub-Zero; No. 23 at p. 1; No. 42 at pp. 1-2).

On September 6, 2011, Sub-Zero filed a petition for waiver from the test procedures for its products that use more than one compressor. DOE published a decision and order granting this waiver request (the "Sub-Zero waiver") on February 6, 2012. 77 FR 5784. The Sub-Zero waiver prescribed an alternative test procedure that does not require separate measurement of each system's components but includes specific provisions to minimize the measurement error associated with truncation. The test does this by requiring a duration of 24 hours for key parts of the test, including the stabilization period, along with the first and second parts of the test. *Id.* By increasing the test period to 24 hours, the total energy use measured during the test is much greater than the possible truncation error, thus reducing the error to an insignificant magnitude. This result is illustrated with test data in the discussion below.

The last set of comments AHAM submitted in response to the December 2010 interim final rule recommended that DOE replace the dual compressor system test procedure with one that is essentially identical to the Sub-Zero waiver test procedure. (Test Procedure

for Residential Refrigerators, Refrigerator-Freezers, and Freezers, Docket No. EERE-2009-BT-TP-0003, AHAM, No. 43 at pp. 2-3)

DOE declined to adopt AHAM's proposed test procedure during the last round of rulemaking because stakeholders did not have an opportunity to comment on the AHAM procedure. Given the complexity of the proposed dual compressor test, and the extent to which it differed from the existing DOE test, DOE believed that, prior to modifying the test procedure in the manner suggested by AHAM, all interested parties should have an opportunity to fully vet and comment on that approach. DOE also noted the limitations of the existing dual compressor test procedure and indicated it would consider revising the procedure in a future rulemaking. 77 FR at 3570-1 (Jan. 25, 2012). Today's notice is addressing these issues.

#### Summary of AHAM's Proposed Multiple Compressor Test Procedure

The multiple compressor test procedure being proposed by DOE today is based in part on the multiple compressor test procedure previously suggested by AHAM—and that DOE ultimately permitted Sub-Zero to use in response to that company's waiver request. The proposed procedure would determine energy use based on a measurement of power input at the product's power cord rather than requiring a separate measurement of the power input of the two compressor systems. The energy use calculated for a multiple compressor product would include: (a) energy use measured during the first part of the test, which involves stable operation (excluding events associated with defrost), and (b) a defrost energy use contribution for each compressor that undergoes defrost cycles, based on measurements made during a second part of the test, which would be conducted for each of the defrosting compressor systems.

To ensure that the product has stabilized after adjusting the temperature controls, the AHAM procedure would require waiting 24 hours rather than evaluating steady-state conditions as currently prescribed in Appendix A1, section 2.9.

The revised draft AHAM procedure would require the first part of the test to be at least 24 hours long in order to minimize the truncation error (see the discussion above explaining truncation error). The test period would consist of a whole number of freezer compressor cycles. The procedure would allow this test period to be a summation of several running periods that do not include any

of the events associated with defrost cycles. To ensure stability during the first part of the test, the procedure would require that the compartment temperatures measured for the compressor cycle at the start and end of the test period (or of each individual running period comprising the test period, if there is more than one) be within 1.0 °F of the test period's temperature average, and that these measurements for fresh food temperature be based on the complete fresh food compressor cycles that are closest to the start and end of the test period.

The revised draft AHAM procedure would require the second part of the test for each measured defrost cycle to be at least 24 hours in duration, running from a time of stable compressor operation (normal compressor cycling) through all events associated with the measured defrost to a later time of stable compressor operation. The test procedure would allow additional non-continuous running periods of stable operation to be added to the test period if needed to achieve a total test duration of 24 hours. To ensure stability during the second part of the test, AHAM's revised procedure would require the compartment temperature averages for the first and last compressor cycle of this test period to be within 1.0 °F of their averages for the first part of the test. DOE notes that this approach is less stringent than the current Appendix A requirement for long-time or variable defrost systems. That provision requires that compartment temperature averages for compressor cycles just prior to and after the second part of the test be within 0.5 °F of their averages for the first part of the test (see Appendix A, section 4.2.1.1).

#### Proposed Amendment

DOE proposes to replace its dual compressor test procedure with a modified version of the test procedure recommended by AHAM. The key differences between the DOE proposal and the Sub-Zero/AHAM test procedure are:

(1) The proposal would define the term "multiple compressor" to help enhance the clarity of this term and to ensure that a uniform definition applies to this term. Adopting such a definition would lessen the risk of confusion.

(2) The proposal would allow an examination of temperature cycles as an alternative to an examination of compressor cycles as the basis for test period duration and for compartment temperature calculation. Also, a definition is proposed for the term

"complete temperature cycle" to support this change.

(3) The proposal would use a stabilization period consistent with the existing test procedure rather than requiring 24 hours for stabilization.

(4) The proposal would allow a single-part test if only one compressor system has defrost and it is a timed defrost with less than 14 hours of compressor run time between defrosts.

(5) In cases where only one compressor in a multiple-compressor-based product cycles, the proposal would specify a test period consisting of a complete number of compressor or temperature cycles lasting at least three hours for the first part of the test, similar to single-compressor products. Similarly, if none of the compressors cycle, the procedure would allow a 3-hour test period for the first part of the test.

(6) Under the proposal, if at least one compressor cycles, the test periods would be based on temperature cycles or compressor cycles of a "primary" compressor system. This would be the freezer compressor system, if its compressor cycles.

(7) For the first part of the test, the proposal would require 24 hours of continuous stable operation if there is no defrost interruption. It would also require at least 18 hours of continuous stable operation if there is a defrost interruption, rather than allowing use of non-continuous running periods, as suggested by AHAM.

(8) For the second part of the test, the proposal would not require 24 hours of operation.

(9) The proposed test would require that, for both the first and the second parts of the test, the temperature averages for the first and last cycle of the test period (either compressor or temperature cycles) for each system must be within 0.5 °F of the temperature average for the first part of the test.

These modifications and other details of the implementation of the proposed procedure are discussed in more detail below. DOE seeks comment on this approach, including on the details that follow below.

#### Multiple Compressor Definition

The term "multiple compressor" is currently undefined. In light of this gap, and the accompanying need to ensure clarity for manufacturers, DOE is proposing to define this term. This term would be used in lieu of the term "dual-compressor" in order to provide general applicability to all refrigeration products that have more than one compressor. Although DOE is not aware of any current refrigeration products

with more than two sealed compressor systems, taking this broader approach in defining this particular term would ensure that products using more than two sealed refrigeration systems that might be manufactured and sold in the future are addressed by DOE's regulations. The new definition in Appendix A, for example, would read as follows: "Multiple Compressor" refrigerator or refrigerator-freezer means a refrigerator or refrigerator-freezer with more than one compressor.

DOE requests comment on this proposed definition.

#### Temperature Cycles

DOE is proposing that test periods for multiple compressor refrigeration products be determined by either compressor operation or compartment temperatures. Reliably identifying individual compressor cycles from power data based on a single power measurement of all the energy use for multiple compressor refrigeration products may be difficult because identifying compressor cycle starts and stops may be challenging and it might not be obvious which events are associated with each compressor unless some means of differentiating these events applies. As an alternative, the proposed test procedure would allow the selection of test periods based on the cycles of the compartment temperatures associated with the multiple compressor systems. Complete temperature cycles are equivalent to complete compressor cycles because the starts and stops of each temperature cycle coincide nearly exactly with the starts and stops of the compressor cycles for the compressor associated with the considered compartment temperature. Since it is the operation of the compressor that causes the refrigeration system to reduce compartment temperatures, compressor and temperature cycles are inherently equivalent. This approach may be easier to apply to some multiple compressor products because the compartment temperature measurements of separate compressor systems are not combined like total product power inputs are. In general, these temperature cycles would coincide with their corresponding compressor cycles (i.e. the compartment temperature falls as the compressor operates and it rises when the compressor is not operating), but the use of temperature cycles may make identification of test periods easier.

DOE proposes to use a definition for "complete temperature cycle" that would refer to a cycle based on compartment temperature variations. To maintain flexibility, the proposal would allow the selection of both temperature

cycles that start when the temperature is at a maximum and those that start when the temperature is at a minimum—such temperature cycles would correspond to compressor cycles that start when the compressor starts or when it stops, respectively. Under the “maximum temperature” approach, the time period would be based on a starting point that coincides with the compartment temperature reaching its maximum temperature and would end once the compartment temperature returns to an equivalent maximum (within 0.5 °F of the starting temperature). During the course of the temperature cycle, the compartment temperature must have fallen to a minimum temperature for the period before rising again to reach the maximum temperature. Likewise, under the “minimum temperature” approach, the time period’s starting point would occur once the compartment temperature reaches a minimum and ends when the compartment temperature returns to an equivalent minimum (within 0.5 °F of the starting temperature), having, in the interim, risen to a maximum and subsequently fallen again to reach the second minimum.

By defining the complete temperature cycle in this way, this proposed definition should resolve the potential difficulties in identifying test periods based on compressor cycles, because, as mentioned above, the compartment temperature measurements would be made separately for the different compressor systems, whereas the power input measurement combines all of the product’s power input. DOE requests comment on this proposed definition that would define a “complete temperature cycle” in a manner that would permit the use of temperature cycles to identify test periods.

#### Measurement Frequency

The current test procedure allows temperature measurements to be taken at up to four-minute intervals (see Appendix A sections 2.9 and 5.1.1). This approach, however, carries with it an inability to further reduce the risk of truncation error beyond a certain degree. The Sub-Zero and revised draft AHAM procedures would further reduce this risk by requiring the measurement of multiple-compressor systems to be recorded at regular intervals not to exceed one minute (Test Procedure for Residential Refrigerators, Refrigerator-Freezers, and Freezers, Docket No. EERE-2009-BT-TP-0003, AHAM, No. 43 at p. 3).

In DOE’s view, increasing the frequency of measurement periods would provide a more accurate picture

regarding the energy usage of refrigeration products. DOE is aware that most test facilities record data for refrigeration product energy tests at a frequency of once per minute. DOE believes that there would be, at most, an insignificant test burden associated with this requirement since most test facilities already use one-minute recording intervals. Accordingly, DOE proposes to adopt a data collection interval that would not exceed one minute in length. DOE requests comment on the requirement for this proposed limit on the data acquisition time interval for test of multiple compressor products.

#### Stabilization Period

Instead of requiring a stabilization period of 24 hours as AHAM suggests, DOE is proposing to apply the existing stabilization requirements (see Appendix A, section 2.9). The DOE proposal would also permit the use of temperature cycles rather than compressor cycles to determine steady-state conditions. For example, while the current section 2.9 requires the comparison of temperature averages for two periods lasting at least two hours comprising complete compressor cycles, the proposal would allow this comparison to consider periods comprising complete temperature cycles or complete compressor cycles. As described above, it may be easier in certain cases to identify individual temperature cycles than individual compressor cycles for a multiple compressor system. DOE proposes to offer this alternative to reduce test burden for the majority of products, which achieve stabilization in less than 24 hours, and to ensure that the existing stabilization requirement is met for any product that requires more than 24 hours to achieve stabilization. DOE requests comments on this proposal.

#### One-Part Test Simplification

DOE proposes using a one-part test for multiple compressor products where (a) only one compressor system has automatic defrost and (b) the defrost is a “short-time” defrost (*i.e.*, not a “long-time defrost” with more than 14 hours of compressor operation between defrosts (see Appendix A, Section 1.12) or variable defrost). The proposed test period would start at a point during a defrost period and end at the same point during the subsequent defrost period, as does the existing test procedure for single-compressor products with automatic defrost that is neither long-time nor variable (see Appendix A, section 4.2). DOE proposes to allow use of the single test period to minimize the

test burden for products with short-time automatic defrost for only one of the compressor systems.

Such a one-part test introduces the possibility of truncation error associated with the second compressor system. However, the clock time (as opposed to the compressor run time upon which CT values are based—see Appendix A section 5.2.1.2) between defrosts for short-time defrost systems is generally about 24 hours. (For example, one of the refrigerators tested and reverse-engineered as part of the September 2011 refrigeration product energy conservation standard rulemaking had a defrost timer with a 10.5-hour timer interval, and clock time between defrosts of 22 hours for a test with temperature controls in the median setting). (Refrigerator with Defrost Timer Example, No. 12) As described below in the discussion addressing truncation error associated with the first part of a two-part test, a test duration of 24 hours is sufficiently long to minimize the overall impact of this type of error.

DOE requests comments on its proposal to allow a one-part test for multiple compressor products in which only one compressor system has a defrost cycle that is neither long-time nor variable.

#### Test Simplifications for Tests With One or No Cycling Compressors

AHAM’s Revised Draft Test Procedure does not consider potential test simplifications that could be implemented for multiple compressor refrigeration products for which one or more of the compressors does not cycle. The DOE proposal would address this possibility by providing details on how to determine test periods and the intervals over which compartment temperatures should be measured if the tested unit has one or no cycling compressors. Specifically, if only one of the compressors cycles, the test period for the first part of the test would be at least three hours long and comprise two or more complete cycles of the cycling compressor. Further, if none of the compressors cycle, the test period for the first part of the test would be three hours long. These test periods are nearly identical to the test periods for products with single compressors. (e.g. Appendix A, section 4.1) This approach, which would reduce manufacturer testing burdens, is justified because truncation error is essentially eliminated when only one compressor cycles or when no compressors cycle.

The proposed test procedure would use a similar simplification for the second part of the test for such products. For example, for a product

with one cycling compressor, it would require that the second part of the test start and stop when the single cycling compressor starts or stops. In addition, the criteria for compartment temperatures at the test period start and stop times would be based on temperature measurements made for full cycles of the single cycling compressor. Again, using this approach for the second part of the test is, in DOE's view, merited since truncation error is eliminated with one or no compressors cycling.

DOE requests comment on this proposed approach to help simplify the test periods for both the first and second parts of the test when less than two of the compressors of a multiple compressor product cycle during a test.

First Part of a Two-Part Test for a System With at Least Two Cycling Compressors

DOE's proposal would require that the first part of the test for multiple compressor products have a test duration of at least 24 hours if the test period is not interrupted by a defrost cycle. The proposal would require test periods to be selected based on the compressor or temperature cycles of a "primary" compressor. A primary compressor would normally be the freezer compressor, if it cycles. If the freezer compressor does not cycle, a fresh food compressor would be the primary compressor, and the test periods would be based upon the compressor or temperature cycles of this fresh food compressor. DOE proposes to require that the first part of the test would include a whole number of primary compressor cycles or temperature cycles. If a defrost cycle occurs prior to the completion of the 24-hour test period, the DOE proposal would allow a shorter test duration of 18 hours. This proposal contrasts with the AHAM test procedure proposal, which would permit multiple segments of running time that add up to at least 24 hours. DOE's reasoning for its approach is described below.

DOE is adopting this modified approach of AHAM's revised draft

procedure because the accuracy of the test is not necessarily improved by allowing the use of multiple segments of running time to increase the total test period time to 24 hours. This is because each segment that is used to comprise the test period would introduce its own contribution to truncation error. Hence, the benefit to accuracy associated with adding additional time to the test period would be reduced or eliminated by the additional truncation error introduced by each additional segment of test period time. DOE recognizes that there may be situations in which it is difficult to obtain 24 hours of uninterrupted stable operation. Based on a review of the test data for tests of multiple compressor products described below, DOE has tentatively concluded that shortening the test period time to 18 hours is a reasonable compromise in such cases, but that further reductions may not be acceptable because of the potential for the truncation error to become unreasonably large.

At the same time, an 18-hour test period would be possible without combining non-continuous running periods, assuming that most multiple compressor products have variable defrost. Multiple compressor products are generally premium products with electronic control and variable defrost as standard convenience features. DOE is aware of products sold by Sub-Zero, Liebherr, Bosch, LG, and GE (under that company's Monogram line of appliances) that use multiple compressor systems. To the extent DOE could determine based upon the certification information in its product listing database, models of this type all have variable defrost systems. Occasionally, defrost cycles may occur with less than 18 hours of stable operation between them, but variable defrost products would increase the defrost time interval during testing. DOE expects that in all cases, the period of stable operation after the second defrost would extend to at least 18 hours. The DOE test would continue to be conducted with the product doors closed, creating little opportunity for moisture to enter the cabinet. Under

these conditions, the need for frequent defrost is eliminated, and a variable defrost product would increase the time duration between defrosts to significantly longer intervals. Hence, DOE believes that an 18-hour minimum continuous test period is reasonable for multiple compressor products.

DOE selected the 18-hour minimum test period duration after considering truncation error—both the actual truncation error associated with a given refrigerator test and the maximum possible truncation error that could occur for the product, given the compressor cycle times and compressor duty cycles exhibited in the examined tests. In order to conduct this evaluation, DOE examined the test data of two multiple compressor refrigerator-freezer products. Table III-7 below summarizes the test data showing the relationship between truncation error and test period duration. DOE was able to distinguish between the operation of the separate compressors of the two products based on an examination of power input and temperature data. This allowed DOE to determine the truncation error (including the maximum possible truncation error) by calculating the difference in measured energy use between a test period with whole fresh food cycles and a test period based on freezer cycles with a truncated fresh food cycle. This method was used because the test period for the first part of the tests includes a whole number of freezer compressor cycles. In general, it includes a whole number of fresh food compressor cycles plus a fraction of a fresh food compressor cycle. The actual truncation error is the difference in energy use for the fresh food compressor between its actual energy use for this fraction of a fresh food compressor cycle and the energy use it would have incurred had it operated at its average wattage for the same amount of time. The maximum possible truncation error is calculated assuming that for the remaining fraction of a fresh food compressor cycle the compressor either runs continuously or is not energized.

TABLE III-7—TRUNCATION ERROR DATA FOR FIRST PART OF TEST \*

Product Number .....	1		2	
Product Class .....	4		5	
Temperature Setting .....	Mid .....	Warm .....	Mid .....	Cold
Hours .....	32.9 .....	31.0 .....	21.9 .....	21.1
Actual Error .....	0.2% .....	0.6% .....	0.0% .....	0.1%
Maximum Error .....	1.0% .....	1.1% .....	0.6% .....	0.6%
Hours .....	12.3 .....	13.4 .....	12.6 .....	15.1
Actual Error .....	1.1% .....	1.0% .....	0.2% .....	0.1%
Maximum Error .....	2.6% .....	2.5% .....	1.1% .....	0.9%

TABLE III—7 TRUNCATION ERROR DATA FOR FIRST PART OF TEST \*—Continued

Hours .....	6.8 .....	8.0 .....	5.6 .....	10.7
Actual Error .....	2.6% .....	1.1% .....	0.4% .....	0.4%
Maximum Error .....	4.7% .....	4.2% .....	2.4% .....	1.2%
Hours .....	4.1 .....	4.1 .....	2.1 .....	5.3
Actual Error .....	2.6% .....	4.5% .....	0.2% .....	0.4%
Maximum Error .....	7.8% .....	8.1% .....	6.3% .....	2.4%

\* Error is presented as a percent of total energy use including defrost energy use.

The data show that the truncation error could be substantially less than one percent for a test period of 24 hours, although in a worst case (the maximum truncation error) scenario, it could be approximately one percent. Hence, if more than 24 hours of run time is present between defrost cycles, using a 24-hour test period would provide acceptably accurate measurements. DOE test data also show that the potential error could be significantly greater than one percent for a test period of 12 hours. Hence, the test period should exceed 12 hours in length in order to reduce this error.

As mentioned above, in cases where a first stable period between defrosts is not long enough, it would be expected that the next stable period would be long enough, since most multiple compressor products have variable defrost. However, DOE believes that an 18-hour test period would be acceptable in order to balance the needs of accuracy and the limitation of test burden. As a result, DOE is proposing to require that the first part of the test include at least 18 hours of stable compressor operation if the 24-hour requirement cannot be met due to an interruption by a defrost cycle. DOE seeks comment on this proposed minimum test period duration.

To ensure stability during the 24-hour first part of the test, the revised draft AHAM procedure would require that compartment temperatures measured for the compressor cycles at the start and end of the test period (or of each individual running period comprising the test period if there is more than one) be within 1.0 °F of this test period's temperature average. Measurements for fresh food compartment temperatures would be based on the complete fresh food compressor cycles that are closest to the start and end of the test period. Because of the duration of the required test period, this temperature requirement would help ensure temperature and average energy use stability throughout the test. However, as described in section III.C.8, DOE is proposing to establish a definition for the term "stable operation." This definition would provide a temperature tolerance based on a temperature change

rate of 0.042 °F per hour, which is consistent with the existing test procedure requirements for determining steady-state operation (see, for example, Appendix A, section 2.9). In essence, DOE proposes to require that the first part of the test for products with multiple compressors be a period of stable operation consistent with this definition, thus obviating the need for additional requirements specific for multiple compressor products. DOE requests comments on this proposal.

Second Part of the Two-Part Test

The draft AHAM test procedure would require the second part of the test to have a 24-hour duration that would start before a defrost cycle during stable operation and continue through the defrost cycle (including any precooling and post-defrost temperature recovery) to the next period of stable operation. If additional defrosts limit the test period to less than 24 hours, the revised draft AHAM procedure would require that additional periods of stable operation be appended to the test period to ensure a total duration of at least 24 hours, even if the test period is not continuous.

The DOE proposal would not require a 24-hour test period for the second part of the test, and would not permit non-continuous running periods to comprise the full test period. The DOE proposal would clarify that the test period may be defined by compressor cycles or temperature cycles, and would require that it start and end when the product is at equivalent states. For example, it can both start and stop at the start of a compressor on-cycle. Similarly, it can both start and stop at the end of a compressor on-cycle.

As described above for the first part of the test, combining multiple running periods to create a test period does not reduce the impact of truncation error. This observation also applies to the second part of the test. Hence, the DOE proposal would not allow combined multiple running periods to comprise the second part of the test.

DOE's analysis and testing show that increasing the duration of this part of the test would not reduce the risk of truncation error. The energy use associated with defrost would be

calculated as the energy use measured during the second part of the test minus the energy use that would have been measured during the same time period if the product had been in stable operation for this time with no influence of events associated with defrost (as done with single-compressor products—see, for example, Appendix A, section 5.2.1.2). A longer test period duration would not minimize the truncation error in this calculation because the calculation would not involve dividing by the test period duration in hours, as would be done for the contribution to daily energy use of the first part of the test. Hence, the duration of the second part of the test would have no direct influence on the magnitude of truncation error associated with the non-synchronous operation of the compressors during this part of the test. The truncation error would instead be minimized by the ratio 12/CT, which adjusts the entire energy use contribution of defrost according to the defrost frequency. Consequently, DOE does not believe that there is a benefit to requiring a 24-hour duration for the second part of the test because increasing test period duration would not reduce the magnitude of the truncation error that might occur.

DOE investigated truncation error associated with the second part of the test in multiple compressor refrigeration products. Table III-8 below contains data from testing that DOE conducted. The data show that the duration of the second part of the test makes little difference to either the actual truncation error measured for the test or the maximum possible truncation error. These errors are calculated in the same manner described in the discussion above involving the first part of the test. DOE found that the maximum possible truncation error associated with the second part of the test did not exceed 0.5% of the total daily energy use measurement, and there is no significant difference in this maximum truncation error associated with the length of the test period. Hence, DOE concludes that requiring a 24-hour test period for the second part of the test is unnecessary, and is proposing that the test period start and end during stable operation.

TABLE III-8—TRUNCATION ERROR DATA FOR SECOND PART OF TEST \*

Product Number .....	1		2	
Product Class .....	4		5	
Temperature Setting .....	Mid .....	Warm .....	Mid .....	Cold
Hours .....	25.9 .....	27.8 .....	25.1 .....	27.2
Actual Error .....	0.2% .....	0.1% .....	0.2% .....	0.2%
Maximum Error .....	0.4% .....	0.5% .....	0.3% .....	0.3%
Hours .....	2.5 .....	3.6 .....	7.4 .....	10.7
Actual Error .....	0.1% .....	0.1% .....	0.0% .....	0.3%
Maximum Error .....	0.4% .....	0.5% .....	0.3% .....	0.3%

\* Error is presented as a percent of total energy use including defrost energy use.

The revised draft AHAM procedure for the second part of the test specified its start and end points as follows: “The test period shall start at the beginning of [a] normal compressor cycle after the previous defrost occurrence (refrigerator or freezer). The test period includes the target defrost and following normal compressor cycles until the next defrost occurrence (refrigerator or freezer).” (Test Procedure for Residential Refrigerators, Refrigerator-Freezers, and Freezers, Docket No. EERE-2009-BT-TP-0003, AHAM, No. 43 at p. 3) DOE believes that this approach is not sufficiently precise since (a) the term “beginning of [a] normal compressor cycle” does not clarify whether the start can occur at the start of an on-cycle, start of an off-cycle, or at either point in the test, and (b) there is no clear end point for the test period. The AHAM approach would, however, specify that the temperature average for each compartment for the first and last compressor cycle of the test period must be within 1.0 °F of the temperature average for the first part of the test, which would ensure that the test period does not omit any portion of the defrost cycle, such as precooling or temperature recovery. (*Id.*) The 1.0 °F temperature requirement is essentially designed to ensure that the second part of the test both starts and ends during steady state operation. By having the start and end points occur during steady state operation, the procedure would ensure that all of the events associated with defrost occur after the start and before the end of the second part of the test. By having all of the events occur in this manner during testing, all additional energy use associated with defrost would be captured by the procedure.

The alternate test procedure DOE permitted in the Sub-Zero waiver specifies the start and end of the test period for the second part of the test slightly differently: “The test period shall start at the end of a regular freezer compressor on-cycle after the previous defrost occurrence (refrigerator or

freezer). The test period also includes the target defrost and subsequent regular freezer compressor cycles, ending at the end of a regular freezer compressor on cycle before the next defrost occurrence (refrigerator or freezer).” 77 FR at 5785–5786 (Feb. 6, 2012). The Sub-Zero waiver procedure also shares the same requirement as the AHAM test procedure proposal regarding the temperature average for each compartment for the first and last compressor cycle of the test period—these must be within 1.0 °F of the temperature average for the first part of the test. *Id.*

The specified start and end times for the Sub-Zero waiver test procedure are consistent with the start and end times specified by DOE for long-time and variable defrost in Appendix A in the January 2010 test procedure final rule. 77 FR at 3564–3565 (Jan. 25, 2012). The test procedure final rule required that the test period both start and end at the end of a compressor on-cycle, because this method provides a more accurate measurement of defrost energy use. *Id.* DOE believes that measurement accuracy will improve for all refrigeration products with long-time or variable defrost, including those with multiple compressors because starting and ending the test period at the same part of a compressor cycle ensures that the product is in the same state (i.e. having the same compartment temperatures) at the end of the test period that it was in at the start of the test period.

The DOE proposal would adopt a similar approach to the Sub-Zero procedure described above for the second part of the test for multiple compressor systems. However, DOE’s proposal would permit a test to start and end at the start of the on-cycle of the primary compressor, or to start and end at the start of the off-cycle. In this way, the DOE proposal would allow greater flexibility in conducting the test, while ensuring the improved accuracy associated with starting and ending the

test period when the refrigeration product is in the same state. The DOE proposal would also specify that if the test periods are defined based on temperature cycles rather than compressor cycles, the test period for the second part of the test would both start and end when the temperature associated with the primary compressor system is at a minimum, or it would both start and end when it is at a maximum. This strategy is equivalent to requiring that the test period both start and end either when the compressor starts or when it stops, ensuring that the product is in the same state at the end of the test period as it was at the start. Hence, this approach would ensure accuracy in measuring the energy use associated with defrost for products tested using test periods based on temperature cycles.

In addition, the DOE proposal for multiple compressor systems would remain consistent with Appendix A’s requirement that the test period for the second part of the test for products with long-time or variable defrost must start and end during stable operation. Appendix A requires that the compartment temperatures for the compressor cycles prior to and after the second part of the test be within 0.5 °F of their temperature averages for the first part of the test (see Appendix A, section 4.2.1.1), as opposed to the 1.0 °F requirement of the Sub-Zero waiver and the AHAM proposal. DOE believes that this same tolerance for ensuring that the test period does not include any events associated with the defrost cycle (such as precooling or recovery) should apply to multiple compressor systems as it does for single-compressor systems because the events before, during, and after the defrost cycles of both types of products have the same basic functions (removing frost from the evaporator) and same basic control sequence (optional precooling, heating, temperature recovery).

However, the DOE proposal for multiple compressor systems would

also require that the compressor cycles examined to confirm stable operation at the start and end of the second part of the test be the first and last compressor cycles (or temperature cycles) within the test period, consistent with the AHAM proposal and Sub-Zero waiver. DOE believes that this approach would better ensure that the test period starts and ends during stable operation since it examines compressor or temperature cycles within the test period, not the cycles that may fall outside of it.

In the special case in which there are no cycling compressors, the DOE proposal would require that the test period start and end when the compartment temperatures are within 0.5 °F of their averages for the first part of the test—this is also consistent with the Appendix A test procedure (see Appendix A, section 4.2.1.2).

DOE seeks comments on its proposals for the second part of the test.

#### Energy Use Equations

The energy use equations proposed by AHAM for the multiple compressor system test procedure and contained in the Sub-Zero waiver are similar to those already found in Appendix A for products with single compressors and multiple defrost cycle types tested using the two-part test. The similarity stems from the fact that the energy use for each compressor system's defrost is added separately using its appropriate CT (i.e. hours of compressor operation between defrosts) value to adjust the measurement so that it represents a tested unit's average energy use over 24 hours (see Appendix A, section 5.2.1.5). The DOE proposal for this energy use equation is essentially identical to the AHAM proposal and Sub-Zero waiver. However, the DOE proposal would also include a test for products where only one of the compressor systems has automatic defrost—and that defrost is neither long-time nor variable. The proposal for this test, which is described above, would reduce the test burden for these types of products. Hence, DOE is also proposing to apply the energy use equation for products tested using a single test period (see Appendix A, section 5.2.1.1) to those multiple compressor products that can use the single-part test.

#### Scope of Amendments

DOE proposes to replace the existing test procedure in Appendix A for products with dual compressor systems with the new test procedure described in this section for products using multiple compressor systems. When modifying test procedures, DOE considers the extent to which the energy

use or energy efficiency measurement may be altered under a proposed procedure. (42 U.S.C. 6293(e)(1)) The test procedures of Appendix A will not be required for certifying compliance until the new refrigeration product energy conservation standards take effect on September 15, 2014. 77 FR 3559 (Jan. 25, 2012). DOE is aware of very few products that have multiple compressor systems and has received a petition for waiver from the existing test procedure only from Sub-Zero—DOE has granted this petition. 77 FR 5784 (Feb. 6, 2012). In DOE's tentative view, today's proposal would not affect the manner in which those Sub-Zero products covered under the waiver are measured for energy usage. DOE seeks information on whether any other products are currently tested using the dual compressor test procedure, whether their measured energy use would change as a result of the proposed test procedure amendment, and by how much the measurement would change. DOE notes that, consistent with its regulations, if it adopts the proposed amendments in Appendix A to address multiple compressor products such as those covered by the Sub-Zero waiver, that waiver would terminate once the amendments to the procedure are required to be used to demonstrate compliance with DOE regulations—*i.e.*, on September 15, 2014.

DOE notes that the discussion in this section focused only on multiple compressor system products with automatic defrost. DOE recognizes that the issues associated with truncation error would also affect multiple compressor products with manual defrost. However, DOE is not aware of any such products and has for this reason not proposed to address them in its test procedures. DOE requests comment on whether any such products exist and whether provisions for assuring the accuracy of testing them should be incorporated into the test procedure as part of this rulemaking.

DOE is also interested in receiving general comments regarding the proposed multiple compressor test procedure.

#### 3. Triangulation

The energy use of refrigeration products is sensitive to the temperature(s) maintained within the cabinet.<sup>10</sup> For this reason, the DOE test

procedures for refrigeration products specify standardized compartment temperatures that form the basis of the energy use measurements (see, for example, Appendix A1, section 3.2). However, conducting a test in which the product's compartment(s) temperatures exactly match the standardized temperatures is generally impossible. Particularly, today's electronic controls often provide only integer options for temperature control set points. The lack of smaller increments would make tuning to the standardized temperature within a tight tolerance impossible if the control did not exactly match the standardized temperature for one of the available settings. Even if smaller control increments are available, such as with mechanical controls, to try to approach the standardized temperatures within tight tolerances would require several iterations of adjusting the temperature controls, followed by re-stabilization and evaluation of the new steady state. This approach is particularly difficult for refrigerator-freezers and refrigerators with freezer compartments because the temperatures of two compartments must be adjusted, rather than just one, and because the compartment temperatures can affect each other.

To avoid these difficulties, the current test procedures require two tests in which the controls are adjusted so that the measured compartment temperatures bound the standardized temperatures (*i.e.*, the compartment temperature is warmer than the standardized temperature for one test and cooler for the second). The energy consumption is calculated as a weighted average of the measurements of the two tests, with averaging weights based on the measured compartment temperatures for the two tests in order to account for their respective variation from the standardized temperatures. In other words, the two measurements establish the relationship of energy use as a function of the compartment temperature(s). DOE's existing test procedure under Appendix A assumes this relationship is linear, which means that the energy use is calculated using linear interpolation (*i.e.*, a method to fit a straight line between a set of points). For example, the energy use equation of section 6.2.1.2 of Appendix A, which applies to all-refrigerators (*i.e.*, refrigerators without freezer compartments or with freezer compartments of 0.5 cubic feet capacity or less, *see* Appendix A, section 1.2), simply determines the value of this

<sup>10</sup> See DOE's discussion regarding the impact of the new Appendix A standardized compartment temperatures on energy use measurement in the refrigeration product energy conservation standard technical support document at <http://www1.eere.energy.gov/buildings/>

function at the standardized temperature.

For refrigerator-freezers and refrigerators with freezer compartments, the two-test approach is complicated by two independent variables—the temperatures of the fresh food and freezer compartments. The energy use depends on both of these temperatures. However, based on information provided by two tests, it is mathematically impossible to determine how the product's energy use varies as both of the temperatures vary independently. As a result, when using two tests, it is generally not possible to determine what the product's energy use would be when both compartments are at their standardized temperatures.

However, there is one exception to this rule: it is possible to determine the energy use in the special case where the temperature controls are perfectly tuned to the standardized temperatures. In this special case, on a chart showing freezer temperature as a function of fresh food temperature, the line passing through the points defined by the compartment temperature pairs measured for the two tests would also pass through a point defined by the standardized temperatures. For this exception, if the energy use is calculated separately for the fresh food and freezer compartments' standardized

temperatures (assuming energy use is a linear function of fresh food temperature for one of these calculations and assuming it is a linear function of freezer temperature for the other), the two energy use calculations would give the same result. For the general case in which such energy use calculations are not equal, the test procedure indicates that the larger of these measurements is used as the basis for the product's rating (see Appendix A, section 6.2.2.2). For this general case, this higher energy use calculation applies to an operating state in which one of the compartments is at its standardized temperature and the other is cooler than its standardized temperature. Consequently, this calculation overestimates the energy use that would occur if both compartments were at their standardized temperatures. It is this overestimation that the so-called triangulation approach eliminates for products that have both fresh food and freezer compartments.

DOE believes the triangulation approach could provide a more accurate estimate of energy use at the standardized temperatures by requiring a third test. If conducted with appropriate control settings, this third test would provide additional information regarding the dependence of energy use on the compartment

temperatures, specifically providing the information needed to determine the energy use for any chosen pair of compartment temperatures. Hence, the approach allows a more accurate calculation of energy use when both compartments are at their standardized temperatures.

In most cases, the error in the calculated energy use when using the two-test method is small because temperature controls are reasonably well-tuned for the standardized temperatures. The modest overestimation of energy use associated with the two-test approach is acceptable in these cases because it avoids the additional test burden of conducting a third test. However, there may be circumstances in which conducting the third test would avoid excessive measurement error. These cases can be identified by observing when the two energy use calculations required in Appendix A, section 6.2.2.2 yield significantly different results. Table III–9 below quantifies the difference in fresh food and freezer interpolations to calculate energy use for six refrigerator-freezer samples tested by DOE using Appendix A. The difference between the two compartment interpolations ranges from a potential overestimation of energy usage of 15 to 51 kWh/year.

TABLE III–9—FRESH FOOD AND FREEZER INTERPOLATION COMPARISON

Sample No.	Product class	Fresh food interpolation (kWh/yr)	Freezer interpolation (kWh/yr)	Difference between interpolations (kWh/yr)	Percent difference %
1 .....	7 .....	599	548	51	8.5
2 .....	3 .....	580	617	37	6.0
3 .....	5A .....	631	595	37	5.9
4 .....	5 .....	646	683	37	5.4
5 .....	4 .....	595	562	33	5.5
6 .....	3 .....	471	485	15	3.1

The Australian/New Zealand Standard 4474.1–2007<sup>11</sup> (AS/NZ 4474.1–2007) includes a triangulation method that involves three tests conducted using three temperature control setting combinations to allow calculation of energy use for the product that would occur when both compartment temperatures exactly equal their standardized temperatures.

<sup>11</sup> "Australian/New Zealand Standard, Performance of Household Electrical Appliances—Refrigerating Appliances, Part 1: Energy Consumption and Performance", AS/NZS 4474.1:2007, Appendix M, available for purchase at <http://infostore.saiglobal.com/store/results2.aspx?searchType=simple&publisher=all&keyword=AS/NZS%204474>.

Stakeholders suggested in oral and written comments to the 2010 NOPR that DOE should adopt the triangulation method outlined in AS/NZS 4474.1–2007 to improve the flexibility and repeatability of the test procedure. 75 FR at 78822 (Dec. 16, 2010). In the interim final rule, DOE declined to adopt this method because it had not been subject to stakeholder evaluation and comment. *Id.* AHAM commented again in response to the interim final rule that DOE should adopt the triangulation method in the test procedures, indicating that it should be introduced as an optional approach for setting temperature controls for testing. AHAM also indicated that DOE could have put this topic up for stakeholder

comment in the interim final rule, and added that if the DOE permits triangulation, it must also use triangulation for enforcement purposes. (Test Procedure for Residential Refrigerators, Refrigerator-Freezers, and Freezers, Docket No. EERE–2009–BT–TP–0003, AHAM, No. 39 at pp. 3–4) In the January 2012 final rule, which finalized Appendices A and B, DOE noted that the triangulation approach departs sufficiently from current procedures for setting temperature controls such that it would have been inappropriate for DOE to incorporate it based solely on the strength of the very limited number of NOPR comments, which contained little to no supporting data. 77 FR at 3571 (Jan. 25, 2012).

Further, interested parties did not have an adequate opportunity to fully evaluate and comment on this issue. Hence, DOE did not incorporate the triangulation approach into DOE's test procedure in the January 2012 final rule.

However, the rulemaking initiated with today's notice provides an opportunity to present the triangulation approach and subject it to full stakeholder consideration and

comment. DOE has evaluated the triangulation approach, determined that it has merit, and is proposing to adopt it as an alternative approach, as described below.

DOE conducted testing to evaluate the triangulation approach and to quantify the difference in measurement when using it as compared to the two-test method currently required. Table III–10 below summarizes test results for two of

the tested refrigerator-freezers. The first product has a side-mounted freezer and electronic temperature controls, and the second product has a top-mounted freezer and mechanical temperature controls. These are the two products of Table III–9 that have the greatest discrepancy between the two energy use calculations based on the fresh food and freezer compartment standardized temperatures.

TABLE III–10—TRIANGULATION TEST RESULTS

	Sample 1 (Side-Mount)			Sample 2 (Top-Mount)		
	1 (Mid/Mid)	2 (Cold/Cold)	3 (Mid/Warm)	1 (Mid/Mid)	2 (Warm/Warm)	3 (Mid/Cold)
Test Number	1	2	3	1	2	3
Setting (Freezer/Fresh Food)	(Mid/Mid)	(Cold/Cold)	(Mid/Warm)	(Mid/Mid)	(Warm/Warm)	(Mid/Cold)
Fresh Food Temperature (°F)	39.9	32.6	40.4	36.4	44.9	37.4
Freezer Temperature (°F)	–1.4	–5.6	4.9	–0.3	7.8	–3.4
Energy Consumption (kWh/day)	1.60	1.92	1.52	1.70	1.34	1.81
<b>Test Results:</b>						
Fresh Food at Std. Temp.:						
Energy Use (kWh/day)	1.64			1.59		
Freezer Temperature (°F)	–1.9			2.2		
Freezer at Std. Temp.:						
Energy Use (kWh/day)	1.50			1.69		
Fresh Food Temperature (°F)	42.3			36.7		
Energy Use Difference (%)	8.5%			6.0%		
Triangulation Result (kWh/day)	1.62			1.67		
Triangulation and Two-Test Percent Difference (%)	–1.2%			–1.2%		

As mentioned above, the existing DOE test procedure requires a rating based on the higher of the two test results (Appendix A, section 6.2.2.2). Hence, for Sample 1, the daily energy use measured using the current test procedure is 1.64 kWh, based on a weighted average of results using the fresh food compartment temperatures to determine averaging weights. At this level of energy use, the fresh food compartment temperature would be equal to the standardized temperature of 39 °F—and the freezer compartment temperature would be –1.9 °F. The equivalent freezer compartment temperature for this test is calculated by applying the same averaging weights used for the energy use calculation to determine a freezer compartment average temperature. The triangulation energy use result, which was determined by matching the standardized temperatures for both compartment temperatures, is 1.62 kWh—lower than the two-test result by approximately 1.2 percent. This difference in measured energy use reflects the difference between the freezer compartment temperatures of the two test methods. The table shows similar results for a second tested sample. These results illustrate the

limitations of the current test procedure's two-test approach to exactly determine the energy use of a product when both compartments are at the standardized temperatures and provide an indication of the magnitude of the potential difference in results obtained when using the triangulation method. DOE concludes that the triangulation method can make, at most, a modest difference in the measured energy use for a subset of products. Since DOE expects this difference to be small in the vast majority of cases, and since use of the two-setting test will always result in a more conservative measurement of energy use, DOE believes that this generally does not merit a mandatory third test when considering the additional test burden that such a requirement would cause.

Because DOE recognizes that there may be circumstances in which the additional test may be more representative of a given product's energy use, particularly in cases where a product's temperature controls are not tuned well to the standardized temperatures, which may result in more significant measurement differences. In such cases, DOE believes that it is appropriate to allow ratings based on use of the triangulation approach to

obtain more precise energy use measurements. Hence, DOE proposes in this notice to adopt in Appendix A a modified version of the AS/NZS triangulation approach as a voluntary testing option that manufacturers may choose to use. DOE requests comments on its proposal to allow triangulation as an optional approach.

Implementation of Triangulation in DOE's Test Procedures

DOE proposes to permit triangulation as an optional method to certify refrigeration products where, due to the basic model's operational characteristics, use of the triangulation method could result in a more representative measurement of energy use than the two-setting test. DOE's approach would be to permit this option in Appendix A. These procedures would incorporate by reference parts of Appendix M of AS/NZS 4474.1–2007 as an optional linear interpolation method. A new section 3.3 of the test procedure would reference subsections M3.a through M3.c and Figure M1 of appendix M of AS/NZS 4474.1–2007 to outline the requirements for the three-setting test procedure as an alternative to using the requirements of section 3.2 of Appendix A. The procedure would

clarify that the target temperatures  $t_{xA}$  and  $t_{xB}$  discussed in the Australia/New Zealand procedure would be the standardized temperatures as defined in section 3.2 of the DOE test procedure. However, the DOE proposal would require that the first two of the three tests comply with the requirements for the DOE two-test method as described in Appendix A, section 3.2.1.

A new section 6.2.2.3 would set the required energy calculation for the triangulation option. The section would reference section M4.a of AS/NZS 4474.1–2007 to determine the energy consumption of the unit and add to it the icemaking energy use, which would be defined in section 6.2.2.1 and which would, if adopted, be measured as described in the new section 8 that DOE is considering adding to its test procedure.

DOE requests comments on this approach for implementing triangulation into the DOE test procedure.

#### Certification

DOE is also proposing that manufacturers identify which method they have used to rate and certify a particular basic model. This proposed amendment would require a manufacturer to indicate whether triangulation serves as the basis for the certified rating. This change would be made in section 429.14(b). DOE recognizes that more than one test is conducted for each rating (see, for example, 10 CFR 429.11(b), which indicates a sample size minimum of two units). DOE proposes to require that all units of a given model that are tested for certification purposes be tested using the same test method and proposes to require that the certification report indicate whether the triangulation method was used. This requirement would be added to the sampling plan for residential refrigerators, refrigerator-freezers, and freezers in 10 CFR 429.14.

Since the two-test method generally yields results that are more conservative than the triangulation test (i.e., higher energy use), DOE would permit manufacturers to continue using the two-part test at their discretion. By permitting manufacturers to continue using the simpler two-part test, DOE's intention is to limit the overall burdens that are placed on the industry. In those instances where individual manufacturers believe that use of the triangulation method will give a more representative value of the energy use of a given basic model, those manufacturers can elect to follow the more comprehensive steps of the triangulation method.

However, given that tests conducted using the triangulation approach may potentially, for certain basic models, yield more representative results, DOE is proposing to use this particular method when conducting assessment testing, pursuant to 10 CFR 429.104, and enforcement testing, pursuant to 10 CFR 429.110, if certain conditions are observed during the first two tests of a given unit of a basic model that suggest that a third test would clearly yield a more representative measurement than the two-test method. Specifically, if the difference in the energy use calculated using the two compartment temperatures measured for the two sets of tests for any one unit of a basic model is greater than five percent, DOE would use the triangulation method for any assessment or enforcement testing of units in that basic model. This approach may, in certain circumstances, require conducting a third test of particular units of a basic model on which DOE has recently conducted assessment or enforcement testing. DOE requests comment on this five percent threshold. As noted, whether used optionally for manufacturer certification testing or for assessment or enforcement testing, DOE would require that all units of a basic model be tested using the same method.

DOE welcomes comment on its proposal to require manufacturers to state in their certification reports whether the triangulation approach was used to determine energy use of a product, and on the proposals to use triangulation for assessment and enforcement if (a) the product was certified using this method, or (b) the measurement results calculated based on the first two tests differ by more than five percent using the two different compartment temperatures for the interpolations.

#### 4. Anti-Circumvention Language

##### Revisions Addressing Past Stakeholder Comments

The current test procedure requires very specific conditions during testing that would normally not exist during consumer use in the field. For example, products are tested in 90 °F ambient temperature conditions (see, for example, Appendix A1, section 2.1), which is much warmer than typical room temperature. Recognizing that manufacturers could design product control systems to detect energy test conditions and modify their operation during testing to obtain a more favorable rating, AHAM introduced “anti-circumvention” language into the 2007 version of HRF–1. (HRF–1–2007, section

1.2) AHAM revised this language slightly in HRF–1–2008.

In the December 2010 final rule, DOE added similar language to 10 CFR 430.23(a)–(b), which contain general provisions applicable to Appendices A and A1 and Appendices B and B1, respectively. Specifically, the final rule added a new section 430.23(a)(10) and a new section 430.23(b)(7), which require that all refrigeration products tested under the DOE test procedures operate during the prescribed testing in a manner equivalent to their operation during representative average consumer use. Both of these provisions included four examples of situations in which a manufacturer must obtain a waiver under 10 CFR 430.27. However, the anti-circumvention language adopted by DOE was not identical to the language contained in either HRF–1–2007 or HRF–1–2008. 77 FR at 3568 (Jan. 25, 2012).

DOE issued an interim final rule covering amendments to Appendices A and B in conjunction with the final rule that added the anti-circumvention language to 10 CFR 430.23. During the comment period for the interim final rule, AHAM and Whirlpool urged DOE to adopt anti-circumvention language identical to HRF–1–2008's. (Test Procedure for Residential Refrigerators, Refrigerator-Freezers, and Freezers, Docket No. EERE–2009–BT–TP–0003, No. 16 at p. 4, No. 12 at p. 2)

In the January 2012 final rule for Appendices A and B, DOE noted that amendments made to 10 CFR 430.23 as part of the December 2010 final rule were already final and not subject to further amendment. However, DOE noted that it would consider making such revisions in a future rulemaking. 77 FR at 3568 (Jan. 25, 2012).

In this notice, DOE proposes to adopt AHAM's suggested revisions to sections 430.23(10)(a)(ii) and 430.23(7)(a)(ii), and to adjust the order of the parts of these sections. The modified anti-circumvention language would duplicate the HRF–1–2008 text, as recommended by AHAM in its comments on the interim final rule, which address the four examples providing test procedure instructions for specific control features. (Test Procedure for Residential Refrigerators, Refrigerator-Freezers, and Freezers, Docket No. EERE–2009–BT–TP–0003, No. 16 at p. 4, No. 12 at p. 2)

In addition, DOE proposes to move the discussion of the circumstances that would lead to the requirement for a waiver to the end of the anti-circumvention section. Currently, the four examples mentioned above appear directly after the waiver requirements

discussion. However, their format providing test procedure instructions (e.g., “Energy used during adaptive defrost shall continue to be tested and adjusted per the calculation provided for in this test procedure.”) is inconsistent with their appearance directly after the waiver discussion. Hence, DOE proposes to reorder the sections, so that the four examples instead follow the sentence, “Energy consuming components that operate in typical room conditions (including as a result of door openings, or a function of humidity), and that are not exempted by this test procedure, shall operate in an equivalent manner during energy testing under this test procedure, or be accounted for by all calculations as provided for in the test procedure”. The discussion of circumstances leading to the requirement to obtain waivers would appear at the end of the section.

DOE welcomes stakeholder comment on DOE’s proposed revisions to the anti-circumvention language and on the reordering of the language.

#### Components That Operate Differently During Testing

The DOE test procedure simulates typical room conditions (approximately 70 °F) with door openings by testing at 90 °F without door openings. See 10 CFR 430.23(a)(10). DOE’s adoption of a modified version of AHAM’s anti-circumvention language for refrigerators and refrigerator-freezers was intended to prevent manufacturers from designing products that actively reduce the energy use of key components when they sense that the product is undergoing energy testing. DOE’s test procedure is designed to permit passive changes in operation because a product under test is expected to operate differently in certain respects than it would under typical room conditions to remove the higher thermal load imposed by the test conditions while continuing to maintain the same thermostatically-controlled internal temperature (e.g., compressor percent run time would be expected to increase during operation at a room temperature of 90 °F as compared with typical room conditions). In this case, the added thermal load to simulate door-openings and the insertion of warm food products is the reason for conducting the test in the 90 °F ambient rather than at approximately 70 °F.

On August 27, 2012, Whirlpool Corporation submitted a petition for waiver from the DOE test procedure for basic models of refrigeration products that use a dual-speed condenser fan motor. (Whirlpool subsequently altered its waiver request into a request for guidance.) These basic models run their

condenser fans at low speed in typical room conditions, increasing condenser fan speed when sensors detect ambient temperatures greater than 80 °F. Increasing condenser fan speed increases the heat rejection from the condenser to a consumer’s home, which reduces the condensing temperature and potentially increases the measured efficiency of the refrigeration system during testing if the reduction in compressor energy use exceeds the increase in fan energy use. Whirlpool indicated that fan noise necessitated the use of a lower fan speed below 80 °F in order to maintain consumer acceptance.

Based on Whirlpool’s description, this feature represents an active operation change that would require the filing of a waiver request from a manufacturer under 10 CFR 430.23(a)(10)(i), since this feature appears to cause the product to operate differently during energy testing than it would during representative average consumer use. See also 10 CFR 430.27 (regarding general test procedure waiver requirements). In its petition, Whirlpool acknowledged that such a feature may conflict with section 430.23(a)(10), but argued that disabling this feature in order to force the test unit to operate in a manner equivalent to typical room conditions would be intrusive to the product’s operation and could introduce concerns about test accuracy. In effect, Whirlpool requested that DOE waive the conditions of section 430.23(a)(10) with respect to this particular feature and permit testing and rating of models with this feature without the use of an alternative test procedure. Whirlpool also indicated that it had determined through testing that Samsung has already introduced models using such a control feature.

As a related matter, on March 7, 2013 Samsung Electronics America Inc. (Samsung) submitted to DOE a petition for waiver for several models that use a multi-speed condenser fan motor, with a description similar in nature to the petition submitted by Whirlpool. The petition did not indicate the specific impact on the measured energy use resulting from the use of this feature or propose an alternative test method, but requested that DOE confirm whether, in fact, the use of this feature represents a violation of the language in 10 CFR 430.23(a)(10) requiring that energy consuming components that operate in typical room conditions (including as a result of door openings, or a function of humidity), and that are not exempted by the DOE test procedure, shall operate in an equivalent manner during energy testing under the DOE test procedure, or be accounted for by all calculations as provided for in the DOE test procedure.

Samsung stated that the general purpose of this feature is to induce a condensing rate that is appropriate for the given ambient room conditions, thus minimizing stress on the refrigerant system and improving system performance and durability.

To address these types of issues generally, DOE initially proposed modified language in its May 27, 2010 NOPR (see 75 FR at 29856), but did not adopt this language due to valid concerns expressed in stakeholder comments. In response to the issues raised by Whirlpool and Samsung, DOE issued guidance on this matter on May 28, 2013, that provides a framework for assessing the potential need for a waiver within the context of the existing anti-circumvention provisions.<sup>12</sup> In the absence of more specific details about the expected energy impact of this feature, DOE is unable to propose a specific amendment to the provisions of 430.23(a)(10) (and 430.23(b)(7) for freezers) that would address these concerns. However, DOE requests comments as to whether modifications to the anti-circumvention language are needed in order to address control algorithms similar to the control described above as well as any available data regarding the net impacts on the measured energy consumption for such a feature and the impacts on the representativeness of related ratings. DOE may consider revising the test procedure accordingly in this or a future test procedure rulemaking.

#### 5. Incomplete Cycling

The refrigeration circuit compressor, which is a key component of refrigeration products, generally is the component that consumes the most energy. Most products use single-speed compressors with sufficient capacity for peak demand conditions, such as when doors are frequently opened. Hence, when testing a product with the doors closed, compressors cycle on and off as the thermostat in the cabinet intermittently energizes the compressor to provide more cooling. Energy use is high when the compressor is operating and low or even zero when it is not. In order to provide a meaningful measurement of average product energy use to maintain specified compartment temperatures, the measurements must be made for a whole number of compressor cycles. A full compressor cycle includes both the time when the compressor is operating and the time

<sup>12</sup> This guidance is posted in DOE’s online Guidance and FAQ database, and is available for viewing at: <http://www1.eere.energy.gov/guidance/default.aspx?pid=2&spid=1>.

when it is not. At the end of a full compressor cycle, the cabinet is in the same state as at the start of the cycle, where the start of the cycle is marked by the time at which the compartment thermostat (or electronic control system) switches the compressor on (or, alternatively, both the start and end of the cycle occur when the compressor is turned off). For this reason, the DOE test procedure requires that when measuring energy use, test periods must include at least two whole compressor cycles (see, for example, Appendix A, section 4.1).

However, some refrigeration products may, for some test conditions, have compressor cycles lasting many hours. In such cases, the specified test period (two whole compressor cycles) could last significantly longer than a day. To limit the testing burden, the test procedure currently limits the test

period to a maximum of 24 hours. The test procedures use the term “incomplete cycling” to denote this condition in which two compressor cycles last more than 24 hours.

In DOE testing, several freezers had compressor cycles lasting longer than 12 hours each, thus invoking the requirements associated with incomplete cycling. (Test Data for Incomplete Cycling Freezers, No. 13) Table III–11 shows the potential measurement error associated with the 24-hour test period as compared with a test period comprising a whole number of compressor cycles. DOE determined that this measurement error varied from 3 to 14 percent for these products. While products that operated with incomplete cycling did so only for one of the two temperature control settings used for the test, the errors shown are

based on the energy use associated with the standardized compartment temperature, based upon the weighted average of energy use measurements made for the two settings. The magnitude of the error and its direction (*i.e.*, whether it results in overestimating or underestimating energy use) depend on whether the 24-hour test period begins when the compressor starts or when it stops. The current DOE test procedure does not specify when such a 24-hour period should start. For these tests, the error is reported based on 24-hour test periods that begin when the compressor starts. In each case, the 24-hour test overestimates the energy use that would have been calculated using test periods consisting of whole numbers of compressor cycles.

TABLE III–11—MEASUREMENTS ERROR ASSOCIATED WITH 24-HOUR TEST PERIOD FOR INCOMPLETE CYCLING

Product Class .....	10 .....	10 .....	10 .....	10 .....
Total Volume (cuft) .....	12.9 .....	14.3 .....	12.9 .....	14.7 .....
Settings used in Test .....	Mid, Warm ...	Mid, Warm ...	Mid, Warm ...	Mid, Warm
Setting with Incomplete Cycling .....	Mid .....	Mid .....	Mid .....	Mid
Energy use 24-hour limit (start w/compressor start) .....	347 .....	367 .....	404 .....	391
Energy use whole number of cycles .....	336 .....	356 .....	349 .....	377
Percent Impact .....	–3.2% .....	–3.0% .....	–13.6% .....	–3.6%
Test start .....	5/7/10 .....	7/28/10 .....	11/4/10 .....	8/7/10
End .....	5/18/10 .....	8/18/10 .....	11/15/10 .....	8/17/10
Duration in hours .....	264 .....	504 .....	264 .....	240
<b>Assessment of Added Test Time</b>				
Two full cycles:				
Test period (hr) .....	47.1 .....	42.1 .....	27.9 .....	50.8
Additional time (hr) .....	23.1 .....	18.1 .....	3.9 .....	26.8
(percent test time) .....	9% .....	4% .....	2% .....	11%
Single cycle:				
Test period (hr) .....	23.5 .....	21.0 .....	14.0 .....	25.4
Test time change (hr) .....	–0.5 .....	–3.0 .....	–10.0 .....	+1.4
(percent test time) .....	–2% .....	–13% .....	–42% .....	+6%

The table also summarizes the increase in test time for these products if a two-cycle or one-cycle test period were specified rather than the current 24-hour test period. For two-cycle test periods, the total test time would increase from 2 to 11 percent. For a single-cycle test period, the total test time could increase up to 6 percent but would on average decrease.

DOE also conducted a theoretical analysis calculating the magnitude of the error associated with the current 24-hour test period. For this analysis, DOE considered variation in (a) The ratio of compressor “on” time relative to “off” time, (b) the duration of full compressor cycles, and (c) whether the 24-hour test period starts when the compressor starts or when it stops. This analysis shows that the error associated with the 24-hour test period can be as large as 40

percent for a temperature setting for a product operating with incomplete cycling and demonstrates that the current 24-hour test period limit for incomplete cycling products can, in certain circumstances, result in significant errors in measurement as compared with the products’ actual average energy use. (Theoretical Analysis of Potential Measurement Error for Incomplete Cycling Products, No. 1)

Based on the test data and its analysis, DOE tentatively concludes that the current test procedure’s approach for incomplete cycling products requiring a 24-hour test period has the potential for a large measurement error. Further, DOE’s test data show that requiring, instead, the use of a full compressor cycle would not add significant test burden and would in most cases reduce test time. For this reason, DOE proposes

to eliminate the current 24-hour test period for products exhibiting incomplete cycling. In order to mitigate the test burden of this change, DOE proposes to allow the test period to consist of a single compressor cycle. DOE requests comments on this proposal.

**Temperature Measurement for Incomplete Cycling or Non-Cycling Products**

As discussed in section III.C.3, the energy use of refrigeration products is sensitive to the temperatures maintained in the compartments. However, the compartment temperatures for most products are not constant. The temperatures of refrigeration product compartments vary as the compressor cycles, dropping when the compressor is operating and

rising when it is not operating. In order to provide a meaningful measurement of compartment temperature, the measurement must be an average for one or more whole compressor cycles, which includes both the off-time and on-time of the compressor.

The December 2010 interim final rule modified the test period for measuring temperature for products tested starting in 2014. This change, implemented in Appendices A and B (see, e.g., Appendix A, section 5.1.2), requires that the test period for temperature measurement coincide with the test period for energy measurement, regardless of whether the product's compressor cycles regularly, does not cycle, or exhibits incomplete cycling. These changes were incorporated into Appendices A and B as part of amendments made to the second part of the test for products with long-time or variable defrost. 75 FR at 78836 (Dec. 16, 2010).

However, DOE has become aware that requiring the same test periods for temperature measurement and energy use, as done for Appendices A and B as described above, may not be appropriate for products with an automatic defrost cycle that is neither long-time nor variable in nature (i.e., "short-time defrost" products). In Appendices A1 and B1, the temperature measurement is made during one or more complete compressor cycles, one of which shall be the last complete compressor cycle in the test period (i.e., the test period specified for energy measurement) (see, e.g., Appendix A1, sections 5.1.2 and 5.1.2.1). For products with short-time defrost, the test period is from one point during a defrost cycle to the same point during the next defrost cycle (see, e.g., Appendix A1, section 4.2). The last complete compressor cycle in such a test period occurs during stable cycling of the compressor just before the defrost timer initiates the defrost cycle. Hence, modifying the test period for temperature measurement to be the same as the test period used for measuring energy usage would be inconsistent with DOE's current test procedures for such products.

To ensure the accuracy and consistency of the soon-to-be required test procedures for short-time defrost products, DOE is proposing to address the inconsistency associated with temperature measurements for short-time defrost products. Specifically, DOE proposes to require that the compartment temperatures for such products shall be the average of the measured temperatures taken in a compartment during a stable period of compressor operation containing no

defrost cycle or events associated with a defrost cycle, such as precooling or recovery, that includes at least two complete compressor or temperature cycles (if the compressor(s) or temperatures cycle) and is at least three hours in duration—essentially the same test period specified in section 4.1 of the test procedure for products with manual defrost. This provision would apply to Appendices A and B. This proposed approach for defining temperature measurement invokes several definitions described elsewhere in this notice: The term "complete temperature cycles" is described in section III.C.2, while "precooling", "recovery", and "stable operation" are discussed in section III.C.8. As described in these sections, DOE proposes to add these definitions to Appendices A and B to support already-established test procedures for products with long-time or variable defrost (see, for example, Appendix A, section 4.2.1), and to support the multiple compressor test procedures proposed for Appendix A.

DOE welcomes comment on its proposed revision to section 4.1 to reduce the potential error while limiting test burden for incomplete cycling products, as well as the proposed revisions to section 5.1 to ensure consistency regarding measurement of compartment temperature.

#### 6. Mechanical Temperature Controls

As discussed in section III.C.3 of this notice, DOE's procedure requires testing at two temperature settings. Appendix A, section 3.2.1 requires that temperature controls be set to the median setting for the first test. The test procedure then calls for a second test to be performed with all controls set at their warmest setting or all controls set to their coldest setting.

Achieving either the warmest or coldest setting for electronic control products is straightforward because controls are set to either the highest or lowest temperature setting that the electronic control allows. However, DOE has received questions about how to properly position a mechanical control to obtain the highest or lowest temperature setting. More specifically, DOE has become aware that there may be confusion as to the meaning of the term "setting" for the purposes of this aspect of the test, particularly for products with mechanical controls that have a range of motion extending beyond the printed indications on the knob or label. In such cases, DOE proposes to clarify whether the control should be set either with a pointer aligned to the highest or lowest number or letter on the dial or to the warmest

or coldest end of the range by turning the dial completely until it is physically unable to be turned further. In doing so, DOE is seeking to ensure test consistency to avoid different lab interpretations of the temperature control setting requirements, which could generate inconsistent results.

To improve test result consistency, DOE is considering modifying section 3.2.1 of Appendices A and B to indicate that the warmest and coldest setting should be achieved by aligning mechanical temperature control dials to the highest or lowest numeral or symbol that indicates a temperature setting. The new approach, which is intended to standardize testing practices while accounting for variability in design of mechanical temperature controls, would be inserted in section of 3.2.1 of Appendices A and B. It would read, ". . . the warmest and coldest settings shall correspond to the positions in which the indicator is aligned with control symbols indicating the warmest and coldest settings." The remainder of section 3.2.1 would not be changed.

DOE welcomes stakeholder comment on its proposal to modify section 3.2.1 of the current test procedure to clarify mechanical control settings during testing.

#### 7. Ambient Temperature Gradient

DOE has observed that the key sections of the two industry-based protocols (i.e., HRF-1-1979 and HRF-1-2008) on which the DOE procedures rely contain inconsistencies regarding specified ambient temperature and vertical ambient temperature gradient requirements. Vertical ambient temperature gradient is the rate of temperature variation with height. For example, the temperature gradient measured by two temperature sensors separated vertically but otherwise at the same location in a room is equal to the difference in measured temperature divided by their vertical separation.

The key requirements for ambient temperature sensors, ambient temperature, ambient temperature gradients, and temperature sensor shielding are summarized in Table III-12 below. All of these factors are significant for purposes of specifying the ambient temperature conditions surrounding a test sample because each one can affect the measured energy use. For example, the ambient temperature sensor location affects the measured value of ambient temperature since temperatures generally are not completely uniform throughout the test chamber. Also, the ambient temperature level directly affects the cabinet thermal

load that must be removed by the refrigeration system.

TABLE III-12—KEY AMBIENT TEMPERATURE REQUIREMENTS

Requirement	Appendix A1	Appendix A
Ambient Temperature Sensor Location.	The ambient temperature is to be recorded at points located 3 feet (91.5 cm) above the floor line and 10 inches (25.4 cm) from the center of the two sides of the cabinet. (HRF-1-1979, section 7.4.3.1).	Not specified (missing from HRF-1-2008).
Ambient Temperature .....	The ambient temperature shall be 90.0± 1 °F (32.2±0.6 °C) during the stabilization period and the test period. (Appendix A1, section 2.1).	The ambient temperature shall be 90.0±1 °F (32.2±0.6 °C) during the stabilization period and the test period (Appendix A, section 2.1).
Ambient Temperature Gradient Sensor Locations.	The vertical ambient temperature gradient in any foot of vertical distance from 2 inches (5.1 cm) above the floor or supporting platform to a height of 7 feet (2.17 m) or to a height 1 foot (30.5 cm) above the top of the cabinet, whichever is greater, is not to exceed 0.5 °F per foot (0.9 °C per meter). (HRF-1-1979, section 7.2.1) Also see text below under “Maintaining Ambient Temperature Gradient During the Test”.	The vertical ambient temperature gradient at locations 10 inches (25.4 cm) out from the centers of the two sides of the unit being tested shall be maintained during the test. Unless the area is obstructed by shields or baffles, the gradient shall be maintained from 2 inches (5.1 cm) above the floor or supporting platform to a height 1 feet (30.5 cm) above the unit under test. The vertical ambient temperature gradient in any foot of vertical distance is not to exceed 0.5 °F per foot (0.9 °C per meter) (HRF-1-2008, section 5.3.1).
Ambient Temperature Gradient.	See above (HRF-1-1979, section 7.2.1) .....	See above (HRF-1-2008, section 5.3.1).
Maintaining Ambient Temperature Gradient During the Test.	* * * the vertical ambient temperature gradient at locations 10 inches (25.4 cm) out from the centers of the two sides of the unit being tested is to be maintained during the test. Unless the area is obstructed by shields or baffles, the gradient is to be maintained from 2 inches (5.1 cm) above the floor or supporting platform to a height 1 foot (30.5 cm) above the unit under test. (Appendix A1, section 2.2).	See above (HRF-1-2008, section 5.3.1).
Shielding of Temperature Sensors.	Temperature measuring devices are to be located or shielded so that indicated temperatures will not be affected by the operation of the condensing unit. (HRF-1-1979, section 7.4.3.1).	Temperature measuring devices shall be located or shielded so that indicated temperatures are not affected by the operation of the condensing unit or adjacent units (HRF-1-2008, section 5.3.1).

Test temperature requirements for freezers, described in Appendices B1 and B, are the same as those summarized in the table above—the Appendix B1 requirements are identical to those of Appendix A1, and the Appendix B requirements identical to those of Appendix A.

Location of Ambient Temperature Sensors

DOE notes that Appendices A and B do not specify the locations of the ambient temperature measurement sensors, since these locations are not specified in HRF-1-2008. To remedy this gap, DOE proposes to add requirements for these sensor locations in a new section 2.1.1 to be added for these two appendices. The addition of these requirements would help ensure testing consistency. DOE requests comment on this proposed amendment.

Shielding

DOE notes one issue with the shielding requirements (as specified in section 5.3.1 of HRF-1-2008, which is incorporated by reference in Appendices A and B): the requirements suggest that relocating the sensors is

appropriate in order to avoid the impact of the warming effect of the condensing unit.

DOE does not believe that relocating temperature sensors is an appropriate means to remedy the effects of the condensing unit or adjacent products under test. As Table III-12 clearly lays out, the requirements for temperature sensor placement are precise, providing manufacturers with the necessary specificity in setting up sensors for the test. See HRF-1-2008, sec. 5.3.1. An attempt to relocate these sensors in a manner that conflicts with these requirements would, in DOE’s view, undermine the procedure’s purpose to ensure that an accurate measurement of energy usage is obtained. Hence, to remove any potential ambiguity or potential loophole, DOE is proposing to eliminate the current sensor relocation option. DOE proposes to implement this change in Appendices A and B by moving the shielding requirement, without the option for sensor relocation, to a new section 2.1. Making a change in this manner would, as described below, permit the removal of related references to section 5.3.1 of HRF-1-

2008 currently contained in Appendices A and B.

DOE requests comment on its proposals to disallow relocation of ambient temperature sensors in order to prevent them from being affected by the test sample’s condensing unit or adjacent test samples.

Maintaining the Ambient Temperature Gradient During Testing

The requirement for maintaining the temperature gradient during the test was added to the test procedure during the rulemaking that adopted sections of HRF-1-1979 by reference. 47 FR 34517 (Aug. 10, 1982). DOE proposed amendments to its then-existing test procedure based on the test methods of HRF-1-1979. See 45 FR 47396 (July 14, 1980). These amendments incorporated HRF-1-1979, section 7.2.1 to require that the vertical temperature gradient in the test room in every foot of vertical distance must be no more than 0.5 °F per foot. On August 10, 1982, DOE revised its test procedures by adding a requirement that the ambient temperature gradient be maintained during testing to address comments pointing out that the proposal lacked

such a requirement. 47 FR at 34522–34523. This new language was incorporated into Appendix A1, section 2.2. DOE tentatively believes that amending this requirement may be necessary because (a) it is not clear that the temperature gradient requirement applies when temperature sensors are shielded, and (b) there are no specific details provided in the referenced HRF–1 procedure regarding the measurements that would demonstrate successful compliance with this requirement.

The current temperature gradient maintenance language indicates that the temperature gradients should be maintained during testing. However, the next part of the requirement states, “Unless the area is obstructed by shields or baffles, the gradient is to be maintained from 2 inches (5.1 cm) above the floor or supporting platform to a height 1 foot (30.5 cm) above the unit under test.” (See Appendix A, section 2.2) This language is unclear as to whether the ambient temperature gradients must be maintained as described if there are shields or baffles. DOE is unaware of any refrigeration product equipped with shields or baffles in the specified locations. Hence, DOE concludes that such shields or baffles would be those placed in the vicinity of the temperature sensors during testing to comply with the requirements to shield the sensors from the effects of the condensing unit or adjacent products under test. (See, e.g., HRF–1–1979, section 7.4.3.1) DOE proposes to eliminate the ambiguity regarding whether the temperature gradients are to be maintained when the temperature sensors are shielded by removing the qualifying text, “unless the area is obstructed by shields or baffles”.

DOE has observed during testing that the gradients are often difficult to maintain during testing. It is DOE’s understanding that test laboratories generally shield the temperature sensors as required and strive to arrange the shields to ensure that the temperature gradients are maintained during the test at the specified location 10 inches from the sides of the units. For example, DOE is aware that test laboratories have generally placed temperature sensors 10 inches from the sides of the unit at heights 2 inches above the floor, 36 inches above the floor, and 12 inches above the top of the unit. The 36-inch high sensors are monitored to ensure they remain within the  $90 \pm 1$  °F specified ambient temperature range required under the procedure. The laboratories also strive to maintain temperature gradients between the lower and higher pairs of temperature

sensors on each side of the unit (*i.e.*, between the 2-inch and 36-inch sensors and also between the 36-inch and highest sensors). Often, one of these gradients exceeds 0.5 °F per foot for a few minutes after the start of a compressor “on”-cycle, when condenser heat release is highest.

In order to rectify this situation, the laboratories shield the sensors (or adjust the shielding as needed) and recheck whether the gradients are maintained. The condensing unit as well as the operation of adjacent test units can impact the temperature measurements by raising the temperature in some locations in the test chamber. The condensing unit rejects heat from the product’s refrigeration system by transferring it to the air surrounding the cabinet, either by drawing air through the condensing unit, or by direct transfer to the air from a condenser mounted on the outside of the cabinet. If this warm air passes near a temperature sensor after leaving the warm condenser, the temperature measured by the sensor will rise.

Further, if this temperature rise is sufficiently greater at one temperature sensor than at the temperature sensor below it, the measured vertical ambient temperature gradient will increase, potentially above the maximum 0.5 °F per foot. Such a condition indicates a failure to “maintain the vertical ambient temperature gradient during the test”, as required by the test procedure. DOE recognizes that it may be difficult to maintain the temperature gradient during testing if some of the temperature sensors are exposed to the warm air of the condensing unit or adjacent test units and requests comment on whether maintaining the gradient at a location 10 inches from the side of the unit as specified is essential to assure repeatable results. Intrinsic to this issue is whether maintaining the temperature gradient can be demonstrated using a different location. However, DOE also recognizes that the test procedure does not specify how to demonstrate that the temperature gradient is maintained during the test. DOE proposes to require the use of sensors on both sides of the test sample at three heights, as described above—at 2 inches above the floor, 36 inches above the floor, and one foot above the top of the cabinet—and that the gradient must be maintained during the test between the two pairs of vertically-adjacent sensors on each side (*i.e.* between the 2-inch and 36-inch temperature sensors and also between the 36-inch and highest sensors). In addition, DOE would require that the temperatures measured by these sensors

be recorded in the test data underlying certifications in accordance with 10 CFR 429.71. DOE proposes these changes for Appendices A and B.

DOE requests comments on its proposal to modify the requirements for maintaining the ambient temperature gradient during testing. In addition, because DOE is aware that it may be difficult to maintain the gradients when temperature sensors are affected by the heat of the condensing unit or adjacent units, DOE also requests comments on whether verification of temperature gradient maintenance should be performed in a different location.

#### Revising Ambient Temperature Requirements for Appendices A and B

Several of the ambient temperature requirements of Appendices A and B appear in section 5.3.1 of HRF–1–2008, which is incorporated by reference. DOE is proposing to modify some of these requirements, particularly those related to maintaining the temperature gradient during testing, as described above. In order to make the necessary changes related to temperature gradient and ambient temperature sensor location requirements while retaining certain other requirements, DOE proposes to move these requirements directly into Appendices A and B, in new sections 2.1.1 through 2.1.3, and to remove the incorporation by reference for HRF–1–2008 section 5.3.1.

DOE requests comments on the proposed changes to ambient temperature and ambient temperature gradient requirements, and on the proposed approach to implement these changes.

#### 8. Definitions Associated With Defrost Cycles

DOE’s amendments in the January 2012 final rule included modifications to test periods for products with long-time and variable defrost (see, for example, Appendix A, section 4.2.1). 77 FR at 3563–3568 (Jan. 25, 2012). That rule provided that the first part of the test would be a stable period of compressor operation that includes no portions of the defrost cycle, such as precooling or recovery. See 77 FR at 3563 (Jan. 25, 2012) for a detailed explanation of the concepts of “precooling” and “temperature recovery.” However, DOE did not define the terms “precooling” and “temperature recovery”, nor did it define what comprises a “stable period of compressor operation.” To address any potential issues that may arise from this gap, today’s notice proposes definitions for each of these terms.

These definitions would also clarify two other proposed sections of the test procedures, should they be adopted. Today's notice proposes adopting test procedures for multiple compressor refrigeration products that use the same concepts of stable operation, precooling, and recovery that are important in describing the test procedure for products with long-time or variable defrost (see section III.C.2). That procedure would be added as part of Appendix A. In addition, this notice proposes to alter the manner in which to determine compartment temperatures in Appendices A and B for products with short-time defrost (automatic defrost that is neither long-time nor variable defrost). Determining compartment temperatures under today's proposal would invoke the concepts of precooling, recovery, and stable operation.

The proposed definitions are as follows:

“Precooling” means operating a refrigeration system before initiation of a defrost cycle to reduce one or more compartment temperatures significantly (more than 0.5 °F) below its minimum during stable operation between defrosts.

“Recovery” means operating a refrigeration system after the conclusion of a defrost cycle to reduce the temperature of one or more compartments to the temperature range that the compartment(s) exhibited during stable operation between defrosts.

“Stable operation” means operation after steady-state conditions have been achieved but excluding any events associated with defrost cycles. During stable operation the rate of change of all compartment temperatures must not exceed 0.042 °F (0.023 °C) per hour. Such a calculation performed for compartment temperatures at any two times, or for any two complete cycles, during stable operation must meet this requirement.

(A) If compartment temperatures do not cycle, the relevant calculation shall be the difference between the temperatures at two points in time divided by the difference, in hours, between those points in time.

(B) If compartment temperatures cycle as a result of compressor cycling or other cycling operation of any system component (e.g., a damper, fan, or heater), the relevant calculation shall be the difference between compartment temperature averages evaluated for whole compressor cycles or complete temperature cycles divided by the difference, in hours, between either the

starts, ends, or mid-times of the two cycles.

“Stable period of compressor operation” is a period of stable operation of a refrigeration system that has a compressor.

The proposed definition for stable operation uses the same rate of temperature change specified in the current test procedures as the indication of steady-state conditions (see, for example, Appendix A, section 2.9).

DOE seeks comment on its proposal to add these definitions to Appendices A and B.

#### 9. Elimination of Reporting of Product Height

Before 1997, DOE made no class distinctions by product size, and compact refrigerators were governed by the same standards as full-size refrigerators. In 1997, DOE issued a final rule that added new product classes for compact refrigerators, refrigerator-freezers, and freezers, which included products with a total volume of less than 7.75 cubic feet that are also 36 inches or less in height. 62 FR 23102, 23111 (Apr. 28, 1997). DOE explained in its July 1995 proposal that it was considering treating compact products separately from standard-sized products because compact products had fewer design options to help reduce their energy consumption. 60 FR 37388, 37396 (July 20, 1995). The July 1995 NOPR proposed a 36-inch height limit for compact class products and explained that this limit was established in recognition of the design constraints faced by manufacturers, particularly with respect to top and bottom panel insulation thicknesses. See 60 FR at 37397 (July 20, 1995).

However, the majority of compact products are not undercounter products that fall within these specified dimensions. To account for this situation, the September 2011 Energy Conservation Standard final rule (September 2011 Final Rule) eliminated the 36-inch height restriction in the definition for compact products, effectively expanding the “compact” definition to include products with a total volume less than 7.75 cubic feet and height exceeding 36 inches. 76 FR at 57538 (Sept. 15, 2014). As described in DOE guidance, the 36-inch height requirement still forms part of the classification of a product as “compact” until the new standards final rule is required for compliance in September 2014.<sup>13</sup> To confirm the proper

classification of products as compact or standard size before the change in the definition takes effect, DOE has required reporting of product height in certification reports (see 10 CFR 429.14(b)(2)). However, such reporting will no longer be necessary after the new definition applies. Consequently, DOE proposes removing this remaining reporting requirement from 10 CFR 429.14(b)(2). DOE requests comments on this proposal.

#### 10. Measurement of Product Volume

The current DOE test procedures for refrigerators, refrigerator-freezers, and freezers in Appendices A1 and B1 require that the total refrigerated volume of these products be measured according to HRF-1-1979. In contrast, Appendices A and B require that volume be measured according to HRF-1-2008. In general, these referenced procedures describe the dimensions that must be measured, list volumes to include or deduct in the final calculation, and specify the appropriate rounding of the final calculated values. However, the procedures do not specify whether measurements may be based on design specifications or if physical measurement of the actual test unit is required. With respect to the latter approach, the procedures do not specify the types of instruments that would be appropriate or should be used for performing these measurements, leaving it to the test laboratory to determine the best means by which to conduct this portion of the test.

Since the January 2012 final rule was published, DOE has become aware that some manufacturers use computer programs to calculate these volumes based on computer-aided design (CAD) models of the product in lieu of physical measurements. While DOE understands that this practice may allow for more precise measurement of these products, especially where the measured volumes include irregular shapes and textured surfaces, and recognizes that neither the referenced AHAM test procedures nor the DOE test procedures specifically prohibit it, DOE has identified two potential issues involved with measuring volumes in this manner. First, the use of measurements based upon design models for the purposes of certification represents an assumption that the actual production units will be exactly consistent with the designs, which may not actually occur. Second, independent verification of the manufacturer's rated volume by a test laboratory that does not possess these models can be difficult, particularly when a product's interior volume includes irregularly shaped

<sup>13</sup> [http://www1.eere.energy.gov/buildings/appliance\\_standards/pdfs/refri-frz\\_faq\\_2011-10-06.pdf](http://www1.eere.energy.gov/buildings/appliance_standards/pdfs/refri-frz_faq_2011-10-06.pdf).

surfaces or volumes that cannot easily be measured by hand. Because permitted maximum annual energy use is a function of volume within a given product class, discrepancies between the volumes measured directly during lab testing and the volumes manufacturers calculate using CAD models could potentially, under the current regulations, affect whether a tested unit of a given basic model meets the applicable energy conservation standard.

In recognition of the practical difficulties associated with measuring the volumes of many products currently on the market, DOE is proposing to explicitly permit the use of CAD models for measuring and computing the volume of refrigerators, refrigerator-freezers, and freezers for the purposes of certifying compliance with the DOE energy conservation standards for these products. This proposal is intended to ensure that manufacturers are able to accurately measure the volumes of their products and that test laboratories are able to verify these.

In addition to a general provision that permits the use of CAD models for determining the volume for the purposes of certification, DOE would also require that manufacturers retain measurements derived using CAD as part of the test records that underlie certifications pursuant to 10 CFR 429.71. These provisions would include a requirement that the manufacturer make these records available to DOE upon request in the form of printed diagrams and/or spreadsheets that demonstrate the calculations of volume performed using the CAD model (rather than computer files that would require use of CAD software to read, such as .dwg files). For the purposes of volume verification, DOE would ensure that the volume measured by the test laboratory is within a prescribed tolerance of the total refrigerated volume certified by the manufacturer. DOE could also request documentation of the manufacturer's volume measurements as needed.

DOE would modify section 5.3 of Appendices A and B to incorporate the requirements allowing use of CAD for volume calculation.

In determining the appropriate tolerance for assessing the validity of volume ratings, DOE considered information from two primary sources. First, DOE considered the AHAM Refrigerator, Refrigerator-Freezer, and Freezer Verification Program Procedural Guide, which uses a 2 percent tolerance for verification of manufacturer volume ratings. To ensure that this threshold would be appropriate, DOE evaluated its own test data and compared volume

measurements taken over the past three years for nearly 300 individual test units representing over 100 models. DOE found that, on average, manufacturers' reported adjusted volumes are slightly less than 0.5 percent larger than the adjusted volumes measured by the test laboratory and that less than 20 percent of units had an adjusted volume more than two percent larger than their certified adjusted volume. Among the tested units that exceeded the 2 percent threshold, more than 70 percent were beyond 3 percent and nearly one third were beyond 4 percent. There was also greater variation in the frequency of results above the 2 percent threshold compared with the units below the threshold, with the frequency of observations below 2 percent following a roughly normal distribution and the frequency of results above 2 percent appearing more erratic. Finally, DOE observed that the impact of a difference in reported adjusted volume of 2 percent resulted in an impact on the calculated energy conservation standard of only 0.5%, probably less than the impacts of other potential errors in measurement and data reporting. This all suggests that the 2 percent threshold is appropriate and that the vast majority of measurements should fall well within this margin.

Based upon this analysis, DOE is proposing to adopt requirements that are essentially the same as those used by AHAM for its verification program. Specifically, the test laboratory's measurement of volume must be no more than 2 percent smaller than the manufacturer's rated volume. If 2 percent of the rated volume is smaller than 0.5 cubic feet for standard-size products or 0.2 cubic feet for compact products, then a 0.5 (or 0.2) cubic feet tolerance would be used. For example, if a product's rated volume is 29.2 cubic feet, the 2 percent margin would be 0.6 cubic feet. Since this is larger than 0.5 cubic feet, the 2 percent margin would be used; therefore, under the proposed approach, the laboratory measurement would have to be at least 28.6 cubic feet for the rating to be considered valid. If DOE determines that the rated volume is not valid, the energy conservation standard applicable to the tested model would be calculated based upon the volume measured by the laboratory. DOE proposes to add a new section 429.134 of 10 CFR part 429 to address the volume verification protocol. DOE also proposes to amend the certification requirements in section 429.14 to require reporting of the total refrigerated volume of each compartment instead of the adjusted volume. This will enable

direct comparisons between the certified volume of a basic model and independently measured volumes for the same model and will also harmonize the DOE reporting requirements for refrigerators, refrigerator-freezers, and freezers with those of the Federal Trade Commission.

As a related matter, DOE noted during its review of test data and manufacturer ratings of adjusted volume that some volumes may have been improperly reported or calculated. Specifically, in some cases it appeared that the adjusted volume may have been calculated based on a total refrigerated volume that was rounded to the nearest whole cubic foot rather than the nearest 0.1 cubic foot as required by section 4.2.3 of AHAM HRF-1-1979, which is referenced by the DOE test procedure. In the most extreme theoretical case, this error could result in the reporting of a total refrigerated volume that is larger by up to 0.5 cubic feet. For a product such as an upright freezer with automatic defrost (product class 9 in the DOE energy conservation standards), this would result in a difference in adjusted volume of 0.865 cubic feet, and a resultant increase in calculated energy conservation standard for that basic model of nearly 11 kWh/year. Such a margin could make the difference between a model meeting the standard or failing to do so. In any evaluation of a product's certified total refrigerated volume, DOE will consider all aspects of the volume calculation, including the rounding of the measured total volume that was used in the calculation to help determine whether a manufacturer derived its certified value of total refrigerated volume in conformity with the DOE test procedure.

DOE seeks comment on its proposal to add a provision permitting use of CAD for measurement of product volume to section 429.72 and procedures for verifying rated volumes to section 429.134, including the proposed tolerance range. DOE also requests information on the documentation kept by manufacturers of CAD modeling used for calculations of volume and whether this documentation is in or could be converted to a format that would allow review by DOE without use of CAD software.

#### 11. Corrections to Temperature Setting Logic Tables

The December 16, 2010 Interim Final Rule established tables in Appendices A and B to illustrate the requirements for setting temperature controls during testing. 75 FR at 78840-78842. However, the tables were presented in the notice without the necessary horizontal lines to properly divide the

different test result possibilities and next steps. The tables were then entered into the CFR with horizontal lines in locations that effectively confused the information that the tables were intended to present. DOE proposes to correct these errors and ensure that the tables in the CFR are corrected to properly show the sequence of temperature control settings required for testing.

#### 12. Minimum Compressor Run-Time Between Defrosts for Variable Defrost Models

The DOE test procedures in Appendices A and B provide specific provisions for calculating the energy use of models with variable defrost, which DOE defines generally as an automatic defrost system in which successive defrost cycles are determined by an operating condition variable or variables other than solely compressor operating time. For such models, the periodicity of defrost cycles may vary based on factors other than the time since the last compressor cycle, such as ambient temperature and humidity, length and frequency of door openings, and other factors that may affect the formation of frost on the evaporator or provide an indication of how much frost may have accumulated. As noted in the definition, this differs from models with non-variable automatic defrost, which generally perform defrosts of the evaporator based solely on compressor operating time. The energy use of variable defrost products is measured using a two-part test which separately measures the energy use associated with defrost in the second part of the test.

To properly account for energy use associated with defrost, Appendices A and B both provide calculations specifically for models that have variable defrost. These calculations estimate the contribution to energy use based upon the values for the minimum compressor run-time between defrosts ( $CT_L$ ) and the maximum compressor run time between defrosts ( $CT_M$ ). Some models have control algorithms with specific values for  $CT_L$  and  $CT_M$ , which DOE requires manufacturers to report as part of their certifications of compliance. These values must be known in order to calculate the representative average value  $CT$  for compressor run time between defrosts, which is used to calculate defrost frequency and therefore also defrost contribution to energy use. In any subsequent verification or enforcement testing, DOE uses the values of  $CT_L$  and  $CT_M$  reported by the manufacturer. For models that are not programmed with fixed  $CT_L$  and  $CT_M$  values, tests must be

conducted using default values of 6 and 96, respectively. For descriptions of these calculations, see sections 5.2.1.3 and 5.2.1.5 of Appendix A, and section 5.2.1.3 of Appendix B.

In general, use of the  $CT_L$  and  $CT_M$  values reported by the manufacturer rather than the default values should result in measurements of energy use that are more representative of the product's actual operation because they represent the actual minimum and maximum amounts of compressor run time between defrosts that the model's control system is designed to use. Thus, the compressor run time between defrosts should never be less than  $CT_L$  and never greater than  $CT_M$ . However, in certain DOE testing of models for which the manufacturer reported values of  $CT_L$  and  $CT_M$  in the certification report, DOE has found that the number of hours of compressor operation between defrost cycles observed in the test data was less than the  $CT_L$  value reported by the manufacturer in its certification report. This difference suggests either that the certified value was erroneous or that the model did not operate as designed. In either case, the energy use calculated using the values reported by the manufacturer would not be representative of how the model actually performed during the test and how it would be expected to perform in the field. To ensure that the energy use calculations will reflect the actual operation of the unit as tested, DOE is proposing to require the use of a value for  $CT_L$  for the energy use calculation that is equal to the shortest compressor run time between defrosts observed during the test, if this observed time is less than the value of  $CT_L$  reported in the certification report. If the model did not have values of  $CT_L$  and  $CT_M$  reported in the certification report, the observed value of  $CT_L$  would only be used if it is less than the default value of 6 hours. This change is proposed for sections 5.2.1.3 and 5.2.1.5 of Appendix A and section 5.2.1.3 of Appendix B.

#### 13. Treatment of "Connected" Products

As part of the Version 5.0 ENERGY STAR Specification for Residential Refrigerators and Freezers, DOE is developing, in cooperation with the EPA, specifications and test methods for refrigerators and refrigerator-freezers that have the capability to enable consumer-authorized energy related commands, such as demand-response signals from a utility.<sup>14</sup> Products with

this capability are referred to generally as "connected" products in the final draft ENERGY STAR specification and in the associated test method (ENERGY STAR Connected Refrigerators and Freezers Final Draft Test Method, No. 14). The draft test method addresses aspects of testing specific to the demand response functionality, but refers to the DOE test procedure in Appendix A to Subpart B of 10 CFR Part 430 for test setup and test conditions. However, the current Appendix A test procedure does not address the condition of the communication module of a connected product during the standard DOE energy test, which is used in section 6 of the demand response test to establish the baseline energy consumption and can be placed by the user in either an active communication mode or a non-communicating mode (ENERGY STAR Connected Refrigerators and Freezers Final Draft Test Method, No. 14, p. 3). DOE views this feature as subject to section 5.5.2.e of AHAM HRF-1-2008, incorporated by reference in Appendix A, which states that customer accessible features, not required for normal operation, which are electrically powered, manually initiated, and manually terminated, shall be set at their lowest energy usage positions when adjustment is provided. In keeping with this requirement, and to ensure that Appendix A provides sufficient clarity on the condition of the communication module of connected products during the DOE energy test, DOE is proposing to amend section 2 of the Appendix A test procedure to specify that the communication module, if integrated into the cabinet, must be energized but placed in the lowest energy use position, and there shall be no active communication during testing. DOE understands that some products will be manufactured without an integrated communication module, and instead will have the capability to allow connection of a module supplied by another manufacturer. In these cases, DOE cannot specify a test condition for the communication module since the module used for the test will not be standardized. Thus, the proposed requirement in section 2 of the test procedure does not require connection of communication modules for products designed for use of an externally-connected module. Finally, while the ENERGY STAR specification for connected products addresses only refrigerators and refrigerator-freezers, DOE is also proposing to add the same provisions to Appendix B to accommodate any future provisions made for connected freezers.

<sup>14</sup> For additional background on the ENERGY STAR Version 5.0 Specification for Residential Refrigerators and Freezers, go to <https://energystar.gov/products/specs/node/125>.

#### 14. Changes to Confidentiality of Certification Data

Section 429.14(b) specifies the data that manufacturers of residential refrigerators, refrigerator-freezers, and freezers must provide to DOE in certifications of compliance for each basic model. Data submitted for the items in paragraph (b)(2) are treated by DOE as public data whereas the data for items in paragraph (b)(3) are evaluated on a case-by-case basis. The items listed in paragraph (b)(3) include specific information related to variable defrost control, variable anti-sweat heater control, and the use of alternate temperature sensor locations. For models with variable defrost and variable anti-sweat heaters, this includes not only the specific operational details of those features, but whether the model has those features at all. Since the publishing of the current version of section 429.14, DOE has determined that there is no clear reason that the indications as to whether a model has variable defrost or variable anti-sweat heater control or the use of alternate temperature sensor locations should be treated as non-public and proposes to move them to paragraph (b)(2), which would make them public data. The other details of variable defrost operation and variable anti-sweat heater control would remain in paragraph (b)(3). These changes would take effect 30 days after publication of the final rule.

#### 15. Package Loading

Section 2.2 of the DOE test procedure for residential freezers, which is located in appendix B1 to subpart B of 10 CFR part 430 (Appendix B1), references the AHAM HRF-1-1979 test procedure for provisions related to certain operational conditions. Among these is a specific provision described in section 7.4.3.3 of AHAM HRF-1-1979, which requires that the freezer compartment be loaded to 75% of the maximum number of filled packages that can be fitted into the compartment, and that the 75% load is to be fitted into the compartment as to permit air circulation around and above the load. The requirements applicable to these products in appendix B to subpart B of 10 CFR part 430 (Appendix B) and the section it references in AHAM HRF-1-2008 procedure (section 5.5.5.3), are essentially identical except that package loading is required only for manual defrost freezers whereas it is required by HRF-1-1979 for all freezer types.

DOE has learned that there may be ambiguity about how to consistently determine the actual number of packages that fulfills the 75% loading

requirement for a given basic model. To clarify, DOE views the appropriate method of accomplishing this requirement as consisting of two steps. The first step is to determine the number of packages that represents 75% of the maximum capacity of the freezer compartment, and the second step is to arrange the 75% load such that the air gap of 0.5 to 1.5 inches between the load and the compartment wall and the pyramid or tiered form needed for placement of the thermocouples are both established, as required by section 7.4.3.3 of the AHAM HRF-1-1979 procedure (or section 5.5.5.3 of AHAM HRF-1-2008).

For determining the number of packages that represents 75% of the load, the compartment should be filled completely with the packages that are to be used for the test, such that the packages fill as much of the usable refrigerated space within the compartment as is physically possible. Once this has been accomplished, a number of packages is removed from the compartment so that the compartment contains 75% of the packages that were placed in the compartment to completely fill it. The remaining packages would then be arranged as necessary in order to achieve the necessary air gap and the tiered or pyramid form needed for thermocouple placement.

To ensure that this practice is used consistently, DOE proposes to place a description of this practice in section 2.9 of Appendix B. The proposed text also specifies that the number of packages representing the completely filled condition and the number left in the compartment for the test should both be recorded in the test data, and maintained as part of the test record in accordance with 10 CFR 429.71. Because section 5.5.5.3 of HRF-1-2008 also applies these requirements to each shelf of a multi-shelf freezer, the requirement to count and record the number of packages would apply on a per-shelf basis for such products.

DOE requests comment on these clarifications and proposed amendments to Appendix B.

#### 16. Product Clearance to the Wall During Testing

In the December 16, 2010 interim final rule, which established Appendices A and B, DOE included provisions to address product clearances to the wall during testing. 75 FR 78810. Specifically, section 2.8 of Appendix A and section 2.6 of Appendix B both require that the space between the plane of the cabinet's back panel and the vertical surface behind

the cabinet (i.e., the test chamber wall or simulated wall) be the minimum distance in accordance with the manufacturer's instructions or 2 inches, whichever is less. If the product has permanent rear spacers that extend beyond this distance, the product is to be located with the spacers in contact with the vertical surface. However, DOE received a request for guidance from AHAM dated May 22, 2013 (AHAM Guidance Request) indicating that these provisions may not be sufficiently clear for cases in which the back of the test unit is not all on one plane due to protrusions or surface irregularities rather than a uniformly flat panel. (AHAM Guidance Request, No. 15, p. 2). AHAM requested that DOE clarify these sections by referencing the Committee Draft for Vote (CDV) version of Part 1 of IEC 62552.2 *Household refrigerating appliances—Characteristics and test methods*. As explained by AHAM, this reference provides guidance on product spacing that is consistent with section 2.8, but is more specific regarding the treatment of irregular surfaces.

Because the IEC reference that AHAM suggested has not been finalized as of the date of this notice, and because DOE generally seeks to limit the number of external references incorporated in the DOE test procedure, DOE declines to incorporate by reference the IEC procedure suggested by AHAM. However, since clarification of this item may result in more consistent application of the DOE test procedure, DOE proposes to adopt revised language for section 2.8 that is intended to accomplish the same objective. Specifically, DOE proposes to specify that, for the purposes of determining the appropriate clearance to the wall for the test, the rear plane of the cabinet is the largest flat surface at the rear of the cabinet. The test procedure would also indicate where individual features, such as brackets, the compressor, or the condenser protrude from the rear plane, that these could not be used as the basis for determining the rear clearance. To account for products that are required by the manufacturer's instructions to be set up with the front of the unit slightly higher off the floor than the rear, such that the top of the cabinet is closer to the wall behind the cabinet than the bottom, the proposed language specifies that the reference point for the maximum 2 inch clearance is lowest part of the rear plane of the cabinet. The proposed language also permits the top of the cabinet to touch the vertical surface if necessary to meet the clearance requirement at the bottom, and for the clearance requirement to be

exceeded if the bottom edge is still more than 2 inches from the vertical surface when the top edge is in contact with the vertical surface. Similarly, the proposed language is consistent with the existing Appendix A test procedure, which allows for the 2-inch clearance requirement to be exceeded if individual features extend more than 2 inches beyond the rear plane, provided these features are in contact with the vertical surface during the test. DOE proposes to incorporate this language in section 2.8 of Appendix A and section 2.6 of Appendix B, and requests comment on these proposed additions.

#### 17. Other Minor Corrections

In reviewing the text of Appendix A, DOE observed that the version adopted in the January 25, 2012 final rule contained a minor error in section 6. Calculation of Derived Results From Test Measurements. Section 6.2.2.2, which provides the method for calculating average per-cycle energy use (“E”) for refrigerators and refrigerator-freezers through interpolation based on compartment temperatures, states that “E” is defined in section 6.2.1.1.” Section 6.2.1.1, however, does not define the term “E” and contains only a formula for  $E = ET1 + IET$ , which does not clarify the meaning in section 6.2.2.2. Since the term “E” itself has the same basic meaning for all portions of section 6.2, DOE proposes to place the definition of this term in the introductory text of section 6.2 and modify the text in the follow-on sections so that it is referred to consistently. For consistency, DOE has proposed nearly identical changes for Appendix B.

DOE has also noted that a certain aspect of the definition of “compact refrigerator/refrigerator-freezer/freezer” in 10 CFR 430.2, which distinguishes the product classes in section 430.32(a) for compact products from the classes for standard-size products, could potentially cause confusion. Specifically, the definition limits the applicability of the compact product classes to products smaller than 7.75 cubic feet in volume. The volume referred to in the definition is the total refrigerated volume measured as specified in section 5.3 of Appendices A, A1, B, and B1. However, the definition uses the term “rated volume,” which is not defined or listed elsewhere in DOE’s test procedures or reporting requirements for these products, and could potentially be confused with the “adjusted volume,” which is a different measurement. To prevent confusion regarding the applicability of this definition, and to ensure standard terminology is used throughout DOE’s

regulations, DOE proposes to amend the definition of “compact refrigerator/refrigerator-freezer/freezer” in 10 CFR 430.2 to specifically indicate that the definition applies based upon the product’s total refrigerated volume.

Also, in its guidance request to DOE dated May 22, 2013, referred to previously in section III.C.15, AHAM raised additional issues. One of these was about a portion of the existing definition of “Defrost cycle type” found in section 1.9 of Appendix A. Specifically, AHAM referred to the last sentence of the definition, which states that “. . . defrost achieved regularly during the compressor off-cycles by warming the evaporator without active heat addition is not a defrost cycle type,” and indicated that this sentence may be causing confusion by implying that this type of defrost, which is commonly referred to as “off-cycle defrost” does not constitute automatic defrost. (AHAM Guidance Request, No. 15, p. 2) DOE inserted the clause regarding off-cycle defrost as part of the December 2010 Interim Final Rule in response to AHAM’s concern that off-cycle defrost should not be considered a defrost cycle type. 75 FR at 78838 (Dec. 16, 2010). However, as pointed out by AHAM in its recent comments, this does not imply that off-cycle defrost is not a form of automatic defrost. DOE agrees and made its position on this topic public as part of the preliminary analysis for the energy conservation standard rulemaking that ended September 15, 2011. (Energy Conservation Standards for Residential Refrigerators, Refrigerator-Freezers, and Freezers, 2009–12–10 Public Meeting Presentation Slides, Docket No. EERE–2008–BT–STD–0012, No. 28 at p. 21) However, DOE understands AHAM’s concerns that the definition of defrost cycle types may be misinterpreted. The clause in question was intended to distinguish off-cycle defrosts from the unique types of defrost cycles that involve a defrost heater, which must be identified individually to establish test periods as required by section 4.2 of the test procedure. To clarify this intent, DOE has proposed a revision to the definition of “defrost cycle type” in section 1.9 of Appendix A.

Finally, another issue raised in AHAM’s May 22, 2013 guidance request addressed test periods for products with automatic defrost that is neither long-time nor variable. (AHAM Guidance Request, No. 15, p. 3) Section III.C.5 addresses this issue.

#### 18. Relocation of Shelving for Temperature Sensors

HRF–1–2008, section 5.5.4, which is incorporated into the DOE test procedures by reference, requires at least one inch of air space separating the thermal mass of a temperature sensor from contact with any surface. In the case of interference with hardware at the specified sensor locations, section 5.5.4 requires that the temperature sensors be placed at the nearest locations such that there will be a one inch air space separating the sensor mass from the hardware. In the case of proximity of the sensor to shelving or other components whose position is adjustable by the consumer, DOE believes that it is more appropriate to relocate the shelf or component than to relocate the sensor. However, HRF–1–2008 section 5.5.2(a) requires that shelves and bins be evenly spaced throughout the compartment. DOE proposes to revise the test procedures to indicate that temperature sensor location would take precedence over the position of shelving and components whose position is adjustable by consumers, even if this means that the shelving closest to the temperature sensors would not be in their evenly spaced locations. Specifically, DOE proposes to add language to Appendices A and B, section 5.1 indicating that consumer-movable shelves and other components should be moved to maintain temperature sensor clearance requirements. While DOE intends that this action would take precedence over the even-spacing requirement, to minimize variation in such repositioning DOE also proposes to specify that any placement adhere as closely as practicable to the setup instructions of section 5.5.2 of HRF–1–2008 (including the requirement that shelves and door bins be evenly spaced). For example, if shelves are repositioned from the exactly evenly spaced positions to accommodate temperature sensors, they should still be spaced as nearly evenly as possible while meeting the required minimum 1-inch separation between the temperature sensor thermal mass and the shelf. DOE requests comments on this proposal.

#### *D. Other Matters Related to the Test Procedure*

##### 1. Built-In Refrigerators

In the course of evaluating the proposed amendments to the DOE test procedures for residential refrigerators, refrigerator-freezers, and freezers, DOE tested several current models of these products. Included were three “built-in

refrigerator/refrigerator-freezer/freezer” models, as defined in 10 CFR 430.2. That provision generally applies to products that (1) Have unfinished sides that are not intended to be viewable after installation, (2) are designed exclusively to be installed totally encased by cabinetry, fastened to the adjoining cabinetry, walls, or floor, and (3) are either equipped with a factory-finished face or accept a custom front panel.

While the tests that DOE conducted on these models were generally associated with evaluating the proposed amendments discussed in this notice, DOE also conducted testing to evaluate any additional impact on measured energy use that may result from being tested in a built-in condition in the test laboratory. DOE performed these tests by enclosing the models in simulated cabinetry and conducting a round of tests using Appendix A, and then compared the results from this round of tests to the results of tests conducted using Appendix A with the products in a freestanding condition. DOE conducted these tests to address questions that DOE received from testing organizations regarding the proper test conditions for products of this type under the DOE test procedure and to ensure that the DOE test procedures prescribed as a result of this rulemaking will result in measures of

energy consumption that are representative of average use, as required under 42 U.S.C. 6293(b)(3). Because these products are, by definition, designed to operate when enclosed by cabinetry, DOE tentatively views the built-in condition during testing as more accurately representing the average use condition of these products than testing these products in a free-standing condition.

DOE expects that many manufacturers and testing organizations are unlikely to test these products in a built-in condition in the laboratory, however, and that in some cases it may not be necessary. DOE believes this to be the case generally because some models of this type use a refrigeration system that, because of the way they reject heat from the refrigeration system, are designed to consume little or no additional energy as a result of being installed in cabinetry, meaning that the difference in measured energy use would essentially be zero. The heat rejection from the condenser of the refrigeration system of these units is achieved by drawing air in from the front of the product and blowing the air back out the front, after the air is warmed by the condenser and the compressor. Enclosing such a product in cabinetry adds no restriction to the air flow path—hence, there should be no significant impact on energy use (see, for example, the test

results for Samples No. 1 and 3 shown in Table III–13).

However, there are competing designs in which the flow of air used to remove refrigeration system heat can be restricted when the refrigeration product is built into cabinetry. As a result, these products could, in DOE’s tentative view, consume more energy when tested in a built-in condition than in a free-standing one.

DOE conducted tests on a model of each type of design, and the results were consistent with the expectations noted above. More specifically, two models demonstrated essentially no change in measured energy use, and the other model demonstrated an increase in measured energy use of approximately 5 percent when tested in a built-in condition. Table III–13 summarizes available DOE data for refrigerator-freezer samples tested in a freestanding configuration and a built-in configuration according to UL 250 sections 8.65 and 11.2. Samples 1 and 3 reject heat through the front and the test results show change in energy use of 0.5% or less, for the built-in test, which very likely represents test variation rather than the impact of testing in the built-in configuration. Sample 2 rejects heat through the back of the unit and has a significant increase in energy consumption for the built-in test.

TABLE III–13—FREESTANDING AND BUILT-IN AEU COMPARISON

Sample No.	Heat rejection location	Freestanding annual energy consumption (kWh/year)	Built-in annual energy consumption (kWh/year)	Percent difference between freestanding and built-in tests (%)
1 .....	Front .....	679	675	–0.5
2 .....	Rear .....	576	607	5.1
3 .....	Front .....	485	487	0.4

While testing products in a built-in condition would theoretically yield the most accurate results, there may be added costs. Assuming that built-in manufacturers do not already have the facilities and testing set-up to test their products in a built-in condition, the primary added cost in this instance stems from the added time and material required for technicians to set up a built-in unit to be tested in a configuration comparable to the manner in which it would be installed in the field. That additional requirement could be significant but it may also represent a first-time-only cost if manufacturers were able to continue using the same built-in configuration set-up for all subsequent built-in products that would need to be tested.

In order to ensure that DOE has considered all relevant aspects of this matter prior to proposing a specific requirement in the test procedure for these products to be tested in a built-in condition, DOE is requesting more information from manufacturers, testing organizations, and any other interested parties on several aspects of this element of the test. Specifically, DOE is interested in receiving information about whether testing in a built-in condition would generally be more representative of energy consumption in average use and, if so, the extent to which testing in this condition would be expected to affect the measured energy use of these products. DOE is also interested in receiving information about the amount of additional test

burden, if any, that would be imposed as result of a specific requirement for all manufacturers of these products to test them in a built-in condition in order to determine their rated value of energy consumption for the purpose of assessing compliance with the energy conservation standards in 10 CFR 430.32.

2. Specific Volume Measurement Issues

As part of the same May 22, 2013 guidance request referred to previously in this notice, AHAM requested clarification of certain provisions of DOE’s prescribed method for measuring product interior volume in section 5.3 of Appendices A and B, which both reference AHAM/ANSI HRF–1–2008, Section 4.2.2 of the HRF–1–2008

procedure lists several components that are required to be deducted from the measured interior volume, among which is “the volume of air ducts required for proper cooling and operation of the unit.” AHAM requested guidance on DOE’s interpretation as to whether this particular provision includes only air ducts that supply cold air to the fresh food and freezer compartments, or to all air ducts within the unit (AHAM Guidance Request, No. 15, p. 2). The guidance request did not include specific examples of ducts other than those which supply air to the fresh food and freezer compartments, which are both clearly required for proper cooling and operation of the unit. DOE is aware also of air ducts used to cool icemaking compartments—such ducts would also be required for proper operation of any refrigeration product that is equipped with an automatic icemaker, or any kitable product with an icemaking compartment that could have an automatic icemaker installed after shipment. DOE is not aware of any other specific examples. However, since the volume measurement method generally excludes volumes occupied by components that are not intended to be removed by the user and that occupy space that cannot be used for storage, which are both likely to apply to an air duct, DOE takes the view that any air duct in the interior of the cabinet should be deducted from the measured product volume.

In a separate communication from a manufacturer, DOE received a question as to whether a water tank within the fresh food space should be included in the measured volume as measured using HRF-1-2008. The tank in question is used for chilling water prior to use in the product’s water dispenser and is located downstream of the valve that admits water into the cabinet from the household water supply. DOE notes that such features were addressed in sections 4.2.1.1(a) and 6.2.1 of HRF-1-1979, which treated “water coolers” as special features and required that they be included in the measured volume. The text of section 4.2.2 of HRF-1-2008, which addresses the determination of volume, is more general than the provisions in HRF-1-1979 and does not specifically address features such as water coolers. Section 4.2.2 of HRF-1-2008 did add a clarification that through-the-door ice and water dispensers and the insulating hump are not included in the volume and that generally no part of the dispenser unit shall be included as volume. DOE understands this to mean that if the water cooler unit is integral to the

dispenser, and thus a part of the dispenser unit, it would be deducted from the volume. However, if the water cooler is separate from the dispenser unit and located within the refrigerated space, it would be included in the volume measurement.

To limit the potential for future confusion regarding components such as those discussed in the preceding paragraphs, DOE proposes to amend section 5.3 of Appendices A and B to clarify the general intent of the volume measurement procedure and the treatment of general categories of components. Specifically, the proposed amendment to section 5.3 would state that the measured volume is to include all spaces within the refrigerated volume of each compartment, with the exception of the volumes that are required to be deducted in accordance with section 4.2.2 of HRF-1-2008. As discussed in section III.C.1 of this notice, DOE has also proposed a definition for “through-the-door ice and water dispenser” for inclusion in Appendices A and B. With this definition, and the proposed clarification in section 5.3 regarding the general volume to be measured, DOE intends to remove any ambiguity regarding the components to be deducted from the volume and the boundaries between these components and the measured refrigerated volume.

DOE requests comment on these interpretations and the proposed modifications to section 5.3 of the test procedures in Appendices A and B addressing volume measurement.

### 3. Treatment of Products That Are Operable as a Refrigerator or Freezer

Since completion of the last test procedure rulemaking, DOE has received questions regarding the appropriate test setting for products with a single compartment that can be operated in either the temperature range for an electric refrigerator or the temperature range for a freezer, as defined in 10 CFR 430.2. DOE notes that section 2.7 of Appendix A1 and Section 2.7 of Appendix A both require compartments that are convertible (e.g., from fresh food to freezer) to be operated in the highest energy use position. In the case of a product for which the convertible compartment is the only compartment (i.e., the entire product is convertible), the product effectively meets the definitions of two different covered products. If the product is marketed as both an electric refrigerator and as a freezer, the product must be tested as both covered products, must meet both applicable standards,

and must be certified as meeting both standards.

If, however, the product is marketed only as a refrigerator or only as a freezer, the product must be tested in accordance with the applicable test procedure, must meet the appropriate standard for that product, and must be certified accordingly.

### 4. Stabilization Period

AHAM’s May 22, 2013 guidance request asked whether the stabilization period (see section 2.9 of Appendix A1 for an example) has a maximum time constraint. (AHAM Guidance Request, No. 15, p. 4) The stabilization period for products with cycling compressors consists of two time periods of at least two hours duration comprising a whole number of compressor cycles, and the time interval between these two periods, where there is an elapsed time of at least three hours between the two time periods. Specifically, AHAM asked whether the two time periods in question have a maximum duration or if they must be selected to be as short as possible while still satisfying the requirements. (Id.) Neither of these requirements is explicitly stated in the test procedure, and neither is implied. The two time periods in question may be extended, for example, if there is irregular cycling of the compressor that makes the first possible selection of such a time period non-representative of the average compartment temperatures for the captured time period. However, it would not be consistent with the test procedure to select two sets of time periods that would allow stability to appear to have been achieved when it has not. Alternative selections of time periods that satisfy the test procedure requirements should also demonstrate that stability has been achieved. DOE does not believe that changes to the test procedure regulatory language are required as clarification for this issue.

### E. Compliance With Other EPCA Requirements

In addition to the issues discussed above, DOE examined its other obligations under EPCA in developing the amendments in today’s notice. These requirements are addressed in greater detail below.

#### 1. Test Burden

EPCA requires that the test procedures DOE prescribes or amends be reasonably designed to produce test results which measure the energy efficiency, energy use, or estimated annual operating cost of a covered product during a representative average use cycle or period of use. These

procedures must also not be unduly burdensome to conduct. *See* 42 U.S.C. 6293(b)(3). DOE has concluded that the amendments proposed in today's notice satisfy this requirement.

Some of the proposed test procedure amendments would clarify how the test should be conducted, or otherwise represent minor changes to the test that do not affect the equipment required for testing, nor the time required to conduct it. These proposed amendments include changes to the anti-circumvention language and ambient temperature gradient requirements, and clarifications to help with setting mechanical temperature controls.

The proposal would also make other changes, none of which would have a significant impact on burden. First, the proposed change in the test procedure for incomplete cycling products could increase or decrease test time, as illustrated in section III.C.5. However, based on tests conducted by DOE, the impact on test time for the proposed amendment does not appear significant. Second, the proposed change to the test procedure to allow use of the triangulation approach for products with two temperature controls would create an optional test and not affect test burden.

Additionally, the proposed modification of test procedures for products with multiple compressors is expected to reduce overall test burdens for manufacturers. This expectation is consistent with information DOE received in written comments such as those from Sub-Zero, which cited the test burden of the current test procedure as an issue in its comments as part of the recent refrigerator test procedure rulemaking. (Test Procedure for Residential Refrigerators, Refrigerator-Freezers, and Freezers, Docket No. EERE-2009-BT-TP-0003, Sub-Zero, No. 42 at p. 1)

Regarding the proposed changes to the requirements for ambient temperature measurement and ambient temperature gradients, these changes would also not increase the burden faced by manufacturers since they would not impose an additional recurring test requirement. The proposed amendments to the anti-circumvention language, the specifications for setting mechanical temperature controls, and the adoption of new definitions associated with defrost cycles would clarify the test procedures but not add any new requirements that would increase test burden. To the extent that there is any burden, the proposed elimination of the current product height reporting requirement would, in DOE's view,

reduce overall burdens on manufacturers.

After reviewing each of the changes under consideration, DOE believes that the icemaking test procedure under consideration would be the only change detailed in this notice that would be likely to increase test burden. That procedure would involve additional measurements and set up requirements not included in the current test procedure. Specifically, it would require the installation of a water supply; the measurement of several additional parameters, including ice weight and water pressure; additional test time; and (for products with icemakers that have no harvest heaters) the monitoring of icemaker mold temperature, water supply temperature, or solenoid valve activity in addition to the measurements already required for the DOE refrigeration product test procedures.

Providing the required water supply to a test facility will likely require some investment. Assuming that the building housing the test facility has water available, the cost of extending this supply to the test facility will require some length of 1/2-inch outer-diameter copper tubing, possibly with insulation to prevent water vapor condensation, and a pressure gauge to confirm that the supply pressure is within the required range specified by the procedure under consideration. Such a water supply system may also require a pressure regulating valve to reduce the supply pressure to the required range if the water supply pressure in the test facility exceeds the pressure required by the test procedure. Assuming \$100 for materials and one day for installation at a \$75 per hour loaded labor rate, the water supply system cost would be roughly \$700 per test chamber. The cost of a scale to weigh ice and the other additional items (temperature sensors, etc.) required for conducting the icemaking test are not expected to exceed \$100. The resulting overall test facility cost increase of \$800 is insignificant compared to the overall anticipated cost of a test facility suitable for testing refrigeration products.

The additional set-up time for connecting the water supply to the product and, if necessary, a temperature sensor to the icemaking mold, may represent an additional half hour of time. The more significant impact on test burden of the icemaking test would be the additional time required to conduct the test. The product would first have to stabilize at the temperature settings used for the icemaking baseline test. During this first phase of the test, there may be some readjustment of the settings required to assure that compartment temperatures are within

the specified tolerance limits of the standardized temperatures. DOE estimates that the stabilization, readjustment, and baseline test duration will typically be 24 hours. The proposed test procedure would require that the duration of the icemaking portion of the test be 24 hours, unless interrupted by defrost or termination of icemaking because the ice storage bin fills. Hence, DOE expects that the icemaking test will typically add two days of test time. While this is not an insignificant addition to the time required to test a refrigeration product, DOE believes it is warranted in light of the complexity associated with making a measurement of icemaking energy use.

DOE welcomes any comment regarding DOE's stance on test burden impacts of the potential amendments discussed in this notice.

## 2. Changes in Measured Energy Use

When DOE modifies test procedures, it must determine to what extent, if any, the new test procedure would alter the measured energy use of covered products. (42 U.S.C 6293(e)(1)). For the reasons described below, DOE has tentatively determined that the projected impact on measured energy use of covered products would not be significantly altered by any of the proposed test procedure amendments.

The test procedure amendments proposed in this notice would, if adopted, primarily affect aspects related to testing after September 15, 2014, when the new energy conservation standards take effect. Table III-1 indicates which parts of DOE's test procedures would be affected by the proposed amendments. The discussion in this section focuses on the potential impact on energy measurements regarding other aspects of DOE's proposal that would be required starting in 2014 (Appendices A and B).

### Impact of Proposed Changes To Testing Using Appendices A and B

Many of the proposed changes to Appendices A and B would clarify how the test should be conducted, or otherwise represent minor changes to the test or reporting requirements that would not affect measured energy use. These proposed amendments include changes to the anti-circumvention language, clarifications for setting mechanical temperature controls, modified ambient temperature gradient requirements, new definitions to help clarify test requirements, elimination of the requirement to report product height, use of CAD models for measuring refrigerated volume, and

corrections to the temperature setting logic tables.

The proposed change that would modify the test period of those products that experience incomplete cycling could increase or decrease measured energy use for a small minority of products and only to a minimal extent. To DOE's knowledge, the only products that exhibit incomplete cycling are chest freezers. As described in section III.5, the energy use measured for such products could increase or decrease, depending on how test laboratories currently interpret the requirements for the test period for such products, but the measured energy use would be more likely to decrease. For these reasons, DOE does not believe an adjustment of the energy conservation standard is necessary for this test procedure change.

The proposed modification to address products with multiple compressors is not expected to alter the measured energy use for these products. The test procedure is functionally equivalent to the test procedure of the Sub-Zero waiver, differing primarily in the requirements for confirming that the unit has reached steady state and in the length and composition of test periods. It also provides guidelines for testing multiple-compressor units that may differ in design details from the Sub-Zero products identified in the waiver, such as multiple compressor products with non-cycling compressors, and it provides more flexibility in how to define test periods. None of these changes would be likely to affect the measured use of any products currently known to DOE.

As described in section III.3, the triangulation test method may, in certain cases, provide a slightly more accurate measurement of the actual energy consumption of a given product. This method would yield lower energy use measurements for some products as compared with the two-test method of the current DOE test procedures (see Appendix A1, section 3.1.2). However, the proposed alternative test would be optional. DOE believes that the majority of products would continue to be tested using the current two-test method, since the test time required for the triangulation approach would be roughly 50 percent greater. Further, DOE testing showed that the products for which the energy use measurement would be most likely to change, i.e., those products for which the two interpolations of the current test procedures (based on the freezer temperature for one calculation and the fresh food temperature for the other), would yield, at most, a 1.2 percent decrease in measured energy usage

when using the triangulation method. Therefore, DOE tentatively concludes that the overall impact of this optional test on energy use measurement will likely be insignificant and that it would not require any change to the relevant standards.

In addition to the amendments discussed above for Appendices A and B, DOE is considering adopting a laboratory-based test procedure to measure the energy use associated with automatic icemaking. DOE conducted testing to validate the feasibility of the proposed icemaking test procedure and to evaluate if icemaking energy measurements using the procedure detailed above differ significantly from the 84 kWh/year fixed value used for automatic icemakers in the current test procedures. The test data and discussion of the results are presented in section III.1. Measured icemaker energy consumption values in the sample of products that DOE and NIST tested ranged from 60 kWh/year to 126 kWh/year, with an average of 92 kWh. While it is unclear precisely how well the group of products DOE tested represents any given set of products equipped with automatic icemakers, DOE believes that the average icemaking energy use of the group is sufficiently close to the fixed value of the current test procedure as to demonstrate that the test method proposed in today's notice is likely to have a minimal impact on the measured energy use of the products that would be evaluated using this method. Hence, DOE tentatively concludes that this potential impact would be de minimus and, if adopted, would not require a change to the energy conservation standard. (See 42 U.S.C 6293(e)(1–2)) DOE seeks additional input from the public regarding the accuracy of this assessment.

However, because the DOE test procedure for measurement of icemaking energy use has not yet been finalized, DOE expects that manufacturers will require additional time after the test method is finalized to conduct testing of their products and assess their ability to comply with a measurement-based standard. In anticipation of such factors, the joint petition submitted to DOE during the energy conservation standards rulemaking had requested that any measurement-based standard for icemaking energy use take effect three years after publication of the final rule establishing such a standard (see Docket EERE–2008–BT–STD–0012, No. 49, p. 17). The schedule laid out in the joint petition would have resulted in a final rule establishing a measurement-based

standard for icemaking energy use in mid-2013 with a compliance date in mid-2016. Although the standards and test procedure final rules did not commit to a specific timeline for implementing a standard based on a test requiring laboratory measurement of icemaking energy use, DOE acknowledges that development of this test has required additional time to ensure that any potential issues have been sufficiently addressed.

In addition, because EPCA requires that, not later than 6 years after publication of a final rule establishing new or amended standards for a covered product, DOE must publish either a notice of proposed rulemaking with new proposed standards or a notice of determination that such standards do not need to be amended, DOE expects to commence an energy conservation standards rulemaking for residential refrigerators, refrigerator-freezers, and freezers that would result in publication of such a notice by late 2017. 42 U.S.C. 6295(m)(1). Because of the expected overlap between this future energy conservation standards rulemaking and the potential compliance delay period for the icemaking energy standard if an adjustment proved to be necessary, along with the potential difficulties that a short transition period to 2014 could impose if an icemaking test were required by September 15, 2014, DOE has tentatively concluded that adoption of an energy conservation standard for icemaking energy use would more appropriately occur as part of this future rulemaking. DOE would also link the required use of a new test procedure that includes an icemaking energy use measurement test with any new standards rulemaking. By following this approach, DOE believes that there will be more than sufficient time to address any remaining technical issues and for manufacturer compliance once those dates are set. Thus, until the compliance date of any such standard, the 84 kWh per year placeholder value would remain in effect for both the test procedure and the energy conservation standards.

Depending upon the comments DOE receives on this proposed approach, DOE may also consider alternatives. DOE invites commenters to offer other alternatives to help ensure both the maximum amount of energy savings along with ensuring that the test procedures that are ultimately adopted will sufficiently address icemaking energy use.

DOE also requests comments on its assessment of the impacts on energy use measurements of the proposed test procedure amendments. DOE further

requests comments to support any potentially claimed change in the measured energy use, including data, if any, that would weigh in favor of adjusting the standards set to take effect on September 15, 2014, for products with automatic icemakers. DOE further requests comment on whether the fixed placeholder value for the icemaking energy use should be retained, rather than adopting a laboratory measurement, and whether to consider adopting a measurement-based standard to occur as part of a future energy conservation standards rulemaking for refrigerators, refrigerator-freezers, and freezers.

### 3. Standby and Off Mode Energy Use

EPCA directs DOE to amend test procedures to include standby mode and off mode energy consumption, and requires that this energy consumption be integrated into the overall energy consumption descriptor for the product, unless DOE determines that the current test procedures for the product already fully account for and incorporate the standby and off mode energy consumption of the covered product. (42 U.S.C. 6295(gg)(2)(A)(i)). The DOE test procedures for refrigeration products involve measuring the energy use of these products during extended time periods that include periods when the compressor and other key components are cycled off. All of the energy these products use during the “off cycles” is already included in the measurements. A given refrigeration product being tested could include auxiliary features that draw power in a standby or off mode. In such instances, HRF-1-1979 and HRF-1-2008, both of which are incorporated in relevant part into DOE’s test procedure, generally instruct manufacturers to set certain auxiliary features to the lowest power position during testing. In this lowest power position, any standby or off mode energy use of such auxiliary features would be included in the energy measurement. Hence, no separate changes are needed to account for standby and off mode energy consumption, since the current (and as proposed) procedures address these modes. DOE requests comments on this determination.

## IV. Procedural Requirements

### A. Review Under Executive Order 12866

The Office of Management and Budget has determined that test procedure rulemakings do not constitute “significant regulatory actions” under section 3(f) of Executive Order 12866, Regulatory Planning and Review, 58 FR

51735 (Oct. 4, 1993). Accordingly, this action was not subject to review under the Executive Order by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB).

### B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, “Proper Consideration of Small Entities in Agency Rulemaking,” 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel’s Web site (<http://www.energy.gov/gc>).

DOE reviewed the test procedures in today’s proposed rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. This proposed rule would prescribe test procedures to test compliance with energy conservation standards for the products that are the subject of this rulemaking.

Specifically, DOE proposes to make changes and additions to the existing test procedure for refrigerators, refrigerator-freezers, and freezers. Changes to the existing rule as described above have potential impacts on manufacturers who will be required to revise their current testing procedures for compliance. As described in section 1, DOE believes the implementation of an icemaking test procedure is the only test procedure amendment proposed in today’s notice that would represent an increase in test burden.

The Small Business Administration (SBA) considers an entity to be a small business if, together with its affiliates, it employs less than a threshold number of workers specified in 13 CFR part 121, which relies on size standards and codes established by the North American Industry Classification System (NAICS). The threshold number for NAICS code 335222, which applies to Household Refrigerator and Home Freezer Manufacturing, is 1,000 employees.

DOE conducted a market survey to determine whether any manufacturers of products covered by this rulemaking were small businesses. During its market survey, DOE used all available public information to create a list of companies that manufacture refrigerators, refrigerator-freezers, or freezers covered by this rulemaking. DOE reviewed these data to determine whether the entities met the SBA’s definition of a small business manufacturer of refrigerators, refrigerator-freezers, or freezers and screened out companies that do not offer products covered by this rulemaking, do not meet the definition of a “small business,” or are foreign owned and operated. DOE identified three small businesses that manufacture refrigeration products.

DOE then determined the expected impacts of the rule on affected small businesses and whether an IRFA was needed (*i.e.*, whether DOE could certify that this rulemaking would not have a significant economic impact on a substantial number of small entities).

One of the three small businesses identified by DOE primarily manufactures compact refrigerators and related compact products such as wine chillers and stand-alone ice makers. These ice makers differ from the automatic icemakers installed in many refrigeration products in that they are separate icemaking appliances designed solely for the production and storage of ice. DOE reviewed the refrigerator, refrigerator-freezer, and freezer products manufactured by this small business and concluded that none of them are sold with automatic icemakers installed. Hence, it would not be required to rate products using the proposed icemaking test procedure. A second of the three small businesses primarily manufactures undercounter refrigeration products, most of which are compact. DOE reviewed the products manufactured by this small business and concluded that none of them are sold with automatic icemakers installed. The third small business, on the other hand, was found to manufacture refrigeration products with automatic icemakers and thus would be subject to the additional testing requirements proposed in today’s test procedure. This small business has 800 employees.

Most of the test procedure amendments proposed in this notice would not affect test burden. One of the amendments would simply incorporate a test procedure for multiple compressor products that manufacturers already use in accordance with test procedure waivers they have received from DOE in order to test and rate these products.

Many of the other amendments clarify how to conduct the test rather than create any fundamental change in the way the test is conducted. An amendment addressing incomplete cycling would apply to a very small minority of products, much less than one percent of refrigeration product models. Amendments addressing the reporting of product height and the measurement of refrigerated volume would reduce measurement and reporting burden. Also, an amendment allowing for use of a third test for products whose control systems are not tuned to match both fresh food and freezer compartment standardized temperatures simultaneously (triangulation) is optional.

The primary incremental cost for small businesses under this rulemaking would result from the aforementioned automatic icemaker testing requirements. The cost to provide a required water supply for a test facility to address icemaker testing is estimated at \$800. The buildings in which the test facilities are housed would already have a water supply—this additional cost would be the cost of extending that supply to the interior of a test facility. The additional test burden impact estimated by DOE is associated with additional test time. DOE estimates that the additional cost associated with this test time is \$1,250 per test, based on an assumption that test time would increase 50% as compared with the current test (e.g., extension of test duration from four to six days) and based also on the costs DOE incurred to conduct testing using the proposed procedure. Since certification for refrigeration products is generally based on testing of three products, the incremental testing cost impact for this small business manufacturer associated with test time is estimated to be \$3,750 per refrigeration product.

These costs were applied to the number of existing models subject to testing requirements outlined in this rulemaking, which DOE estimated at 20 basic models, based on its review of the number of products that would have automatic icemakers offered by the examined manufacturer. DOE assumed that the costs would be incurred in the year preceding the implementation of the new testing requirements, which, for the purposes of the analysis, is assumed to take effect coincident with a revision of the 2014 energy conservation standards in 2021. The test costs are assumed to occur in the preceding year as the manufacturer certifies the new product models in preparation for the potential adjustment in energy conservation standards. Based on these

assumptions, incremental testing costs for small businesses were estimated at \$76,000 in 2020.

As explained below, the findings of the DOE analysis suggest that small business manufacturers of refrigerators, refrigerator-freezers, and freezers would not be disproportionately impacted by the proposed test procedure, relative to their competition. DOE conducted an analysis to evaluate the testing cost burden that would likely be affected by the inclusion of the proposed procedure for automatic icemakers relative to the estimated annual R&D budget of the small manufacturer. The analysis utilized financial data gathered from other public sources (including Hoover's and financial statements from publicly-traded manufacturers in the industry) to derive the estimated average annual R&D budget of the small business impacted by this rule. The average industry R&D expenditure was estimated at 2.4 percent of revenues. The average annual revenues for a small business manufacturer of residential refrigeration products was estimated based on revenues of these manufacturers as reported by Hoover's. The annualized costs associated with this rulemaking were then compared to estimated R&D expenditures to determine the magnitude of the cost impacts of this test procedure on small businesses. Based on this analysis, DOE estimates that the cost burden of the proposed test procedure to this small manufacturer represents a one-time cost of approximately 5 percent of the annual R&D budget for an average small business manufacturer of residential refrigeration products. Based on this analysis, DOE concludes that this value would be unlikely to represent a significant economic impact on this small manufacturer in light of the small additional one-time cost that would be incurred to conduct the proposed procedure.

Based on the criteria outlined above, DOE has determined that the proposed test procedure amendments would not have a "significant economic impact on a substantial number of small entities," and the preparation of a regulatory flexibility analysis is not warranted. DOE will transmit the certification and supporting statement of factual basis to the Chief Counsel for Advocacy of the Small Business Administration for review under 5 U.S.C. 605(b).

DOE seeks comment on its estimated additional cost of testing due to the new requirements for testing presented in this NOPR. Specifically, DOE seeks comment on the impacts of the additional cost of testing on small manufacturers. DOE also seeks comment

on its reasoning that the proposed test procedure changes would not have a significant impact on a substantial number of small entities.

#### *C. Review Under the Paperwork Reduction Act of 1995*

Manufacturers of refrigeration products must certify to DOE that their products comply with the applicable energy conservation standard. In certifying compliance, manufacturers must test their products according to the DOE test procedure for refrigeration products, including any amendments adopted for that test procedure. The information collection requirement for certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This requirement has been submitted to OMB for approval. DOE received OMB approval to collect this information and has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment, including the refrigeration products addressed by today's proposed rule. 76 FR 12422 (March 7, 2011). The public reporting burden for the certification is estimated to average 20 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. While DOE has proposed to add a new reporting requirement (whether the manufacturer used the triangulation method for its certification tests), it has also proposed to remove a requirement (reporting of product height). Thus, DOE has determined that there is effectively no change in the reporting burden for these products.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

#### *D. Review Under the National Environmental Policy Act of 1969*

In this notice, DOE proposes to amend its test procedure for refrigerators, refrigerator-freezers, and freezers. These proposed amendments would improve the ability of DOE's procedures to more accurately account for the energy consumption of products that incorporate a variety of new technologies that were not contemplated when the current procedure was promulgated. DOE has determined that

this proposed rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and DOE's implementing regulations at 10 CFR part 1021. Specifically, this rule proposes to amend an existing rule without changing its environmental effect, and, therefore, is covered by the Categorical Exclusion in 10 CFR part 1021, subpart D, appendix A6. *See* 76 FR 63764, 63788 (Oct. 13, 2011). The exclusion applies because this proposed rule would establish a strictly procedural requirement by revising existing test procedures. These proposed revisions will not affect the amount, quality, or distribution of energy usage, and, therefore, will not result in any environmental impacts. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

#### *E. Review Under Executive Order 13132*

Executive Order 13132, "Federalism," imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. 64 FR 43255 (Aug. 10, 1999). The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process that it will follow in developing such regulations. 65 FR 13735. DOE examined this proposed rule and determined that it 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. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of today's proposed rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297) No further action is required by Executive Order 13132.

#### *F. Review Under Executive Order 12988*

Regarding the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform," 61 FR 4729 (Feb. 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation specifies the following: (1) the preemptive effect, if any; (2) any effect on existing Federal law or regulation; (3) a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) the retroactive effect, if any; (5) definitions of key terms; and (6) other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met or whether it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this proposed rule meets the relevant standards of Executive Order 12988.

#### *G. Review Under the Unfunded Mandates Reform Act of 1995*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4; 2 U.S.C. 1501 *et seq.*) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. For a regulatory action resulting in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish estimates of the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a)-(b)) UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed "significant intergovernmental mandate," and requires an agency plan for giving notice and opportunity for timely input to potentially-affected

small governments before establishing any requirements that might significantly or uniquely affect such governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820. (The policy is also available at <http://www.gc.doe.gov/gc/office-general-counsel/>). Today's proposed rule contains neither an intergovernmental mandate nor a mandate that may result in an expenditure of \$100 million or more in any year, so these requirements do not apply.

#### *H. Review Under the Treasury and General Government Appropriations Act, 1999*

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105-277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. Today's proposed rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

#### *I. Review Under Executive Order 12630*

DOE has determined, under Executive Order 12630, "Governmental Actions and Interference with Constitutionally Protected Property Rights," 53 FR 8859 (March 18, 1988), that this proposed regulation would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

#### *J. Review Under the Treasury and General Government Appropriations Act, 2001*

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed today's proposed rule under OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

#### *K. Review Under Executive Order 13211*

Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," 66 FR 28355 (May 22, 2001), requires Federal agencies to

prepare and submit to OIRA a Statement of Energy Effects for any significant energy action. A “significant energy action” is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule and that (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use if the regulation is implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. Today’s proposed regulatory action is not a significant regulatory action under Executive Order 12866. It has likewise not been designated as a significant energy action by the Administrator of OIRA. Moreover, it would not have a significant adverse effect on the supply, distribution, or use of energy. Therefore, it is not a significant energy action, and, accordingly, DOE has not prepared a Statement of Energy Effects.

#### *L. Review Under Section 32 of the Federal Energy Administration Act of 1974*

Under section 301 of the DOE Organization Act (Pub. L. 95–91; 42 U.S.C. 7101 *et seq.*), DOE must comply with section 32 of the Federal Energy Administration Act of 1974, as amended by the Federal Energy Administration Authorization Act of 1977 (FEAA). (15 U.S.C. 788) Section 32 essentially provides in part that, where a rule authorizes or requires use of commercial standards, the rulemaking must inform the public of the use and background of such standards. In addition, section 32(c) requires DOE to consult with the Attorney General and the Chairman of the Federal Trade Commission (FTC) concerning the impact of the commercial or industry standards on competition.

The proposed modifications to the test procedures addressed by this proposed action incorporate testing methods contained in certain sections of the commercial standard, HRF–1–2008, and a separate standard adopted by the Australian and New Zealand governments—Australian/New Zealand Standard 44474.1:2007, Performance of household electrical appliances—Refrigerating appliances, Part 1: Energy consumption and performance. DOE has evaluated this standard and is unable to conclude whether it fully complies with

the requirements of section 32(b) of the FEAA (i.e., whether it was developed in a manner that fully provides for public participation, comment, and review). The Attorney General and FTC will be consulted about the impact on competition of using the methods contained in this standard, prior to the issuance of a final rule.

### **V. Public Participation**

#### *A. Attendance at the Public Meeting*

The time, date, and location of the public meeting are listed in the **DATES** and **ADDRESSES** sections at the beginning of this document. If you plan to attend the public meeting, please notify Ms. Brenda Edwards at (202) 586–2945 or [Brenda.Edwards@ee.doe.gov](mailto:Brenda.Edwards@ee.doe.gov). Please note that foreign nationals visiting DOE Headquarters are subject to advance security screening procedures. Any foreign national wishing to participate in the meeting should advise DOE as soon as possible by contacting Ms. Edwards to initiate the necessary procedures. Please also note that those wishing to bring laptops into the Forrestal Building will be required to obtain a property pass. Visitors should avoid bringing laptops, or allow an extra 45 minutes. Persons can attend the public meeting via webinar. For more information, refer to the Public Participation section near the end of this notice.

In addition, you can attend the public meeting via webinar. Webinar registration information, participant instructions, and information about the capabilities available to webinar participants will be published on DOE’s Web site [http://www1.eere.energy.gov/buildings/appliance\\_standards/current\\_rulemakings-notice.html](http://www1.eere.energy.gov/buildings/appliance_standards/current_rulemakings-notice.html). Participants are responsible for ensuring their systems are compatible with the webinar software.

#### *B. Procedure for Submitting Requests to Speak*

Any person who has plans to present a prepared general statement may request that copies of his or her statement be made available at the public meeting. Such persons may submit requests, along with an advance copy of their statement in PDF (preferred), Microsoft Word or Excel, or text (ASCII) file format, to the appropriate address shown in the **ADDRESSES** section at the beginning of this notice. The request and advance copy of statements must be received at least one week before the public meeting and may be emailed, hand-delivered, or sent by mail. DOE prefers to receive requests and advance copies

via email. Please include a telephone number to enable DOE staff to make a follow-up contact, if needed.

#### *C. Conduct of Public Meeting*

DOE will designate a DOE official to preside at the public meeting and may also use a professional facilitator to aid discussion. The meeting will not be a judicial or evidentiary-type public hearing, but DOE will conduct it in accordance with section 336 of EPCA (42 U.S.C. 6306). A court reporter will be present to record the proceedings and prepare a transcript. DOE reserves the right to schedule the order of presentations and to establish the procedures governing the conduct of the public meeting. After the public meeting, interested parties may submit further comments on the proceedings as well as on any aspect of the rulemaking until the end of the comment period.

The public meeting will be conducted in an informal, conference style. DOE will present summaries of comments received before the public meeting, allow time for general statements by participants, and encourage all interested parties to share their views on issues affecting this rulemaking. Each participant will be allowed to make a general statement (within time limits determined by DOE) before the discussion of specific topics. DOE will permit, as time permits, other participants to comment briefly on any general statements.

At the end of all prepared statements on a topic, DOE will permit participants to clarify their statements briefly and comment on statements made by others. Participants should be prepared to answer questions by DOE and by other participants concerning these issues. DOE representatives may also ask questions of participants concerning other matters relevant to this rulemaking. The official conducting the public meeting will accept additional comments or questions from those attending, as time permits. The presiding official will announce any further procedural rules or modification of the above procedures that may be needed for the proper conduct of the public meeting.

A transcript of the public meeting will be included in the docket, which can be viewed as described in the *Docket* section at the beginning of this notice. In addition, any person may buy a copy of the transcript from the transcribing reporter.

#### *D. Submission of Comments*

DOE will accept comments, data, and information regarding the proposed rule before or after the public meeting, but

no later than the date provided in the **DATES** section at the beginning of this notice. Interested parties may submit comments using any of the methods described in the **ADDRESSES** section at the beginning of this notice.

Submitting comments via regulations.gov. The regulations.gov Web page will require you to provide your name and contact information. Your contact information will be viewable to DOE Building Technologies staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to regulations.gov information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (CBI)). Comments submitted through regulations.gov cannot be claimed as CBI. Comments received through the Web site will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section.

DOE processes submissions made through regulations.gov before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that regulations.gov provides after you have successfully uploaded your comment.

*Submitting comments via email, hand delivery, or mail.* Comments and documents submitted via email, hand delivery, or mail also will be posted to regulations.gov. If you do not want your personal contact information to be publicly viewable, do not include it in

your comment or any accompanying documents. Instead, provide your contact information on a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information each time you submit comments, data, documents, and other information to DOE. If you submit via mail or hand delivery, please provide all items on a CD, if feasible. It is not necessary to submit printed copies. No facsimiles (faxes) will be accepted.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, written in English and are free of any defects or viruses. Documents should not contain special characters or any form of encryption and, if possible, they should carry the electronic signature of the author.

*Campaign form letters.* Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This reduces comment processing and posting time.

*Confidential Business Information.* According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email, postal mail, or hand delivery two well-marked copies: One copy of the document that includes all of the information believed to be confidential, and one copy of the document marked non-confidential with the information believed to be confidential deleted. Submit these documents via email or on a CD, if feasible. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Factors of interest to DOE when evaluating requests to treat submitted information as confidential include the following: (1) A description of the items; (2) whether and why such items are customarily treated as confidential within the industry; (3) whether the information is generally known by or available from other sources; (4) whether the information was previously made available to others without obligation concerning its confidentiality; (5) an explanation of the competitive injury to the submitting

person that would result from public disclosure; (6) when such information might lose its confidential character due to the passage of time; and (7) why disclosure of the information would be contrary to the public interest.

#### *E. Issues on Which DOE Seeks Comment*

Although DOE welcomes comments on any aspect of this proposal, DOE is particularly interested in receiving comments and views of interested parties concerning the following issues:

##### 1. Modifications to Appendices A1 and B1

DOE is primarily proposing changes to the test procedures that will be required for certification starting in 2014. Many of these changes would help improve measurement accuracy by clarifying certain aspects of the test procedures, and would reduce test burden, but would not affect measured energy use. While the current test procedures are scheduled to be obsolete after September 2014, DOE may consider proposing these amendments also in the current test procedures to allow for the earlier adoption of these improvements and to smooth the path for their possible adoption in the test procedures that will be applicable after September 2014. DOE requests comments on whether any of the proposed amendments should also be considered for the current test procedures of Appendices A1 and B1.

##### 2. Icemaking Test Procedure Request for Comments

DOE requests comments on any aspects of the proposal for measurement of energy use associated with icemaking. DOE further requests comment on the following details of the test procedure proposal.

###### a. Refrigerators With Automatic Icemakers

DOE requests comment on whether any refrigerators (*i.e.*, "electric refrigerator" as defined in 10 CFR 430.2 rather than "electric refrigerator-freezer") are sold with automatic icemakers. If so, DOE also seeks comment on whether test procedures for automatic icemakers should cover these "electric refrigerators" and to what extent, if any, the test procedure would need to be modified to accommodate the testing of these products. DOE is seeking comment on this issue in part to ascertain whether this aspect of today's proposal should apply to refrigerators as opposed to only refrigerator-freezers. DOE is currently unaware of any refrigerators that are also equipped with an automatic icemaker.

**b. Manual Defrost Products With Automatic Ice Makers**

DOE requests comment on whether any manual defrost refrigerator-freezers or freezers are sold with automatic ice makers and whether any modifications to the proposed test procedure are required to address such products.

**c. Ice Making Definitions**

DOE requests comment on the proposal to establish definitions for "Harvest", "Ice storage bin", and "Ice piece" in the test procedures.

**d. Anti-Sweat Heater Switch**

DOE requests comment on the proposed requirements that products with anti-sweat heater switches be tested with the switches in the off position and that products with variable anti-sweat heater control without an anti-sweat heater switch be tested in an ambient environment with sufficiently low humidity to prevent the anti-sweat heaters from being energized. DOE also requests suggestions regarding how the objectives of these requirements could be satisfied with alternative approaches.

**e. Setup for Ice Making**

DOE requests comment on the proposed modification of the setup requirements, specifically the requirements addressing water lines, water filters, and ice storage bins.

**f. Ice Making Water Temperature and Pressure Conditions**

DOE seeks comment on its proposal to require 90 +/- 2 °F water inlet temperature and 60 ± 15 psig inlet pressure conditions.

**g. Ice Making Data Collection Rate for Ice Making Test**

DOE requests comments on the proposed one minute maximum data collection interval for the proposed ice making test and its assumption that most test facilities record data for refrigeration product energy tests at a frequency of at least once per minute.

**h. Ice Maker Cycles**

DOE requests comment on its proposed delineation between ice maker cycles at the end of the harvest of a batch of ice.

**i. Alternative Ice Maker Cycle Indication**

DOE requests comment on its proposal for monitoring ice maker cycles for products whose ice makers have no mold heaters, on the details of the three proposed methods, on the requirements that one of the three identified methods be used to indicate ice maker cycles and

that the test report indicate which one was used, and whether DOE should propose requirements indicating under what circumstances which of the three alternatives must be used. DOE further requests comment on whether additional alternative methods should be allowed by the test procedure. Finally, DOE requests comments on its proposal that the delineation between ice making cycles determined by the proposed alternative methods would be when water is flowing into the ice maker mold.

**j. Ice Maker Field Operation**

DOE assumes that in the field, continuous ice making would typically occur only for initial filling of the bin and successive ice maker cycles would occur after a portion of ice has been withdrawn from the ice bin. DOE seeks comment and data confirming DOE's assumption or, if that assumption is incorrect, information suggesting an alternative approach and description with respect to ice making operation in the field.

**k. Ice Making Temperature Setting**

DOE requests comments on its proposed variation limits on compartment temperatures during different parts of the ice making test, which would require that (1) Compartment temperatures be set to their warmest setting for which compartment temperatures are no more than 1 °F warmer than their standardized temperatures for the baseline test, (2) if the compartment temperatures increase during ice making that they be adjusted to their warmest setting for which compartment temperatures are no more than 1 °F warmer during the ice making test than they were in the baseline test, (3) for mechanical controls these settings be aligned with symbols on the temperature dial, and (4) products that use quick-freeze control during ice making be tested without disabling this feature during the test.

**l. Test Period for Baseline Part of Test**

DOE requests comments on its proposal to adopt a test period for the baseline part of the test that is equivalent to its existing test period for products with manual defrost, i.e. consisting of a period of time at least three hours in duration and, if the product's compressor cycles, comprising at least two complete compressor cycles. DOE further requests comment on the proposal to allow overlap of the stabilization period and the test period for the baseline part of the test as long as the stabilization

period ends no later than the test period for the baseline part of the test.

**m. Test Periods for Ice Making Part of Test**

With respect to refrigeration products that cycle their compressors during ice making, DOE requests comments on its proposal to (1) establish test periods for the ice making part of the test based both on ice maker cycles and on compressor cycles and (2) require that energy use be calculated using both of these test periods and applying them to the same period of ice making in order to provide a more accurate calculation of ice making energy use. Likewise, DOE requests comment on its proposal to allow use of only the test period based on ice maker cycles for refrigeration products that do not cycle their compressors during ice making.

**n. Ice Making Test Period Stability Tolerance**

DOE requests comment on its proposal to include a temperature stability requirement in the ice making test procedure that would require the temperature in the freezer compartment, measured for any compressor cycle (if the refrigeration product cycles its compressor during ice making) or any ice maker cycle (if the refrigeration product does not cycle its compressor during ice making) within the test period, to be within 3 °F of the compartment's temperature average for the full test period.

**o. Ice Making Test Period Duration**

DOE requests comment on its proposal to adopt a minimum test period duration of 24 hours for the ice making portion of the test, if this is possible prior to a defrost cycle occurrence or filling of the ice storage bin. Additionally, DOE requests comments on its proposal to require ice making to be initiated shortly after the start of compressor operation following a defrost cycle.

**p. Ice Mass**

DOE requests comment on its proposed method of measuring ice mass.

**q. Multiple Ice Makers**

The DOE proposal addresses refrigeration products with one ice maker serving a through-the-door feature and another not serving this feature, proposing that ice making energy use be measured only for the ice maker serving the through-the-door feature. DOE requests comment on this approach for testing these products. DOE also requests comment on whether

products with multiple icemakers using other configurations exist, what their design details are, whether DOE should consider modifying the proposed test procedure to address these products, and how the proposed test procedure should be modified to address them.

#### r. Ice Production Rate

DOE seeks information on consumer daily ice production to help determine the most appropriate ice production rate for the test procedure. DOE further seeks comment on whether the proposed 1.8 pounds per day ice production rate should be retained or whether a lower rate, as suggested by data provided by the Northwest Energy Efficiency Alliance, should be considered.

#### s. Measurements of Energy Use Associated With Icemaking

DOE seeks icemaking energy use data for typical products sold with automatic icemakers, using the test procedure proposed in this notice. DOE seeks these data in order to improve confidence in the understanding of typical icemaking energy use per pound of ice of residential refrigeration products.

#### t. Impact on Energy Use Measurement

DOE requests comments on its assessment of the impacts on energy use measurements of the proposed test procedure amendments. DOE further requests comments to support any potentially claimed change in the measured energy use, including data, if any, that would weigh in favor of adjusting the standards set to take effect on September 15, 2014, for products with automatic icemakers. DOE further requests comment on whether the fixed placeholder value for the icemaking energy use should be retained, rather than adopting a laboratory measurement, with adoption of a measurement-based standard to occur as part of a future energy conservation standards rulemaking for refrigerators, refrigerator-freezers, and freezers.

### 3. Multiple Compressor Test Procedure Request for Comments

DOE is interested in receiving general comments regarding the proposed multiple compressor test procedure and specific comments regarding the following items.

#### a. Multiple Compressor Definition

DOE requests comment on its proposed definition of refrigerator-freezers or refrigerators with multiple compressors.

#### b. Temperature Cycles

DOE requests comment on its proposal to allow use of temperature cycles as alternative indicators for start and stop times for multiple compressor test periods.

#### c. Data Collection Rate

DOE requests comments on the proposed one minute maximum data collection interval for the proposed multiple compressor test.

#### d. Multiple Compressor Stabilization Period

DOE requests comment on its proposal to apply the current stabilization requirement of Appendix A, section 2.9 to multiple compressor products and also on its proposal to allow evaluation of temperatures based either on temperature cycles or compressor cycles when evaluating stabilization.

#### e. One-Part Multiple Compressor Test

DOE requests comments on its proposal to allow a one-part test for multiple compressor products where only one compressor system has a defrost cycle (but this system's defrost control is neither long-time nor variable).

#### f. Test Periods for Products With One or No Cycling Compressors

DOE requests comment on its proposal allowing simplified test periods for both the first and second parts of the test (consistent with the test periods used for products with single compressors) when testing multiple-compressor products in which one or no compressor cycles during a test.

#### g. Duration of the First Part of the Test

DOE seeks comment on its proposal to require the first part of the test to be a single continuous period lasting at least 24 hours, if this period is not interrupted by a defrost, and that the test period be no less than 18 hours long if it is interrupted by a defrost. Further, DOE seeks comment on its proposal that this test period comprise a whole number of cycles of a "primary" compressor (or a whole number of temperature cycles of the compartment associated with the "primary" compressor), and that the "primary" compressor be the freezer compressor, if the freezer compressor cycles during the test.

#### h. Stabilization for the First Part of the Test

DOE requests comment on its proposal to require that the first part of the test consist of a period of stable

operation. DOE also seeks comment on its proposed definition for stable operation, which would require compartment temperature changes during the period to not exceed 0.042 °F per hour.

#### i. Second Part of the Test

DOE requests comment on its proposal that the second part of the test that would be conducted for each compressor system that has a defrost cycle must include start and end points that occur during stable operation while surrounding the defrost cycle being measured. Further, DOE requests comment on the proposal that both the start and end of the test period occur either (a) when the primary compressor on-cycle starts or (b) when the primary compressor on-cycle stops—or alternatively that both the start and end of the test period occur either (c) when the compartment temperature associated with the primary compressor is at a maximum or (d) when the compartment temperature associated with the primary compressor is at a minimum. Finally, DOE requests comment on its proposal to allow start and end times for the test period for products with non-cycling compressors to occur when the compartment temperatures are within 0.5 °F of their averages for the first part of the test.

#### j. Measurement Changes for Multiple Compressor Products

DOE requests information regarding any refrigeration products with multiple compressors (other than those already covered by test procedure waivers) and whether the proposed test procedure would alter the measurement of energy use of any multiple compressor products. If the proposed test procedure would alter the measured energy use, DOE requests information regarding how large the change would be and what aspects of the proposed test would be most responsible for that change.

#### k. Multiple Compressor Products With Manual Defrost

DOE requests comment on whether any multiple compressor refrigeration products with manual defrost exist and whether the test procedure proposal should address such products.

### 4. Triangulation Approach

DOE welcomes comment on its proposal to include the triangulation approach as an optional interpolation method in the test procedure, including comment on the proposed approach for implementing this method in the test procedure and the proposed requirement to indicate in certification

reports that triangulation has been used for certification. DOE also welcomes comment on its proposal to use triangulation for assessment and enforcement testing if (a) the product was certified using this method, or (b) the measurement results calculated based on the first two tests differ by more than five percent using the two different compartment temperatures for the interpolations.

#### 5. Anti-Circumvention Language

##### a. Modification to Anti-Circumvention Language

DOE invites stakeholder comment on its proposal to modify the anti-circumvention language.

##### b. Components That Operate Differently During Testing

DOE seeks comment on potential revisions to the anti-circumvention language that would, in limited circumstances, permit the use of control algorithms that may cause a system to operate differently during testing from how it would operate in the field.

#### 6. Incomplete Cycling

DOE seeks comment on its proposed amendment to the incomplete cycling definition and the associated modification of the test period for such products from 24 hours to one whole compressor cycle. DOE also seeks comment on its proposal to alter the test period requirements of Appendices A and B for products with automatic (but not long-time or variable) defrost so that the temperature measurements are made during test periods that do not include any of the events associated with defrost cycles. DOE also requests comment on whether temperature measurement requirements for incomplete cycling or non-cycling products in Appendices A1 and B1 should be made consistent with the temperature measurement requirements in Appendices A and B, i.e., that the temperature measurement and energy measurement test periods would coincide.

#### 7. Mechanical Control Settings

DOE invites stakeholder comment on its proposal to modify its test procedures to clarify the setting of mechanical controls during testing.

#### 8. Ambient Temperature Conditions

DOE requests comment on its proposed changes to ambient temperature and ambient temperature gradient requirements and its proposed approach to implementing these changes.

#### 9. Definitions Associated With Defrost Cycles

DOE welcomes comment on the proposed definitions for terms associated with defrost cycles—“precooling”, “recovery”, “stable operation”, and “stable period of compressor operation”.

#### 10. Elimination of Product Height Reporting

DOE invites comment on its proposal to eliminate the certification requirement for reporting product height starting September 15, 2014.

#### 11. Measurement of Product Volume

DOE seeks comment on its proposal to permit the use of CAD models to measure product volumes for the purposes of certification, the proposed 2 percent (or 0.5/0.2 cubic foot) allowance with respect to differences between the certified and measured volumes, and the requirements for retention of CAD-generated volume calculations as part of certification test reports. DOE also requests information on the documentation kept by manufacturers of CAD modeling used for calculations of volume and whether this documentation is in or could be converted to a format that would allow review by DOE without use of CAD software.

#### 12. Package Loading

DOE requests comment on its clarifications of the appropriate method for determining that the 75% package loading requirement for manual defrost freezers in section 5.5.5.3 of HRF-1-2008 has been met and the proposed amendments to the text of Appendix B to address this issue.

#### 13. Product Clearance to the Wall During Testing

DOE requests comment on its proposed revisions to the text of Appendices A and B to address product clearance to the wall during testing.

#### 14. Relocation of Shelving

DOE requests comments on its proposal to require that shelving and/or other components whose position is adjustable by consumers be relocated to assure that temperature sensors maintain the required clearance from hardware, while indicating that the shelving be installed as evenly as possible if relocation for temperature sensors is required.

#### 15. Built-in Refrigerators

DOE requests comment on whether testing in a built-in condition would generally be more representative of

energy consumption in average use and, if so, the extent to which testing in this condition would be expected to affect the measured energy use of these products. DOE is also interested in receiving comment on whether there would be a significant additional test burden resulting from a requirement that specifies these products be tested in a built-in condition.

#### 16. Measurement of Product Volume

DOE requests comment on its interpretations of the volume measurement provisions of AHAM HRF-1-2008 pertaining to air ducts and water coolers, and its proposed revisions to section 5.3 of the test procedures in Appendices A and B addressing volume measurement.

#### 17. Test Burden

DOE seeks comment regarding its assessment of the test burden impacts of the test procedure amendments proposed in this notice.

#### 18. Changes in Measured Energy Use

DOE invites stakeholder comment regarding DOE's assessments of the potential changes in measured energy use associated with the proposed test procedure changes. DOE requests comment on whether any of the proposed amendments to the test procedures could alter energy use measurements, and, if so, DOE requests data showing the magnitude of the measurement changes.

#### 19. Standby and Off/Mode Energy Use

DOE tentatively proposed that no separate changes are needed to account for standby and off mode energy consumption, since the current (and as proposed) procedures already address energy consumed in standby and off modes. DOE requests comments on this determination.

#### 20. Regulatory Flexibility

DOE requests comment on its initial conclusion that there are no small business manufacturers of refrigeration products that would be affected by the proposed changes in the test procedures for products with automatic icemakers.

### VI. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this proposed rulemaking.

#### List of Subjects

##### 10 CFR Part 429

Administrative practice and procedure, Confidential business information, Energy conservation,

Household appliances, Reporting and recordkeeping requirements.

*10 CFR Part 430*

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Incorporation by reference, Intergovernmental relations, Small businesses.

Issued in Washington, DC, on June 28, 2013.

**Kathleen B. Hogan,**

*Deputy Assistant Secretary, Energy Efficiency and Renewable Energy.*

For the reasons stated in the preamble, DOE proposes to amend parts 429 and 430 of chapter II of title 10, of the Code of Federal Regulations, as set forth below:

**PART 429—CERTIFICATION, COMPLIANCE, AND ENFORCEMENT FOR CONSUMER PRODUCTS AND COMMERCIAL AND INDUSTRIAL EQUIPMENT**

■ 1. The authority citation for part 429 continues to read as follows:

**Authority:** 42 U.S.C. 6291–6317.

■ 2. Section 429.14 is amended by adding paragraphs (a)(3) and (a)(4), and by revising paragraphs (b)(2) and (b)(3) to read as follows:

**§ 429.14 Residential refrigerators, refrigerator-freezers and freezers.**

(a) \* \* \*

(3) Where the test procedures for these products provide more than one means for measuring the energy consumption of a basic model, all units of the basic model must be tested using the same method.

(4) The value of total refrigerated volume of a basic reported in accordance with paragraph (b)(2) of this section shall be the mean of the total refrigerated volumes measured for each tested unit of the basic model or the total refrigerated volume of the basic model as calculated in accordance with § 429.72.

(b) \* \* \*

(2) Pursuant to § 429.12(b)(13), a certification report shall include the following public product-specific information: The annual energy use in kilowatt hours per year (kWh/yr); the fresh food compartment volume in cubic feet (ft<sup>3</sup>) and the freezer compartment volume in cubic feet (ft<sup>3</sup>), as applicable; whether the basic model has variable defrost control; whether the basic model has variable anti-sweat heater control; whether testing has been conducted with modifications to the

standard temperature sensor locations specified by the figures referenced in section 5.1 of appendices A1, B1, A, and B to subpart B of part 430; and whether the optional triangulation approach of section 3.3 of appendix A was used for certification testing.

(3) Pursuant to § 429.12(b)(13), a certification report shall include the following additional product-specific information: for models with variable defrost control, the values, if any, of CT<sub>L</sub> and CT<sub>M</sub> (for an example, see section 5.2.1.3 in appendix A to subpart B of part 430) used in the calculation of energy consumption; and, for models with variable anti-sweat heater control, the values of heater watts at the ten relative humidity levels (5%, 15%, 25%, 35%, 45%, 55%, 65%, 75%, 85%, and 95%) used to calculate the variable anti-sweat heater “Correction Factor”.

■ 3. Add § 429.72 to read as follows:

**§ 429.72 Alternative methods for determining non-energy ratings.**

(a) *General.* Where §§ 429.14 through 429.54 authorize the use of an alternative method for determining a physical or operating characteristic other than the energy consumption or efficiency, such characteristics must be determined either by testing in accordance with the applicable test procedure and applying the specified sampling plan provisions established in those sections or as described in the appropriate product-specific paragraph below. In all cases, the models, measurements, and calculations used to determine the rating for the physical or operating characteristic shall be retained as part of the test records underlying the certification of the basic model in accordance with 10 CFR 429.71.

(b) *Testing.* [Reserved]

(c) *Residential refrigerators, refrigerator-freezers, and freezers.* The total refrigerated volume of a basic model of refrigerator, refrigerator-freezer, or freezer may be determined by performing a calculation of the volume based upon computer-aided design (CAD) models of the basic model in lieu of physical measurements of a production unit of the basic model. Any value of total refrigerated volume of a basic model reported to DOE in a certification of compliance in accordance with § 429.14(b)(2) must be calculated using the CAD-derived volume(s) and the applicable provisions in the test procedures in part 430 for measuring volume, and must be within two percent, or 0.5 cubic feet (0.2 cubic feet for compact products), whichever is greater, of the volume of a production unit of the basic model measured in

accordance with the applicable test procedure in part 430.

■ 4. Add § 429.134 to read as follows:

**§ 429.134 Product-specific enforcement provisions.**

(a) *General.* The following provisions apply to enforcement testing of the relevant products.

(b) *Refrigerators, refrigerator-freezers, and freezers.*

(1) *Verification of total refrigerated volume.* The total refrigerated volume of the basic model will be measured pursuant to the test requirements of part 430 for each unit tested. The results of the measurement(s) will be averaged and compared to the value of total refrigerated volume certified by the manufacturer. The certified volume will be considered valid only if:

(i) The measurement is within two percent, or 0.5 cubic feet (0.2 cubic feet for compact products), whichever is greater, of the certified volume, or

(ii) The measurement is greater than the certified volume.

(A) If the certified total refrigerated volume is found to be valid, that volume will be used as the basis for calculation of maximum allowed energy use for the basic model.

(B) If the certified total refrigerated volume is found to be invalid, the average measured volume will serve as the basis for calculation of maximum allowed energy use for the tested basic model.

(2) Reserved.

(b) *Test for Models with Two Compartments and User Operable Controls.* The test described in section 3.3 of the applicable test procedure for refrigerators or refrigerator-freezers shall be used if:

(1) The certification report indicates that the basic model was certified using this method, or

(2) The difference between the two values calculated as described in section 6.2.2.2 of the test procedure is greater than five percent of the larger value for any one unit of the basic model.

**PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS**

■ 5. The authority citation for part 430 continues to read as follows:

**Authority:** 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

■ 6. Section 430.2 is amended by revising the definition of “compact refrigerator/refrigerator-freezer/freezer” to read as follows:

**§ 430.2 Definitions.**

\* \* \* \* \*

*Compact refrigerator/refrigerator-freezer/freezer* means any refrigerator, refrigerator-freezer or freezer with total refrigerated volume less than 7.75 cubic foot (220 liters) (total refrigerated volume as determined in appendices A1 and B1 of subpart B of this part before appendices A and B become mandatory and as determined in appendices A and B of this subpart once appendices A and B become mandatory (see the notes at the beginning of appendices A and B)).

\* \* \* \* \*

■ 7. Section 430.3 is amended by adding paragraph (e) to read as follows:

**§ 430.3 Materials incorporated by reference.**

\* \* \* \* \*

(e) AS/NZS. Australian/New Zealand Standard, GPO Box 476, Sydney NSW 2001, (02) 9237-6000 or (12) 0065-4646, or go to [www.standards.org.au/](http://www.standards.org.au/) Standards New Zealand, Level 10 Radio New Zealand House 144 The Terrace Wellington 6001 (Private Bag 2439 Wellington 6020), (04) 498-5990 or (04) 498-5991, or go to [www.standards.co.nz](http://www.standards.co.nz).

(1) AS/NZS 4474.1:2007, Performance of Household Electrical Appliances—Refrigerating Appliances; Part 1: Energy Consumption and Performance, August 15, 2007, IBR approved for Appendix A to Subpart B.

(2) Reserved.

\* \* \* \* \*

■ 8. Section 430.23 is amended by revising paragraphs (a)(10) and (b)(7) to read as follows:

**§ 430.23 Test procedures for the measurement of energy and water consumption.**

\* \* \* \* \*

(a) \* \* \*

(10) The following principles of interpretation should be applied to the test procedure. The intent of the energy test procedure is to simulate typical room conditions (approximately 70 °F (21 °C)) with door openings by testing at 90 °F (32.2 °C) without door openings. Except for operating characteristics that are affected by ambient temperature (for example, compressor percent run time), the unit, when tested under this test procedure, shall operate in a manner equivalent to the unit in typical room conditions.

(i) The energy used by the unit shall be calculated when a calculation is provided by the test procedure. Energy consuming components that operate in typical room conditions (including as a result of door openings, or a function of humidity), and that are not exempted by this test procedure, shall operate in an equivalent manner during energy testing

under this test procedure, or be accounted for by all calculations as provided for in the test procedure.

Examples:

A. Energy saving features that are designed to operate when there are no door openings for long periods of time shall not be functional during the energy test.

B. The defrost heater shall not either function or turn off differently during the energy test than it would when in typical room conditions. Also, the product shall not recover differently during the defrost recovery period than it would in typical room conditions.

C. Electric heaters that would normally operate at typical room conditions with door openings shall also operate during the energy test.

D. Energy used during adaptive defrost shall continue to be tested and adjusted per the calculation provided for in this test procedure.

(ii) DOE recognizes that there may be situations that may not be completely addressed by the test procedures. A manufacturer must obtain a waiver in accordance with the relevant provisions of 10 CFR part 430 in such cases, if:

A. A product contains energy consuming components that operate differently during the prescribed testing than they would during representative average consumer use; and

B. Applying the prescribed test to that product would evaluate it in a manner that is unrepresentative of its true energy consumption (thereby providing materially inaccurate comparative data).

(b) \* \* \*

(7) The following principles of interpretation should be applied to the test procedure. The intent of the energy test procedure is to simulate typical room conditions (approximately 70 °F (21 °C)) with door openings by testing at 90 °F (32.2 °C) without door openings. Except for operating characteristics that are affected by ambient temperature (for example, compressor percent run time), the unit, when tested under this test procedure, shall operate in a manner equivalent to the unit in typical room conditions.

(i) The energy used by the unit shall be calculated when a calculation is provided by the test procedure. Energy consuming components that operate in typical room conditions (including as a result of door openings, or a function of humidity), and that are not exempted by this test procedure, shall operate in an equivalent manner during energy testing under this test procedure, or be accounted for by all calculations as provided for in the test procedure.

Examples:

A. Energy saving features that are designed to operate when there are no door openings for long periods of time shall not be functional during the energy test.

B. The defrost heater shall not either function or turn off differently during the energy test than it would when in typical room conditions. Also, the product shall not recover differently during the defrost recovery period than it would in typical room conditions.

C. Electric heaters that would normally operate at typical room conditions with door openings shall also operate during the energy test.

D. Energy used during adaptive defrost shall continue to be tested and adjusted per the calculation provided for in this test procedure.

(ii) DOE recognizes that there may be situations that may not be completely addressed by the test procedures. A manufacturer must obtain a waiver in accordance with the relevant provisions of 10 CFR part 430 in such cases, if:

A. A product contains energy consuming components that operate differently during the prescribed testing than they would during representative average consumer use; and

B. Applying the prescribed test to that product would evaluate it in a manner that is unrepresentative of its true energy consumption (thereby providing materially inaccurate comparative data).

\* \* \* \* \*

■ 9. Appendix A to subpart B of part 430 is amended:

■ a. In section 1. Definitions, by:

- 1. Redesignating section 1.5 as 1.6;
- 2. Redesignating section 1.6 as 1.7;
- 3. Redesignating section 1.7 as 1.9;
- 4. Redesignating section 1.8 as 1.10;
- 5. Redesignating section 1.9 as 1.11 and revising the newly designated section 1.11;
- 6. Redesignating section 1.10 as 1.12;
- 7. Redesignating section 1.11 as 1.14;
- 8. Redesignating section 1.12 as 1.17;
- 9. Redesignating section 1.13 as 1.21;
- 10. Redesignating section 1.14 as 1.22;
- 11. Redesignating section 1.15 as 1.23;
- 12. Redesignating section 1.16 as 1.26;
- 13. Redesignating section 1.17 as 1.28;
- 14. Redesignating section 1.18 as 1.29;
- 15. Adding sections 1.5, 1.8, 1.11, 1.13, 1.15, 1.16, 1.18, 1.19, 1.20, 1.24, 1.25, and 1.26;

■ b. In section 2. Test Conditions, by:

- 1. Revising sections 2.1, 2.2, 2.6, and 2.8;
- 2. Adding sections, 2.1.1, 2.1.2, 2.1.3, and 2.11;

■ c. In section 3. Test Control Setting, by:

- 1. Revising section 3.2.1;
- 2. Adding section 3.3;

- 3. Revising Tables 1 and 2;
- d. In section 4. Test period, by:
  - 1. Revising sections 4.1, 4.2, and 4.2.3;
  - 2. Adding sections 4.2.3.1, 4.2.3.2, 4.2.3.3, 4.2.3.4, 4.2.3.4.1, 4.2.3.4.2, 4.2.3.4.3;
  - 3. In section 5. Test Measurements, by revising sections 5.1, 5.1.1, 5.1.2, 5.2.1.1, 5.2.1.3, 5.2.1.4, 5.2.1.5, and 5.3;
- e. In section 6. Calculation of Derived Results from Test Measurements, by:
  - 1. Revising sections 6.2, 6.2.1, 6.2.2, 6.2.2.1, 6.2.2.2; and;
  - 2. Adding section 6.2.2.3;
- f. Adding section 8. Icemaking Test.

The additions and revisions read as follows:

**Appendix A to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Electric Refrigerators and Electric Refrigerator-Freezers**

\* \* \* \* \*

**1. Definitions**

\* \* \* \* \*

1.5 “AS/NZS 44474.1:2007” means Australian/New Zealand Standard 44474.1:2007, Performance of household electrical appliances—Refrigerating appliances, Part 1: Energy consumption and performance. Only sections of AS/NZS 44474.1:2007 (incorporated by reference; see § 430.3) specifically referenced in this test procedure are part of this test procedure. In cases where there is a conflict, the language of the test procedure in this appendix takes precedence over AS/NZS 44474.1:2007.

\* \* \* \* \*

1.8 “Complete temperature cycle” means a time period defined based upon the cycling of compartment temperature that starts when the compartment temperature is at a maximum and ends when the compartment temperature returns to an equivalent maximum (within 0.5 °F of the starting temperature), having in the interim fallen to a minimum and subsequently risen again to reach the second maximum. Alternatively, a complete temperature cycle can be defined to start when the compartment temperature is at a minimum and ends when the compartment temperature returns to an equivalent minimum (within 0.5 °F of the starting temperature), having in the interim risen to a maximum and subsequently fallen again to reach the second minimum.

\* \* \* \* \*

1.11 “Defrost cycle type” means a distinct sequence of control whose function is to remove frost and/or ice from a refrigerated surface. There may be variations in the defrost control sequence such as the number of defrost heaters energized. Each such variation establishes a separate distinct defrost cycle type. However, defrost achieved regularly during the compressor off-cycles by warming of the evaporator without active heat addition, although a form of automatic defrost, does not constitute a unique defrost cycle type for the purposes of identifying the

test period in accordance with section 4 of this appendix.

\* \* \* \* \*

1.13 “Harvest” means the process of freeing or removing ice pieces from an automatic icemaker.

\* \* \* \* \*

1.15 “Ice piece” means a piece of ice made by an automatic icemaker that has not been reduced in size by crushing or other mechanical action.

1.16 “Ice storage bin” means a container in which ice can be stored.

\* \* \* \* \*

1.18 “Multiple compressor” refrigerator or refrigerator-freezer means a refrigerator or refrigerator-freezer with more than one compressor.

1.19 “Precooling” means operating a refrigeration system before initiation of a defrost cycle to reduce one or more compartment temperatures significantly (more than 0.5 °F) below its minimum during stable operation between defrosts.

1.20 “Recovery” means operating a refrigeration system after the conclusion of a defrost cycle to reduce the temperature of one or more compartments to the temperature range that the compartment(s) exhibited during stable operation between defrosts.

\* \* \* \* \*

1.24 “Stable operation” means operation after steady-state conditions have been achieved but excluding any events associated with defrost cycles. During stable operation the rate of change of all compartment temperatures must not exceed 0.042 °F (0.023 °C) per hour. Such a calculation performed for compartment temperatures at any two times, or for any two complete cycles, during stable operation must meet this requirement.

(A) If compartment temperatures do not cycle, the relevant calculation shall be the difference between the temperatures at two points in time divided by the difference, in hours, between those points in time.

(B) If compartment temperatures cycle as a result of compressor cycling or other cycling operation of any system component (e.g., a damper, fan, or heater), the relevant calculation shall be the difference between compartment temperature averages evaluated for whole compressor cycles or complete temperature cycles divided by the difference, in hours, between either the starts, ends, or mid-times of the two cycles.

1.25 “Stable period of compressor operation” is a period of stable operation of a refrigeration system that has a compressor.

1.26 “Through-the-door ice/water dispenser” means a device incorporated within the cabinet, but outside the boundary of the refrigerated space, that delivers to the user on demand ice or water from within the refrigerated space without opening an exterior door. This definition includes dispensers that are capable of dispensing ice and water, ice only, or water only.

\* \* \* \* \*

**2. Test Conditions**

2.1 Ambient Temperature Measurement. Temperature measuring devices shall be shielded so that indicated temperatures are

not affected by the operation of the condensing unit or adjacent units.

2.1.1 Ambient Temperature. The ambient temperature shall be recorded at points located 3 feet (91.5 cm) above the floor and 10 inches (25.4 cm) from the center of the two sides of the unit under test. The ambient temperature shall be 90.0 ±1.0 °F (32.2 ±0.6 °C) during the stabilization period and the test period.

2.1.2 Ambient Temperature Gradient. The test room vertical ambient temperature gradient in any foot of vertical distance from 2 inches (5.1 cm) above the floor or supporting platform to a height of 7 feet (2.2 m) or to a height 1 foot (30.5 cm) above the top of the unit under test, whichever is greater, is not to exceed 0.5 °F per foot (0.9 °C per meter). The vertical ambient temperature gradient at locations 10 inches (25.4 cm) out from the centers of the two sides of the unit being tested is to be maintained during the test. To demonstrate that this requirement has been met, test data must include measurements taken using temperature sensors at locations 2 inches (5.1 cm) and 36 inches (91.4 cm) above the floor or supporting platform and at a height of 1 foot (30.5 cm) above the unit under test.

2.1.3 Platform. A platform must be used if the floor temperature is not within 3 °F (1.7 °C) of the measured ambient temperature. If a platform is used, it is to have a solid top with all sides open for air circulation underneath, and its top shall extend at least 1 foot (30.5 cm) beyond each side and front of the unit under test and extend to the wall in the rear.

2.2 Operational Conditions. The unit under test shall be installed and its operating conditions maintained in accordance with HRF-1-2008, (incorporated by reference; see § 430.3), sections 5.3.2 through section 5.5.5.5 (excluding section 5.5.5.4). Exceptions and clarifications to the cited sections of HRF-1-2008 are noted in sections 2.3 through 2.8, and 5.1 of this appendix.

\* \* \* \* \*

2.6 The unit under test and its refrigerating mechanism shall be assembled and set up in accordance with the printed consumer instructions supplied with the unit. Set-up of the unit shall not deviate from these instructions, unless explicitly required or allowed by this test procedure. Specific required or allowed deviations from such set-up include the following:

(a) Connection of water lines and installation of water filters are required only when conducting the icemaking test described in section 8 of this appendix;

(b) Clearance requirements from surfaces of the unit shall be as described in section 2.8 of this appendix;

(c) The electric power supply shall be as described in HRF-1-2008 (incorporated by reference; see § 430.3), section 5.5.1;

(d) Temperature control settings for testing shall be as described in section 3 of this appendix. Settings for convertible compartments and other temperature-controllable or special compartments shall be as described in section 2.7 of this appendix;

(e) The unit does not need to be anchored or otherwise secured to prevent tipping during energy testing;

(f) All the unit's chutes and throats required for the delivery of ice shall be free of packing, covers, or other blockages that may be fitted for shipping or when the icemaker is not in use; and

(g) Ice storage bins shall be emptied of ice except as required for the icemaking test described in section 8 of this appendix.

For cases in which set-up is not clearly defined by this test procedure, manufacturers must submit a petition for a waiver (see section 7 of this appendix).

\* \* \* \* \*

2.8 Rear Clearance.

(a) General. The space between the lowest edge of the rear plane of the cabinet and a vertical surface (the test room wall or simulated wall) shall be the minimum distance in accordance with the manufacturer's instructions, unless other provisions of this section apply. The rear plane shall be considered to be the largest flat surface at the rear of the cabinet, excluding features that protrude beyond this surface, such as brackets, the compressor, or rear-wall-mounted condensers.

(b) Maximum clearance. The clearance shall not be greater than 2 inches (51 mm) from the lowest edge of the rear plane to the vertical surface, unless the provisions of subsection (c) of this section apply.

(c) If permanent rear spacers or other components that protrude beyond the rear plane extend further than the 2 inch (51 mm) distance, or if the highest edge of the rear

plane is in contact with the vertical surface when the unit is positioned with the lowest edge of the rear plane at or further than the 2 inch (51 mm) distance from the vertical surface, the appliance shall be located with the spacers or other components protruding beyond the rear plane, or the highest edge of the rear plane, in contact with the vertical surface.

\* \* \* \* \*

2.11 Refrigerators and Refrigerator-Freezers with Demand-Response Capability. For refrigerators and refrigerator-freezers that have a communication module for demand-response functions, whether integrated within the cabinet or external to the cabinet and connected by the consumer, the communication module must be installed, energized, and connected to a network, but there shall be no active communication during testing.

\* \* \* \* \*

3. Test Control Settings

3.2 \* \* \*

3.2.1 A first test shall be performed with all compartment temperature controls set at their median position midway between their warmest and coldest settings. For mechanical control systems, (a) knob detents shall be mechanically defeated if necessary to attain a median setting, and (b) the warmest and coldest settings shall correspond to the positions in which the indicator is aligned with control symbols indicating the warmest

and coldest settings. For electronic control systems, the test shall be performed with all compartment temperature controls set at the average of the coldest and warmest settings—if there is no setting equal to this average, the setting closest to the average shall be used. If there are two such settings equally close to the average, the higher of these temperature control settings shall be used. A second test shall be performed with all controls set at their warmest setting or all controls set at their coldest setting (not electrically or mechanically bypassed). For all-refrigerators, this setting shall be the appropriate setting that attempts to achieve compartment temperatures measured during the two tests that bound (*i.e.*, one is above and one is below) the standardized temperature for all refrigerators. For refrigerators and refrigerator-freezers, the second test shall be conducted with all controls at their coldest setting, unless all compartment temperatures measured during the first part of the test are lower than the standardized temperatures, in which case the second test shall be conducted with all controls at their warmest setting. Refer to Table 1 of this appendix for all refrigerators or Table 2 of this appendix for refrigerators with freezer compartments and refrigerator-freezers to determine which test results to use in the energy consumption calculation. If any compartment is warmer than its standardized temperature for a test with all controls at their coldest position, the tested unit fails the test and cannot be rated.

TABLE 1—TEMPERATURE SETTINGS FOR ALL REFRIGERATORS

First test		Second test		Energy calculation based on—
Settings	Results	Settings	Results	
Mid .....	Low .....	Warm .....	Low .....	Second Test Only. First and Second Tests. First and Second Tests. No Energy Use Rating.
	High .....	Cold .....	High .....	

TABLE 2—TEMPERATURE SETTINGS FOR REFRIGERATORS WITH FREEZER COMPARTMENTS AND REFRIGERATOR-FREEZERS

First test		Second test		Energy calculation based on—
Settings	Results	Settings	Results	
Fzr Mid .....	Fzr Low .....	Fzr Warm .....	Fzr Low .....	Second Test Only.
FF Mid .....	FF Low .....	FF Warm .....	FF Low .....	
		Fzr Low .....	First and Second Tests.	
		FF High .....	First and Second Test.	
		FF High .....	First and Second Test.	
		Fzr High .....	First and Second Test.	
		FF Low .....	First and Second Test.	
		Fzr High .....	First and Second Test.	
		FF High .....	First and Second Test.	
	Fzr Low .....	Fzr Cold .....	Fzr Low .....	No Energy Use Rating.
	FF High .....	FF Cold .....	FF High .....	
			Fzr Low .....	First and Second Tests.
			FF Low .....	
	Fzr High .....	Fzr Cold .....	Fzr High .....	No Energy Use Rating.
	FF Low .....	FF Cold .....	FF Low .....	
Fzr Low .....	First and Second Tests..			First and Second Tests.
	Fzr High .....	Fzr Cold .....	FF Low .....	
	FF High .....	FF Cold .....	Fzr Low .....	
Fzr Low .....	No Energy Use Rating.		FF Low .....	

TABLE 2—TEMPERATURE SETTINGS FOR REFRIGERATORS WITH FREEZER COMPARTMENTS AND REFRIGERATOR-FREEZERS—Continued

First test		Second test		Energy calculation based on—
Settings	Results	Settings	Results	
Fzr High .....	No Energy Use Rating.		FF High .....	
Fzr High .....		No Energy Use Rating.		
FF High .....				

NOTES: Fzr = Freezer Compartment, FF = Fresh Food Compartment.

\* \* \* \* \*

3.3 Optional Test for Models with Two Compartments and User Operable Controls. As an alternative to section 3.2, in addition to the two tests described in section 3.2.1, perform a third test such that the set of tests meets the “minimum requirements for interpolation” of AS/NZS 44474.1:2007 (incorporated by reference; see § 430.3) appendix M, section M3, paragraphs (a) through (c) and as illustrated in Figure M1. The target temperatures  $t_{xA}$  and  $t_{xB}$  defined in section M4(a)(i) of AS/NZ 44474.1:2007 shall be the standardized temperatures defined in section 3.2 of this appendix.

**4. Test Period**

\* \* \* \* \*

4.1 Non-Automatic Defrost. If the model being tested has no automatic defrost system, the test period shall start after steady-state conditions (see section 2.9 of this appendix) have been achieved and be no less than three hours in duration. During the test period, the compressor motor shall complete two or more whole compressor cycles. (A compressor cycle is a complete “on” and a complete “off” period of the motor.) If no “off” cycling occurs, the test period shall be three hours. If incomplete cycling occurs (fewer than two compressor cycles during a 24-hour period), then a single complete compressor cycle may be used.

4.2 Automatic Defrost. If the model being tested has an automatic defrost system, the test period shall start after steady-state conditions have been achieved and be from one point during a defrost period to the same point during the next defrost period. If the model being tested has a long-time automatic defrost system, the alternative provisions of section 4.2.1 may be used. If the model being tested has a variable defrost control, the provisions of section 4.2.2 shall apply. If the model is a multiple compressor product with automatic defrost, the provisions of section 4.2.3 shall apply. If the model being tested has long-time automatic or variable defrost control involving multiple defrost cycle types, such as for a product with a single compressor and two or more evaporators in which the evaporators are defrosted at different frequencies, the provisions of section 4.2.4 shall apply. If the model being tested has multiple defrost cycle types for which compressor run time between defrosts is a fixed time of less than 14 hours for all

such cycle types, and for which the compressor run times between defrosts for different defrost cycle types are equal to or multiples of each other, the test period shall be from one point of the defrost cycle type with the longest compressor run time between defrosts to the same point during the next occurrence of this defrost cycle type. For such products not using the procedures of section 4.2.4, energy consumption shall be calculated as described in section 5.2.1.1 of this appendix.

\* \* \* \* \*

**4.2.3 Multiple Compressor Products with Automatic Defrost.**

4.2.3.1 Measurement Frequency. Measurements shall be taken at regular intervals not exceeding one minute.

4.2.3.2 Steady-state Condition. The requirements of section 2.9 of this appendix shall be met for the compartment temperature of each compartment served by each of the compressors of the multiple compressor product. As an alternative to evaluating steady-state conditions based on complete compressor cycles, this evaluation may be based on complete temperature cycles for the compartments served by each of the compressors.

4.2.3.3 Short-Time Defrost for a Single Compressor. For multiple compressor products where (a) only one compressor system has automatic defrost and (b) this is a short-time defrost (*i.e.*, not long-time or variable), the test period shall start after steady-state conditions have been achieved and be from one point during a defrost period to the same point during the next defrost period.

4.2.3.4 If the conditions of section 4.2.3.3 do not apply, the two-part method shall be used. The first part is a stable period of compressor operation that includes no defrost cycles or events associated with a defrost cycle, such as precooling or recovery, for any compressor system. The second part is designed to capture the energy consumed during all of the events occurring with the defrost control sequence that are outside of stable operation. The second part of the test shall be conducted separately for each automatic defrost system present.

4.2.3.4.1 Multiple Compressor Products with at Least Two Cycling Compressors. For a multiple compressor product with at least two cycling compressors, test periods shall be based on compressor or temperature

cycles associated with the primary compressor system (these are referred to as primary compressor cycles or primary temperature cycles). If the freezer compressor cycles, it shall be the primary compressor system. The first part of the test shall include a whole number of complete primary compressor cycles or a whole number of complete primary temperature cycles comprising at least 24 hours of stable operation. If a defrost occurs prior to completion of 24 hours of stable operation, the first part of the test shall be at least 18 hours long.

The second part of the test starts during stable operation before all portions of the defrost cycle at the beginning of a complete primary compressor or temperature cycle. The test period for the second part of the test ends after all portions of the defrost cycle and after all compartment temperatures have fully recovered to their stable operation conditions at the termination of a complete primary compressor or temperature cycle. If the test period is based on compressor cycles, the start and stop shall both occur either when the primary compressor starts or when the primary compressor stops. If the test period is based on temperature cycles, the start and stop shall both occur either when the primary compartment temperature is at a maximum or when it is at a minimum. For each compressor system, the compartment temperature averages for the first and last complete compressor or temperature cycles that lie completely within the second part of the test must be within 0.5 °F (0.3 °C) of the average compartment temperature measured for the first part of the test. If any one of the compressor systems is non-cycling, its compartment temperature averages during the first and last complete primary compressor or temperature cycles of the second part of the test must be within 0.5 °F (0.3 °C) of the average compartment temperature measured for the first part of the test.

4.2.3.4.2 Multiple Compressor Products with Non-Cycling Compressors. For a multiple compressor product with no cycling compressors, the first part of the test is a stable period of compressor operation that includes no defrost cycles or events associated with a defrost cycle, such as precooling or recovery, that shall start after steady-state conditions (see section 2.9 of this appendix) have been achieved, and shall be three hours in duration.

The second part of the test starts during stable operation before all portions of the defrost cycle when the compartment temperatures of all compressor systems are within 0.5 °F (0.3 °C) of their average temperatures measured for the first part of the test. The second part stops during stable operation after all portions of the defrost cycle when the compartment temperatures of all compressor systems are within 0.5 °F (0.3 °C) of their average temperatures measured for the first part of the test.

4.2.3.4.3 Multiple Compressor Products with One Cycling Compressor. For a multiple compressor product with one cycling compressor, the first part of the test is a stable period of compressor operation that includes no defrost cycles or events associated with a defrost cycle, such as precooling or recovery, that shall start after steady-state conditions (see section 2.9 of this appendix) have been achieved, shall be no less than three hours in duration, and shall consist of two or more whole compressor or temperature cycles of the cycling compressor system.

The second part of the test shall be as described in section 4.2.3.4.1 for the second part of the test for multiple compressor products with at least two cycling compressors. The single cycling compressor system shall be considered the primary compressor system.

\* \* \* \* \*

**5. Test Measurements**

\* \* \* \* \*

5.1 Temperature Measurements. Temperature measurements shall be made at the locations prescribed in Figures 5.1 and 5.2 of HRF-1-2008 (incorporated by reference; see § 430.3) and shall be accurate to within ±0.5 °F (0.3 °C). No freezer temperature measurements need be taken in an all-refrigerator model.

If the interior arrangements of the unit under test do not conform with those shown in Figure 5.1 and 5.2 of HRF-1-2008, the unit may be tested by relocating the temperature sensors from the locations specified in the figures to avoid interference with non-adjustable hardware or components within the unit, in which case the specific locations used for the temperature sensors shall be noted in the test data records maintained by the manufacturer in accordance with 10 CFR 429.71, and the

certification report shall indicate that non-standard sensor locations were used. If the temperature sensor placement required by this section is impeded by adjustable shelves or other components that could be relocated by the consumer, those components shall be repositioned as necessary to allow for placement of the sensors in the required locations. Any repositioning of components shall adhere as closely as practicable to the set-up instructions specified in section 5.5.2 of HRF-1-2008 while maintaining a minimum 1-inch air space between the sensor thermal mass and adjacent hardware.

5.1.1 Measured Temperature. The measured temperature of a compartment is the average of all sensor temperature readings taken in that compartment at a particular point in time. Measurements shall be taken at regular intervals not to exceed 4 minutes. Measurements for products with multiple compressor systems shall be taken at regular intervals not to exceed one minute.

5.1.2 Compartment Temperature. The compartment temperature for each test period shall be an average of the measured temperatures taken in a compartment during the test period as defined in section 4 of this appendix. For long-time automatic defrost models, compartment temperatures shall be those measured in the first part of the test period specified in section 4.2.1 of this appendix. For models with variable defrost controls, compartment temperatures shall be those measured in the first part of the test period specified in section 4.2.2 of this appendix. For models with automatic defrost that is neither long-time nor variable defrost, the compartment temperature shall be an average of the measured temperatures taken in a compartment during a stable period of compressor operation that (a) includes no defrost cycles, such as precooling or recovery, (b) is no less than three hours in duration, and (c) includes two or more whole compressor cycles or two or more complete temperature cycles. If neither the compressor nor the temperature cycles, the stable period used for the temperature average shall be three hours in duration.

\* \* \* \* \*

5.2 \* \* \*

5.2.1 \* \* \*

5.2.1.1 Non-automatic Defrost, Automatic Defrost, and Multiple Compressor Products in which only one compressor system uses

automatic defrost (but not long-time or variable). The energy consumption in kilowatt-hours per day shall be calculated equivalent to:

$$ET = EP \times 1440/T$$

Where:

ET = test cycle energy expended in kilowatt-hours per day;

EP = energy expended in kilowatt-hours during the test period;

T = length of time of the test period in minutes; and

1440 = conversion factor to adjust to a 24-hour period in minutes per day.

\* \* \* \* \*

5.2.1.3 Variable Defrost Control. The energy consumption in kilowatt-hours per day shall be calculated equivalent to:

$$ET = (1440 \times EP1/T1) + (EP2 - (EP1 \times T2/T1)) \times (12/CT),$$

Where:

1440 is defined in 5.2.1.1 and EP1, EP2, T1, T2, and 12 are defined in 5.2.1.2;

CT = (CT<sub>L</sub> × CT<sub>M</sub>)/(F × (CT<sub>M</sub> - CT<sub>L</sub>) + CT<sub>L</sub>);

CT<sub>L</sub> = the shortest compressor run time between defrosts observed for the test—or the shortest compressor run time between defrosts used in the variable defrost control algorithm (greater than or equal to 6 but less than or equal to 12 hours)—whichever is shorter, in hours rounded to the nearest tenth of an hour;

CT<sub>M</sub> = maximum compressor run time between defrosts in hours rounded to the nearest tenth of an hour (greater than CT<sub>L</sub> but not more than 96 hours);

F = ratio of per day energy consumption in excess of the least energy and the maximum difference in per-day energy consumption and is equal to 0.20.

For variable defrost models with no values for CT<sub>L</sub> and CT<sub>M</sub> in the algorithm, the default values of 6 and 96 shall be used, respectively. However, the shortest compressor run time between defrosts observed for the test shall be used for CT<sub>L</sub>, if it is less than 6.

5.2.1.4 Multiple Compressor Products with Automatic Defrost. For multiple compressor products that do not meet the conditions of section 4.2.3.3 of this appendix, the two-part test method in section 4.2.3.4 of this appendix must be used. The energy consumption in kilowatt-hours per day shall be calculated equivalent to:

$$ET = \left( 1440 \times \frac{EP1}{T1} \right) + \sum_{i=1}^D \left[ \left( EP2_i - \left( EP1 \times \frac{T2_i}{T1} \right) \right) \times \left( \frac{12}{CT_i} \right) \right]$$

Where:

1440, EP1, T1, and 12 are defined in 5.2.1.2; i = a variable that can equal 1, 2, or more that identifies each individual compressor system that has automatic defrost;

D = the total number of compressor systems with automatic defrost.

EP2<sub>i</sub> = energy expended in kilowatt-hours during the second part of the test for compressor system i;

T2<sub>i</sub> = length of time in minutes of the second part of the test for compressor system i;

CT<sub>i</sub> = the compressor run time between defrosts for compressor system i in hours rounded to the nearest tenth of an hour, for long-time automatic defrost control equal to a fixed time in hours, and for variable defrost control equal to

(CT<sub>L<sub>i</sub></sub> × CT<sub>M<sub>i</sub></sub>)/(F × (CT<sub>M<sub>i</sub></sub> - CT<sub>L<sub>i</sub></sub>) + CT<sub>L<sub>i</sub></sub>);

Where:

CT<sub>L<sub>i</sub></sub> = for compressor system i, the shortest compressor run time between defrosts observed for the test—or the shortest compressor run time between defrosts used in the variable defrost control algorithm (greater than or equal to 6 but less than or equal to 12 hours)—whichever is shorter, in hours rounded to the nearest tenth of an hour;

CT<sub>Mi</sub> = maximum compressor run time between defrosts for compressor system i in hours rounded to the nearest tenth of an hour (greater than CT<sub>Li</sub> but not more than 96 hours);  
 F = default defrost energy consumption factor, equal to 0.20.

For variable defrost models with no values for CT<sub>Li</sub> and CT<sub>Mi</sub> in the algorithm, the default values of 6 and 96 shall be used, respectively. However, the shortest compressor run time between defrosts observed for compressor system i during the

test shall be used for CT<sub>Li</sub>, if it is less than 6.  
 5.2.1.5 Long-time or Variable Defrost Control for Systems with Multiple Defrost Cycle Types. The energy consumption in kilowatt-hours per day shall be calculated equivalent to:

$$ET = (1440 \times EP1 / T1) + \sum_{i=1}^D [(EP2_i - (EP1 \times T2_i / T1)) \times (12 / CT_i)]$$

Where:

1440 is defined in 5.2.1.1 and EP1, T1, and 12 are defined in 5.2.1.2;  
 i is a variable that can equal 1, 2, or more that identifies the distinct defrost cycle types applicable for the refrigerator or refrigerator-freezer;  
 EP2<sub>i</sub> = energy expended in kilowatt-hours during the second part of the test for defrost cycle type i;  
 T2<sub>i</sub> = length of time in minutes of the second part of the test for defrost cycle type i;  
 CT<sub>i</sub> is the compressor run time between instances of defrost cycle type i, for long-time automatic defrost control equal to a fixed time in hours rounded to the nearest tenth of an hour, and for variable defrost control equal to (CT<sub>Li</sub> × CT<sub>Mi</sub>)/(F × (CT<sub>Mi</sub> - CT<sub>Li</sub>) + CT<sub>Li</sub>);  
 CT<sub>Li</sub> = for defrost cycle type i, the shortest compressor run time between defrosts of this type observed for the test—or the shortest compressor run time between defrosts of this type used in the variable defrost control algorithm (greater than or equal to 6 but less than or equal to 12 hours for the defrost cycle type with the longest compressor run time between defrosts)—whichever is shorter, in hours rounded to the nearest tenth of an hour;  
 CT<sub>Mi</sub> = maximum compressor run time between instances of defrost cycle type i in hours rounded to the nearest tenth of an hour (greater than CT<sub>Li</sub> but not more than 96 hours);

For cases in which there is more than one fixed CT value (for long-time defrost models) or more than one CT<sub>M</sub> and/or CT<sub>L</sub> value (for variable defrost models) for a given defrost cycle type, an average fixed CT value or average CT<sub>M</sub> and CT<sub>L</sub> values shall be selected for this cycle type so that 12 divided by this value or values is the frequency of occurrence of the defrost cycle type in a 24 hour period, assuming 50% compressor run time.

F = default defrost energy consumption factor, equal to 0.20.

For variable defrost models with no values for CT<sub>Li</sub> and CT<sub>Mi</sub> in the algorithm, the default values of 6 and 96 shall be used, respectively. However, the shortest compressor run time between defrosts observed for defrost cycle type i during the test shall be used for CT<sub>Li</sub>, if it is less than 6.

D is the total number of distinct defrost cycle types.

5.3 Volume Measurements. The unit's total refrigerated volume, VT, shall be

measured in accordance with HRF-1-2008 (incorporated by reference; see § 430.3), section 3.30 and sections 4.2 through 4.3. The measured volume shall include all spaces within the insulated volume of each compartment except for the volumes that must be deducted in accordance with section 4.2.2 of HRF-1-2008, and be calculated equivalent to:

VT = VF + VFF

Where:

VT = total refrigerated volume in cubic feet,  
 VF = freezer compartment volume in cubic feet, and  
 VFF = fresh food compartment volume in cubic feet.

In the case of products with automatic icemakers, the volume occupied by the automatic icemaker, including its ice storage bin, is to be included in the volume measurement.

Total refrigerated volume is determined by physical measurement of the test unit. Measurements and calculations used to determine the total refrigerated volume shall be retained as part of the test records underlying the certification of the basic model in accordance with 10 CFR 429.71.

\* \* \* \* \*

**6. Calculation of Derived Results From Test Measurements**

\* \* \* \* \*

6.2 Average Per-Cycle Energy Consumption. The average per-cycle energy consumption for a cycle type, E, is expressed in kilowatt-hours per cycle to the nearest one hundredth (0.01) kilowatt-hour and shall be calculated according to the sections below.

6.2.1 All-Refrigerator Models. The average per-cycle energy consumption shall depend upon the temperature attainable in the fresh food compartment as shown below.

\* \* \* \* \*

6.2.2 Refrigerators and Refrigerator-Freezers. The average per-cycle energy consumption shall be defined in one of the following ways as applicable.

6.2.2.1 If the fresh food compartment temperature is at or below 39 °F (3.9 °C) during both tests and the freezer compartment temperature is at or below 15 °F (-9.4 °C) during both tests of a refrigerator or at or below 0 °F (-17.8 °C) during both tests of a refrigerator-freezer, the average per-cycle energy consumption shall be:

E = ET1 + IET

Where:

ET is defined in 5.2.1;

IET, expressed in kilowatt-hours per cycle, equals 0 (zero) for products without an automatic icemaker, and for products with an automatic icemaker, shall be equal to 0.23 until the energy conservation standards at 10 CFR 430.32(a) are amended. Beginning on the compliance date of any such amended standards, the icemaking energy shall be calculated as described in section 8.3.6 of this appendix; and  
 The number 1 indicates the test period during which the highest freezer compartment temperature was measured.

6.2.2.2 If the conditions of 6.2.2.1 do not exist, the average per-cycle energy consumption shall be defined by the higher of the two values calculated by the following two formulas:

E = ET1 + ((ET2 - ET1) × (39.0 - TR1)/(TR2 - TR1)) + IET

and

E = ET1 + ((ET2 - ET1) × (k - TF1)/(TF2 - TF1)) + IET

Where:

ET is defined in 5.2.1;  
 IET is defined in 6.2.2.1;  
 TR and the numbers 1 and 2 are defined in 6.2.1.2;

TF = freezer compartment temperature determined according to 5.1.4 in degrees F;

39.0 is a specified fresh food compartment temperature in degrees F; and k is a constant 15.0 for refrigerators or 0.0 for refrigerator-freezers, each being standardized freezer compartment temperatures in degrees F.

6.2.2.3 Optional Test for Models with Two Compartments and User Operable Controls. If the procedure of section 3.3 of this appendix is used for setting temperature controls, the average per-cycle energy consumption shall be defined as follows:

E = E<sub>x</sub> + IET

Where:

E is defined in 6.2.1.1;  
 IET is defined in 6.2.2.1; and

E<sub>x</sub> is defined and calculated as described in AS/NZS 44474.1:2007 (incorporated by reference; see § 430.3) appendix M, section M4(a). The target temperatures t<sub>xA</sub> and t<sub>xB</sub> defined in section M4(a)(i) of AS/NZS 44474.1:2007 shall be the standardized temperatures defined in section 3.2 of this appendix.

\* \* \* \* \*

## 8. Icemaking Test

This section would apply to manufacturers seeking to demonstrate compliance with any new or amended energy conservation standard that DOE may issue in a final rule for refrigerators, refrigerator-freezers, and freezers that DOE may issue after September 15, 2014. Absent the issuance of a test procedure waiver by the Department of Energy permitting the earlier use of this section, this section is not required unless and until such final rule is issued.

### 8.1 Special Test Conditions.

**8.1.1 Multiple Icemakers.** If one of the automatic icemakers in a product with multiple icemakers serves a through-the-door ice dispenser, initiate icemaking only for this icemaker when conducting the icemaking part of the test of section 8.3.

**8.1.2 Anti-sweat Heater.** The anti-sweat heater switch shall be off for the icemaking test. In the case of a product equipped with variable anti-sweat heater control but without an anti-sweat heater switch, the test shall be conducted in an ambient humidity condition that will prevent the anti-sweat heater from being energized.

**8.1.3 Connection of water lines and installation of water filters are required.** Inlet water temperature shall be 90 +/- 2 °F. The water supply system shall be designed to assure that inlet water temperature stays within this specified range at all times during the test. Inlet water pressure shall be 60 +/- 15 psig.

**8.1.4 Data collection frequency for temperatures, power, and energy shall be no less than once per minute.**

**8.1.5 Icemaker Cycle Indication.** The end of one icemaker cycle and the start of the following icemaker cycle is defined to occur when the mold heater (to release ice pieces) is turned off. When measuring energy use for an icemaker (a) without a mold heater or (b) for which review of test data does not allow easy determination of the times that a mold heater was turned off, the end of one icemaker cycle and the start of the following icemaker cycle is defined to occur when one of the methods described in this section indicates the initiation of water flow into the icemaker mold. One of the following measurement approaches shall be used to indicate the start and end of icemaker cycles using measurements at a data acquisition time interval no greater than the data acquisition time interval used for the test's energy and temperature measurements. The test data record maintained in accordance with 10 CFR 429.71 shall indicate which of these three methods is used.

**8.1.5.1 Mold Temperature.** Measure icemaker mold temperature during the test with a temperature sensor adhered to the bottom of the icemaker mold. Ensure that the temperature sensor is installed so that the icemaker operation, including operations such as twisting of the icemaker mold and ice dropping into the ice bin, will not be impeded by the temperature sensor and its connecting wire(s), and that neither the temperature sensor nor its connecting wire(s) will be dislodged or damaged by icemaker operation.

**8.1.5.2 Water Supply Temperature.** Measure the temperature of the water at a

location in the water supply line where the measured temperature changes (within the 90 +/- 2F supply temperature range) when water is supplied to the icemaker, thus reliably indicating the start of an icemaking cycle. If the temperature changes measurably when the icemaker water supply valve opens, this change may be used to provide an indication of when a new icemaker cycle has started.

**8.1.5.3 Solenoid Valve Activation.** Measure power input, voltage, or current supplied to the icemaker water supply solenoid valve to indicate when the valve is energized. Make this measurement at a frequency sufficient to identify individual valve activation events, or use an event counter to track valve activation events. Alternatively, measure energy use of the valve with a precision sufficient to indicate individual activation events.

**8.2 Baseline Test.** Render the icemaker inoperative as described in HRF-1-2008 (incorporated by reference; see § 430.3), section 5.5.2(c), and empty the ice storage bin before beginning the baseline test.

**8.2.1 Baseline Test Temperature Control Settings.** Baseline test compartment temperatures shall be as defined in sections 5.1.3 and 5.1.4 of this appendix and measured during the same test period used to determine baseline test average power, as described in section 8.2.3. Temperature controls shall be adjusted to their warmest settings for which baseline test compartment temperatures are no more than 1 °F (0.6 °C) warmer than their standardized temperatures, as defined in section 3.2 of this appendix. For products with a single temperature control, this requirement shall apply to the freezer compartment. For mechanical temperature controls, only settings corresponding to positions in which the indicator is aligned with a control symbol shall be used. Temperature controls shall be readjusted and stabilization shall be repeated, if necessary to meet this requirement. Temperature controls shall not be adjusted between the icemaking baseline test and subsequent parts of the icemaking test except as described in section 8.3.2.2.

**8.2.2 Stabilization.** After setting the temperature controls as described in section 8.2.1, wait until steady-state conditions have been confirmed, as described in section 2.9 of this appendix.

**8.2.3 Baseline Test Average Power.** The test period shall be as described in section 4.1 of this appendix and shall not include any defrost cycles or events associated with a defrost cycle, such as precooling or recovery. The stabilization period and the baseline test period may overlap, provided the baseline test period ends no earlier than the stabilization period. The baseline test average power, expressed in Watts (W), shall be calculated as:

$$PI1 = \frac{EPI1 \times 1,000}{\left(\frac{TI1}{60}\right)}$$

Where:

EPI1 = Energy use measured for the baseline test period (Icemaking Test Period 1), expressed in kilowatt-hours;

TI1 = Length of time in minutes of the baseline test period;

1,000 = conversion factor to adjust kilowatt-hours to watt-hours; and

60 = conversion factor to adjust minutes to hours.

### 8.3 Icemaking Test.

**8.3.1 Initiation and Duration of Icemaking Operation.**

**8.3.1.1** For units that can complete 24 hours of icemaking or can fill their ice storage bin without encountering a defrost or the precooling preceding the defrost, or for units for which the defrost can be disabled or bypassed by the tester, verify that the ice storage bin is empty and initiate icemaking during a compressor on cycle. Continue the icemaking operation until either:

(a) The ice storage bin becomes full and stops the icemaker, or

(b) an icemaker harvest occurs at least 24 hours after the initial icemaker harvest.

**8.3.1.2** For units that cannot complete 24 hours of icemaking without encountering a defrost or the precooling preceding the defrost, verify that the ice storage bin is empty and initiate icemaking shortly after the start of the compressor after a defrost. Continue the icemaking operation until either (a) the ice storage bin becomes full and stops the icemaker, or (b) the next defrost cycle occurs.

### 8.3.2 Compartment Temperatures.

**8.3.2.1 Compartment Temperature Measurement.** For products with cycling compressors during icemaking, the compartment temperatures shall be as measured for Icemaking Test Period 3, which is defined in section 8.3.5.2 and comprises a whole number of compressor cycles. For products with non-cycling compressors during icemaking, compartment temperatures shall be as measured for Icemaking Test Period 2, which is defined in section 8.3.4.1 and comprises a whole number of icemaking cycles.

**8.3.2.2 Temperature Control Settings.** If either compartment temperature is warmer during the icemaking test than it was during the baseline test without making temperature control setting adjustments, the compartment temperature controls shall be adjusted to their warmest settings for which compartment temperatures are no more than 1 °F warmer than their temperatures measured for the baseline test. For products with a single temperature control, this requirement shall apply to the freezer compartment. For mechanical temperature controls, only settings corresponding to positions in which the indicator is aligned with a control symbol shall be used. For products with controls that automatically reduce compartment temperature settings or automatically increase compressor duty cycle or compressor speed to enhance cooling for icemaking, this enhanced cooling feature shall not be disabled during icemaking, and temperature control settings shall not be adjusted.

### 8.3.3 Ice Mass per Icemaker Cycle.

**8.3.3.1 Total Ice Mass.** After completion of icemaking, determine the total mass of ice produced,  $M_{ICE}$ , expressed in pounds, by weighing the ice storage bin when it contains the ice made during the test and subtracting the weight of the empty ice storage bin.

8.3.3.2 Total Number of Icemaker Cycles. Count the total number of icemaker cycles (*i.e.*, number of harvests),  $TN_{CYC}$ , that have occurred between initiation of icemaking and ice weight measurement based on examination of the recorded power input data or the measurements described in section 8.1.5.

8.3.3.3 The Ice Mass per Icemaker Cycle, expressed in pounds, shall be calculated as:

$$M_{ICE\_CYC} = M_{ICE} / TN_{CYC}$$

Where:

$M_{ICE}$  is defined in section 8.3.3.1; and  $TN_{CYC}$  is defined in section 8.3.3.2.

8.3.4 Energy Use per Ice Mass for Non-Cycling Compressor During Icemaking. This section describes the calculation of energy use per mass of ice produced if the compressor does not cycle during the icemaking test. Icemaking Test Period 2 can be used to measure both energy use per icemaker cycle and icemaking test average power.

8.3.4.1 Icemaking Test Period 2. The test period shall include a whole number of icemaker cycles (defined in section 8.1.5). The following stability requirement shall apply for the chosen test period: the average temperature of the freezer compartment for each complete icemaker cycle included in the test period shall be within 3 °F (1.7 °C) of its temperature average for the full test period. The number of icemaker cycles within the test period is designated  $NCYC$ , which can be less than or equal to  $TN_{CYC}$ .

8.3.4.2 Icemaking Test Average Power. The test period shall be as described in section 8.3.4.1. The icemaking test average power, expressed in Watts (W), shall be calculated as:

$$PI2 = \frac{EPI2 \times 1,000}{\left(\frac{TI2}{60}\right)}$$

Where:

$EPI2$  = Energy use measured for the icemaking test period (Icemaking Test Period 2), expressed in kilowatt-hours;  $TI2$  = Length of time in minutes of the icemaking test period; 1,000 = conversion factor to adjust kilowatt-hours to watt-hours; and 60 = conversion factor to adjust minutes to hours.

8.3.4.3 Energy Use per Ice Mass. The energy use per mass of ice produced,  $EIM$ , expressed in kilowatt-hours per pound, shall be calculated as:

$$EIM = \frac{(PI2 - PI1) \times \left(\frac{TI2}{60}\right)}{1,000 \times M_{ICE\_CYC} \times NCYC}$$

Where:

$PI2$  and  $TI2$  are defined in section 8.3.4.2;  $PI1$  is defined in section 8.2.3;  $M_{ICE\_CYC}$  is defined in section 8.3.3.4;  $NCYC$  is defined in section 8.3.4.1; 1,000 = conversion factor to adjust watt-hours to kilowatt-hours; and 60 = conversion factor to adjust minutes to hours.

8.3.5 Energy Use per Ice Mass for Cycling Compressor During Icemaking. This section

describes the calculation of energy use per mass of ice produced if the compressor cycles during the icemaking test. Icemaking Test Period 2 shall be used to measure energy use per icemaker cycle and Icemaking Test Period 3 shall be used to measure icemaking test average power.

8.3.5.1 Icemaking Test Period 2. The icemaking test period for measuring energy use per icemaker cycle shall be as described in section 8.3.4.1, except that the stability requirement shall be evaluated for Icemaking Test Period 3 rather than for Icemaking Test Period 2 as follows: the average temperature of the freezer compartment for each compressor cycle within Test Period 3 must be within 3 °F (1.7 °C) of the average temperature of the freezer compartment during Icemaking Test Period 3, which comprises a whole number of compressor cycles. The stability requirement is satisfied if the freezer compartment temperature determined for each compressor cycle contained in the test period is within 3 °F (1.7 °C) of the compartment's temperature for Icemaking Test Period 3.

8.3.5.2 Icemaking Test Period 3. The test period for measuring icemaking average power shall be the longest period that can be selected from the test data that includes a whole number of compressor cycles starting after the start of Icemaking Test Period 2 and ending before the end of Icemaking Test Period 2.

8.3.5.3 Icemaking Test Average Power. The test period for measuring average power shall be as described in section 8.3.5.2. The icemaking test average power, expressed in Watts (W), shall be calculated as:

$$PI3 = \frac{EPI3 \times 1,000}{\left(\frac{TI3}{60}\right)}$$

Where:

$EPI3$  = Energy use measured for Icemaking Test Period 3, expressed in kilowatt-hours;  $TI3$  = Length of time in minutes of Icemaking Test Period 3; 1,000 = conversion factor to adjust kilowatt-hours to watt-hours; and 60 = conversion factor to adjust minutes to hours.

8.3.5.4 Energy Use per Ice Mass. The energy use per mass of ice produced,  $EIM$ , expressed in kilowatt-hours per pound, shall be calculated as:

$$EIM = \frac{(PI3 - PI1) \times (EPI2)}{PI3 \times M_{ICE\_CYC} \times NCYC}$$

Where:

$PI3$  is defined in section 8.3.5.3;  $PI1$  is defined in section 8.2.3;  $EPI2$  = Energy use, expressed in kilowatt-hours, measured during Icemaking Test Period 2, defined in section 8.3.4.1;  $M_{ICE\_CYC}$  is defined in section 8.3.3.4; and  $NCYC$  is defined in section 8.3.4.1;

8.3.6 The icemaking energy use per cycle,  $IET$ , expressed in kilowatt-hours per cycle, shall be calculated as:

$$IET = 1.8 \times EIM$$

Where:

$EIM$  = Energy use per ice mass, defined in section 8.3.4.3 or 8.3.5.4; and 1.8 = Daily ice production in pounds.

■ 10. Appendix B to subpart B of part 430 is amended:

- a. In section 1. Definitions, by:
  - 1. Redesignating section 1.6 as 1.7;
  - 2. Redesignating section 1.7 as 1.8;
  - 3. Redesignating section 1.8 as 1.10;
  - 4. Redesignating section 1.9 as 1.13;
  - 5. Redesignating section 1.10 as 1.15;
  - 6. Redesignating section 1.11 as 1.17;
  - 7. Redesignating section 1.12 as 1.18;
  - 8. Redesignating section 1.13 as 1.19;
  - 9. Redesignating section 1.14 as 1.22;
  - 10. Redesignating section 1.15 as 1.24;
  - 11. Adding sections 1.6, 1.9, 1.11, 1.12, 1.14, 1.16, 1.20, 1.21, and 1.23;
- b. In section 2. Test Conditions, by:
  - 1. Revising sections 2.1, 2.2, 2.3, 2.4, and 2.6;
  - 2. Adding sections 2.1.1, 2.1.2, 2.1.3, 2.8, and 2.9;
- c. Revising section 3.2.1 and Table 1 in section 3. Test Control Settings;
- d. Revising section 4.1 in section 4. Test Period;
- e. Revising sections 5.1, 5.1.2, 5.2.1.3, and 5.3 in section 5. Test Measurements;
- f. In section 6. Calculation of Derived Results from Test Measurements, by:
  - 1. Revising section 6.2;
  - 2. Removing section 6.2.1
  - 3. Redesignating section 6.2.1.1 as 6.2.1 and revising the newly designated section 6.2.1;
  - 4. Redesignating section 6.2.1.2 as 6.2.2 and revising the newly designated section 6.2.2;
  - 5. Redesignating section 6.2.2 as 6.2.3 and revising the newly designated section 6.2.3;
- g. Adding section 8, Icemaking Test. The additions and revisions read as follows:

**Appendix B to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Freezers**

\* \* \* \* \*

**1. Definitions**

1.6 “Complete temperature cycle” means a time period defined based upon cycling of compartment temperature that starts when the compartment temperature is at a maximum and ends when the compartment temperature returns to an equivalent maximum (within 0.5 °F of the starting temperature), having in the interim fallen to a minimum and subsequently risen again to reach the second maximum. Alternatively, a complete temperature cycle can be defined to start when the compartment temperature is at a minimum and ends when the compartment temperature returns to an equivalent minimum (within 0.5 °F of the starting temperature), having in the interim risen to a maximum and subsequently fallen again to reach the second minimum.

\* \* \* \* \*

1.9 “Harvest” means the process of freeing or removing ice pieces from an automatic icemaker.

\* \* \* \* \*

1.11 “Ice piece” means a piece of ice made by an automatic icemaker that has not been reduced in size by crushing or other mechanical action.

1.12 “Ice storage bin” means a container in which ice can be stored.

\* \* \* \* \*

1.14 “Precooling” means operating a refrigeration system before initiation of a defrost cycle to reduce one or more compartment temperatures significantly (more than 0.5 °F) below its minimum during stable operation between defrosts.

\* \* \* \* \*

1.16 “Recovery” means operating a refrigeration system after the conclusion of a defrost cycle to reduce the temperature of one or more compartments to the temperature range that the compartment(s) exhibited during stable operation between defrosts.

\* \* \* \* \*

1.20 “Stable operation” means operation after steady-state conditions have been achieved but excluding any events associated with defrost cycles. During stable operation the rate of change of all compartment temperatures must not exceed 0.042 °F (0.023 °C) per hour. Such a calculation performed for compartment temperatures at any two times, or for any two complete cycles, during stable operation must meet this requirement.

(A) If compartment temperatures do not cycle, the relevant calculation shall be the difference between the temperatures at two points in time divided by the difference, in hours, between those points in time.

(B) If compartment temperatures cycle as a result of compressor cycling or other cycling operation of any system component (e.g., a damper, fan, or heater), the relevant calculation shall be the difference between compartment temperature averages evaluated for whole compressor cycles or complete temperature cycles divided by the difference, in hours, between either the starts, ends, or mid-times of the two cycles.

1.21 “Stable period of compressor operation” is a period of stable operation of a refrigeration system that has a compressor.

\* \* \* \* \*

1.23 “Through-the-door ice/water dispenser” means a device incorporated within the cabinet, but outside the boundary of the refrigerated space, that delivers to the user on demand ice or water from within the refrigerated space without opening an exterior door. This definition includes dispensers that are capable of dispensing ice and water, ice only, or water only.

\* \* \* \* \*

## 2. Test Conditions

2.1 Ambient Temperature Measurement. Temperature measuring devices shall be shielded so that indicated temperatures are not affected by the operation of the condensing unit or adjacent units.

2.1.1 Ambient Temperature. The ambient temperature shall be recorded at points

located 3 feet (91.5 cm) above the floor and 10 inches (25.4 cm) from the center of the two sides of the unit under test. The ambient temperature shall be 90.0 ±1.0 °F (32.2 ±0.6 °C) during the stabilization period and the test period.

2.1.2 Ambient Temperature Gradient. The test room vertical ambient temperature gradient in any foot of vertical distance from 2 inches (5.1 cm) above the floor or supporting platform to a height of 7 feet (2.2 m) or to a height 1 foot (30.5 cm) above the top of the unit under test, whichever is greater, is not to exceed 0.5 °F per foot (0.9 °C per meter). The vertical ambient temperature gradient at locations 10 inches (25.4 cm) out from the centers of the two sides of the unit being tested is to be maintained during the test. To demonstrate that this requirement has been met, test data must include measurements taken using temperature sensors at locations 2 inches (5.1 cm) and 36 inches (91.4 cm) above the floor or supporting platform and at a height of 1 foot (30.5 cm) above the unit under test.

2.1.3 Platform. A platform must be used if the floor temperature is not within 3 °F (1.7 °C) of the measured ambient temperature. If a platform is used, it is to have a solid top with all sides open for air circulation underneath, and its top shall extend at least 1 foot (30.5 cm) beyond each side and front of the unit under test and extend to the wall in the rear.

2.2 Operational Conditions. The freezer shall be installed and its operating conditions maintained in accordance with HRF-1-2008 (incorporated by reference; see § 430.3), sections 5.3.2 through section 5.5.5.5 (but excluding sections 5.5.5.2 and 5.5.5.4). The quick freeze option shall be switched off except as specified in section 3.1 of this appendix. Additional clarifications are noted in sections 2.3 through 2.9 of this appendix.

2.3 Anti-Sweat Heaters. The anti-sweat heater switch is to be on during one test and off during a second test. In the case of an electric freezer with variable anti-sweat heater control, the standard cycle energy use shall be the result of the calculation described in 6.2.3.

2.4 The unit under test and its refrigerating mechanism shall be assembled and set up in accordance with the printed consumer instructions supplied with the unit. Set-up of the freezer shall not deviate from these instructions, unless explicitly required or allowed by this test procedure. Specific required or allowed deviations from such set-up include the following:

(a) Connection of water lines and installation of water filters are required only when conducting the icemaking test described in section 8 of this appendix;

(b) Clearance requirements from surfaces of the unit shall be as described in section 2.6 of this appendix;

(c) The electric power supply shall be as described in HRF-1-2008 (incorporated by reference; see § 430.3) section 5.5.1;

(d) Temperature control settings for testing shall be as described in section 3 of this appendix. Settings for special compartments shall be as described in section 2.5 of this appendix;

(e) The unit does not need to be anchored or otherwise secured to prevent tipping during energy testing;

(f) All the unit’s chutes and throats required for the delivery of ice shall be free of packing, covers, or other blockages that may be fitted for shipping or when the icemaker is not in use; and

(g) Ice storage bins shall be emptied of ice except as required for the icemaking test described in section 8 of this appendix.

For cases in which set-up is not clearly defined by this test procedure, manufacturers must submit a petition for a waiver (see section 7 of this appendix).

\* \* \* \* \*

### 2.6 Rear Clearance.

(a) General. The space between the lowest edge of the rear plane of the cabinet and a vertical surface (the test room wall or simulated wall) shall be the minimum distance in accordance with the manufacturer’s instructions, unless other provisions of this section apply. The rear plane shall be considered to be the largest flat surface at the rear of the cabinet, excluding features that protrude beyond this surface, such as brackets, the compressor, or rear-wall-mounted condensers.

(b) Maximum clearance. The clearance shall not be greater than 2 inches (51 mm) from the lowest edge of the rear plane to the vertical surface, unless the provisions of subsection (c) of this section apply.

(c) If permanent rear spacers or other components that protrude beyond the rear plane extend further than the 2 inch (51 mm) distance, or if the highest edge of the rear plane is in contact with the vertical surface when the unit is positioned with the lowest edge of the rear plane at or further than the 2 inch (51 mm) distance from the vertical surface, the appliance shall be located with the spacers or other components protruding beyond the rear plane, or the highest edge of the rear plane, in contact with the vertical surface.

\* \* \* \* \*

2.8 Freezers with Demand-Response Capability. For freezers that have a communication module for demand-response functions, whether integrated within the cabinet or external to the cabinet and connected by the consumer, the communication module must be installed, energized, and connected to a network, but there shall be no active communication during testing.

2.9 For products that require the freezer compartment to be loaded with packages in accordance with section 5.5.5.3 of HRF-1-2008, the number of packages comprising the 75% load shall be determined by filling the compartment completely with the packages that are to be used for the test, such that the packages fill as much of the usable refrigerated space within the compartment as is physically possible and removing from the compartment a number of packages so that the compartment contains 75% of the packages that were placed in the compartment to completely fill it. For multi-shelf units this method should be applied to each shelf. The remaining packages may be arranged as necessary to provide the required air gap and thermocouple placement. The

number of packages comprising the 100% and 75% loading conditions should be recorded in the test data maintained in accordance with 10 CFR 429.71.

**3. Test Control Settings**

\* \* \* \* \*

3.2 \* \* \*

3.2.1 A first test shall be performed with all temperature controls set at their median position midway between their warmest and coldest settings. For mechanical control systems, (a) knob detents shall be mechanically defeated if necessary to attain a median setting, and (b) the warmest and coldest settings shall correspond to the positions in which the indicator is aligned

with control symbols indicating the warmest and coldest settings. For electronic control systems, the test shall be performed with all compartment temperature controls set at the average of the coldest and warmest settings—if there is no setting equal to this average, the setting closest to the average shall be used. If there are two such settings equally close to the average, the higher of these temperature control settings shall be used.

A second test shall be performed with all controls set at either their warmest or their coldest setting (not electrically or mechanically bypassed), whichever is appropriate, to attempt to achieve compartment temperatures measured during the two tests that bound (i.e., one is above

and one is below) the standardized temperature. If the compartment temperatures measured during these two tests bound the standardized temperature, then these test results shall be used to determine energy consumption. If the compartment temperature measured with all controls set at their coldest setting is above the standardized temperature, the tested unit fails the test and cannot be rated. If the compartment temperature measured with all controls set at their warmest setting is below the standardized temperature, then the result of this test alone will be used to determine energy consumption. Also see Table 1 of this appendix, which summarizes these requirements.

TABLE 1—TEMPERATURE SETTINGS FOR FREEZERS

First test		Second test		Energy calculation based on—
Settings	Results	Settings	Results	
Mid .....	Low .....	Warm .....	Low .....	Second Test Only. First and Second Tests. First and Second Tests. No Energy Use Rating.
	High .....	Cold .....	High .....	
			Low .....	
			High .....	

\* \* \* \* \*

**4. Test Period**

\* \* \* \* \*

4.1 Non-automatic Defrost. If the model being tested has no automatic defrost system, the test period shall start after steady-state conditions (see section 2.7 of this appendix) have been achieved and be no less than three hours in duration. During the test period, the compressor motor shall complete two or more whole compressor cycles. (A whole compressor cycle is a complete “on” and a complete “off” period of the motor.) If no “off” cycling occurs, the test period shall be three hours. If incomplete cycling occurs (less than two compressor cycles during a 24-hour period), then a single complete compressor cycle may be used.

\* \* \* \* \*

**5. Test Measurements**

\* \* \* \* \*

5.1 Temperature Measurements. Temperature measurements shall be made at the locations prescribed in Figure 5.2 of HRF-1-2008 (incorporated by reference; see § 430.3) and shall be accurate to within ±0.5 °F (0.3 °C).

If the interior arrangements of the unit under test do not conform with those shown in Figure 5.2 of HRF-1-2008, the unit may be tested by relocating the temperature sensors from the locations specified in the figures to avoid interference with non-adjustable hardware or components within the unit, in which case the specific locations used for the temperature sensors shall be noted in the test data records maintained by the manufacturer in accordance with 10 CFR 429.71, and the certification report shall indicate that non-standard sensor locations were used.

If the temperature sensor placement required by this section is impeded by adjustable shelves or other components that

could be relocated by the consumer, those components shall be repositioned as necessary to allow for placement of the sensors in the required locations. Any repositioning of components shall adhere as closely as practicable to the set-up instructions specified in section 5.5.2 of HRF-1-2008 while maintaining a minimum 1 inch air space between the sensor thermal mass and adjacent hardware.

\* \* \* \* \*

5.1.2 Compartment Temperature. The compartment temperature for each test period shall be an average of the measured temperatures taken in a compartment during the test period as defined in section 4 of this appendix. For long-time automatic defrost models, compartment temperature shall be that measured in the first part of the test period specified in section 4.2.1 of this appendix. For models with variable defrost controls, compartment temperature shall be that measured in the first part of the test period specified in section 4.2.2 of this appendix. For models with automatic defrost that is neither long-time nor variable defrost, the compartment temperature shall be an average of the measured temperatures taken in a compartment during a stable period of compressor operation that;

- (a) Includes no defrost cycles or events associated with a defrost cycle, such as precooling or recovery,
- (b) Is no less than three hours in duration, and
- (c) Includes two or more whole compressor cycles or two or more complete temperature cycles. If neither the compressor nor the temperature cycles, the stable period used for the temperature average shall be three hours in duration.

\* \* \* \* \*

5.2.1.3 Variable Defrost Control. The energy consumption in kilowatt-hours per day shall be calculated equivalent to:

$$ET = (1440 \times K \times EP1/T1) + (EP2 - (EP1 \times T2/T1)) \times K \times (12/CT),$$

Where:

ET, K, and 1440 are defined in section 5.2.1.1;

EP1, EP2, T1, T2, and 12 are defined in section 5.2.1.2;

$$CT = (CT_L \times CT_M) / (F \times (CT_M - CT_L) + CT_L)$$

Where:

CT<sub>L</sub> = the shortest compressor run time between defrosts observed for the test—or the shortest compressor run time between defrosts used in the variable defrost control algorithm (greater than or equal to 6 but less than or equal to 12 hours)—whichever is shorter, in hours rounded to the nearest tenth of an hour;

CT<sub>M</sub> = maximum compressor run time between defrosts in hours rounded to the nearest tenth of an hour (greater than CT<sub>L</sub> but not more than 96 hours);

F = ratio of per day energy consumption in excess of the least energy and the maximum difference in per-day energy consumption and is equal to 0.20.

For variable defrost models with no values for CT<sub>L</sub> and CT<sub>M</sub> in the algorithm, the default values of 6 and 96 shall be used, respectively. However, the shortest compressor run time between defrosts observed for the test shall be used for CT<sub>L</sub>, if it is less than 6.

5.3 Volume Measurements. The unit’s total refrigerated volume, VT, shall be measured in accordance with HRF-1-2008 (incorporated by reference; see § 430.3), section 3.30 and sections 4.2 through 4.3. The measured volume shall include all spaces within the insulated volume of each compartment except for the volumes that must be deducted in accordance with section 4.2.2 of HRF-1-2008.

In the case of freezers with automatic icemakers, the volume occupied by the automatic icemaker, including its ice storage

bin, is to be included in the volume measurement.

Total refrigerated volume is determined by physical measurement of the test unit. Measurements and calculations used to determine the total refrigerated volume shall be retained as part of the test records underlying the certification of the basic model in accordance with 10 CFR 429.71.

\* \* \* \* \*

## 6. Calculation of Derived Results From Test Measurements

\* \* \* \* \*

6.2 Average Per-Cycle Energy Consumption. The average per-cycle energy consumption for a cycle type, E, is expressed in kilowatt-hours per cycle to the nearest one hundredth (0.01) kilowatt-hour, and shall be calculated according to the sections below.

6.2.1 If the compartment temperature is always below 0.0 °F (−17.8 °C), the average per-cycle energy consumption shall be equivalent to:

$$E = ET_1 + IET$$

Where:

ET is defined in 5.2.1;

The number 1 indicates the test period during which the highest compartment temperature is measured; and

IET, expressed in kilowatt-hours per cycle, equals 0 (zero) for products without an automatic icemaker, and for products with an automatic icemaker shall be equal to 0.23 until the energy conservation standards at 10 CFR 430.32(a) are amended. Beginning on the compliance date of any such amended standards, the icemaking energy shall be calculated as described in section 8.3.6 of this appendix.

6.2.2 If one of the compartment temperatures measured for a test period is greater than 0.0 °F (17.8 °C), the average per-cycle energy consumption shall be equivalent to:

$$E = ET_1 + ((ET_2 - ET_1) \times (0.0 - TF_1) / (TF_2 - TF_1)) + IET$$

Where:

IET is defined in 6.2.1 and ET is defined in 5.2.1;

TF = freezer compartment temperature determined according to 5.1.3 in degrees F;

The numbers 1 and 2 indicate measurements taken during the first and second test period as appropriate; and 0.0 = standardized compartment temperature in degrees F.

6.2.3 Variable Anti-Sweat Heater Models. The standard cycle energy consumption of an electric freezer with a variable anti-sweat heater control (Estd), expressed in kilowatt-hours per day, shall be calculated equivalent to:

Estd = E + (Correction Factor) where E is determined by 6.2.1, or 6.2.2, whichever is appropriate, with the anti-sweat heater switch in the "off" position or, for a product without an anti-sweat heater switch, the anti-sweat heater in its lowest energy use state.

Correction Factor = (Anti-sweat Heater Power × System-loss Factor) × (24 hrs/1 day) × (1 kW/1000 W)

Where:

Anti-sweat Heater Power = 0.034 \* (Heater Watts at 5%RH)  
 + 0.211 \* (Heater Watts at 15%RH)  
 + 0.204 \* (Heater Watts at 25%RH)  
 + 0.166 \* (Heater Watts at 35%RH)  
 + 0.126 \* (Heater Watts at 45%RH)  
 + 0.119 \* (Heater Watts at 55%RH)  
 + 0.069 \* (Heater Watts at 65%RH)  
 + 0.047 \* (Heater Watts at 75%RH)  
 + 0.008 \* (Heater Watts at 85%RH)  
 + 0.015 \* (Heater Watts at 95%RH)  
 Heater Watts at a specific relative humidity = the nominal watts used by all heaters at that specific relative humidity, 72 °F ambient (22.2 °C), and DOE reference freezer (FZ) average temperature of 0 °F (−17.8 °C).

System-loss Factor = 1.3

\* \* \* \* \*

## 8. Icemaking Test

This section would apply to manufacturers seeking to demonstrate compliance with any new or amended energy conservation standard that DOE may issue in a final rule for refrigerators, refrigerator-freezers, and freezers after September 15, 2014. Absent the issuance of a test procedure waiver by the Department of Energy permitting the earlier use of this section, this section is not required unless and until such final rule is issued.

### 8.1 Special Test Conditions.

8.1.1 Multiple Ice Makers. If one of the automatic ice makers in a product with multiple ice makers serves a through-the-door ice dispenser, initiate icemaking only for this icemaker when conducting the icemaking part of the test of section 8.3.

8.1.2 Anti-sweat Heater. The anti-sweat heater switch shall be off for the icemaking test. In the case of a freezer equipped with variable anti-sweat heater control but without an anti-sweat heater switch, the test shall be conducted in an ambient humidity condition that will prevent the anti-sweat heater from being energized.

8.1.3 Connection of water lines and installation of water filters are required. Inlet water temperature shall be 90 +/- 2 °F. The water supply system shall be designed to assure that inlet water temperature stays within this specified range at all times during the test. Inlet water pressure shall be 60 +/- 15 psig.

8.1.4 Data collection frequency for temperatures, power, and energy shall be no less than once per minute.

8.1.5 Icemaker Cycle Indication. The end of one icemaker cycle and the start of the following icemaker cycle is defined to occur when the mold heater (to release ice pieces) is turned off. When measuring energy use for an icemaker (a) without a mold heater or (b) for which review of test data does not allow easy determination of the times that a mold heater was turned off, the end of one icemaker cycle and the start of the following icemaker cycle is defined to occur when one of the methods described in this section indicates the initiation of water flow into the icemaker mold. One of the following measurement approaches shall be used to indicate the start and end of icemaker cycles using measurements at a data acquisition

time interval no greater than the data acquisition time interval used for the test's energy and temperature measurements. The test data record maintained in accordance with 10 CFR 429.71 shall indicate which of these three methods is used.

8.1.5.1 Mold Temperature. Measure icemaker mold temperature during the test with a temperature sensor adhered to the bottom of the icemaker mold. Ensure that the temperature sensor is installed so that the icemaker operation, including operations such as twisting of the icemaker mold and ice dropping into the ice bin, will not be impeded by the temperature sensor and its connecting wire(s), and that neither the temperature sensor nor its connecting wire(s) will be dislodged or damaged by icemaker operation.

8.1.5.2 Water Supply Temperature. Measure the temperature of the water at a location in the water supply line where the measured temperature changes (within the 90 ±2F supply temperature range) when water is supplied to the icemaker, thus reliably indicating the start of an icemaking cycle. If the temperature changes measurably when the icemaker water supply valve opens, this change may be used to provide an indication of when a new icemaker cycle has started.

8.1.5.3 Solenoid Valve Activation. Measure power input, voltage, or current supplied to the icemaker water supply solenoid valve to indicate when the valve is energized. Make this measurement at a frequency sufficient to identify individual valve activation events, or use an event counter to track valve activation events. Alternatively, measure energy use of the valve with a precision sufficient to indicate individual activation events.

8.2 Baseline Test. Render the icemaker inoperative as described in HRF-1-2008 (incorporated by reference; see § 430.3), section 5.5.2(c), and empty the ice storage bin before beginning the baseline test.

8.2.1 Baseline Test Temperature Control Settings. Baseline test compartment temperatures shall be as defined in section 5.1.3 of this appendix and measured during the same test period used to determine baseline test average power, as described in section 8.2.3. Temperature controls shall be adjusted to their warmest settings for which baseline test compartment temperatures are no more than 1 °F (0.6 °C) warmer than their standardized temperatures, as defined in section 3.2 of this appendix. For mechanical temperature controls, only settings corresponding to positions in which the indicator is aligned with a control symbol shall be used. Temperature controls shall be readjusted and stabilization shall be repeated, if necessary to meet this requirement. Temperature controls shall not be adjusted between the icemaking baseline test and subsequent parts of the icemaking test except as described in section 8.3.2.2.

8.2.2 Stabilization. After setting the temperature controls as described in section 8.2.1, wait until steady-state conditions have been confirmed, as described in section 2.7 of this appendix.

8.2.3 Baseline Test Average Power. The test period shall be as described in section 4.1 of this appendix and shall not include

any defrost cycles or events associated with a defrost cycle, such as precooling or recovery. The stabilization period and the baseline test period may overlap, provided the baseline test period ends no earlier than the stabilization period. The baseline test average power, expressed in Watts (W), shall be calculated as:

$$PI1 = \frac{EPI1 \times 1,000}{\left(\frac{TI1}{60}\right)}$$

Where:

EPI1 = Energy use measured for the baseline test period (Icemaking Test Period 1), expressed in kilowatt-hours;

TI1 = Length of time in minutes of the baseline test period;

1,000 = conversion factor to adjust kilowatt-hours to watt-hours; and

60 = conversion factor to adjust minutes to hours.

### 8.3 Icemaking Test

#### 8.3.1 Initiation and Duration of Icemaking Operation

8.3.1.1 For units that can complete 24 hours of icemaking or can fill their ice storage bin without encountering a defrost or the precooling preceding the defrost, or for units for which the defrost can be disabled or bypassed by the tester, verify that the ice storage bin is empty and initiate icemaking during a compressor on cycle. Continue the icemaking operation until either:

(a) The ice storage bin becomes full and stops the icemaker, or

(b) An icemaker harvest occurs at least 24 hours after the initial icemaker harvest.

8.3.1.2 For units that cannot complete 24 hours of icemaking without encountering a defrost or the precooling preceding the defrost, verify that the ice storage bin is empty and initiate icemaking shortly after the start of the compressor after a defrost. Continue the icemaking operation until either:

(a) The ice storage bin becomes full and stops the icemaker, or

(b) The next defrost cycle occurs.

#### 8.3.2 Compartment Temperature.

8.3.2.1 Compartment Temperature Measurement. For products with cycling compressors during icemaking, the compartment temperature shall be as measured for Icemaking Test Period 3, which is defined in section 8.3.5.2 and comprises a whole number of compressor cycles. For products with non-cycling compressors during icemaking, compartment temperatures shall be as measured for Icemaking Test Period 2 (defined in section 8.3.4.1) and comprises a whole number of icemaking cycles.

8.3.2.2 Temperature Control Settings. If the compartment temperature is warmer during the icemaking test than it was during the baseline test without making temperature control setting adjustments, the compartment temperature control shall be adjusted to its warmest setting for which compartment temperature is no more than 1 °F warmer than its temperature measured for the baseline test. For mechanical temperature controls, only settings corresponding to positions in which the indicator is aligned

with a control symbol shall be used. For products with controls that automatically reduce compartment temperature settings or automatically increase compressor duty cycle or compressor speed to enhance cooling for icemaking, this enhanced cooling feature shall not be disabled during icemaking, and temperature control settings shall not be adjusted.

#### 8.3.3 Ice Mass per Icemaker Cycle

8.3.3.1 Total Ice Mass. After completion of icemaking, determine the total mass of ice produced,  $M_{ICE}$ , expressed in pounds, by weighing the ice storage bin when it contains the ice made during the test and subtracting the weight of the empty ice storage bin.

8.3.3.2 Total Number of Icemaker Cycles. Count the total number of icemaker cycles (*i.e.*, number of harvests),  $TN_{CYC}$ , that have occurred between initiation of icemaking and ice weight measurement based on examination of the recorded power input data or the measurements described in section 8.1.5.

8.3.3.3 The Ice Mass per Icemaker Cycle, expressed in pounds, shall be calculated as:

$$M_{ICE\_CYC} = M_{ICE} / TN_{CYC}$$

Where:

$M_{ICE}$  is defined in section 8.3.2.1; and  $TN_{CYC}$  is defined in section 8.3.2.2.

8.3.4 Energy Use per Ice Mass for Non-Cycling Compressor During Icemaking. This section describes the calculation of energy use per mass of ice produced if the compressor does not cycle during the icemaking test. Icemaking Test Period 2 can be used to measure both energy use per icemaker cycle and icemaking test average power.

8.3.4.1 Icemaking Test Period 2. The test period shall include a whole number of icemaker cycles (defined in section 8.1.5). The following stability requirement shall apply for the chosen test period: the average temperature of the freezer compartment for each complete icemaker cycle included in the test period shall be within 3 °F (1.7 °C) of its temperature average for the full test period. The number of icemaker cycles within the test period is designated  $N_{CYC}$ , which can be less than or equal to  $TN_{CYC}$ .

8.3.4.2 Icemaking Test Average Power. The test period shall be as described in section 8.3.4.1. The icemaking test average power, expressed in Watts (W), shall be calculated as:

$$PI2 = \frac{EPI2 \times 1,000}{\left(\frac{TI2}{60}\right)}$$

Where:

EPI2 = Energy use measured for the icemaking test period (Icemaking Test Period 2), expressed in kilowatt-hours;

TI2 = Length of time in minutes of the icemaking test period;

1,000 = conversion factor to adjust kilowatt-hours to watt-hours; and

60 = conversion factor to adjust minutes to hours.

8.3.4.3 Energy Use per Ice Mass. The energy use per mass of ice produced, EIM, expressed in kilowatt-hours per pound, shall be calculated as:

$$EIM = \frac{(PI2 - PI1) \times \left(\frac{TI2}{60}\right)}{1,000 \times M_{ICE\_CYC} \times N_{CYC}}$$

Where:

PI2 and TI2 are defined in section 8.3.4.2;

PI1 is defined in section 8.2.3;

$M_{ICE\_CYC}$  is defined in section 8.3.3.4;

$N_{CYC}$  is defined in section 8.3.4.1;

1,000 = conversion factor to adjust watt-hours to kilowatt-hours; and

60 = conversion factor to adjust minutes to hours.

8.3.5 Energy Use per Ice Mass for Cycling Compressor During Icemaking. This section describes the calculation of energy use per mass of ice produced if the compressor cycles during the icemaking test. Icemaking Test Period 2 shall be used to measure energy use per icemaker cycle and Icemaking Test Period 3 shall be used to measure icemaking test average power.

8.3.5.1 Icemaking Test Period 2. The icemaking test period for measuring energy use per icemaker cycle shall be as described in section 8.3.4.1, except that the stability requirement shall be evaluated for Icemaking Test Period 3 rather than for Icemaking Test Period 2 as follows: the average temperature of the freezer compartment for each compressor cycle within Test Period 3 must be within 3 °F (1.7 °C) of the average temperature of the freezer compartment during Icemaking Test Period 3.

8.3.5.2 Icemaking Test Period 3. The test period for measuring icemaking average power shall be the longest period that can be selected from the test data that includes a whole number of compressor cycles starting after the start of Icemaking Test Period 2 and ending before the end of Icemaking Test Period 2.

8.3.5.3 Icemaking Test Average Power. The test period for measuring average power shall be as described in section 8.3.5.2. The icemaking test average power, expressed in Watts (W), shall be calculated as:

$$PI3 = \frac{EPI3 \times 1,000}{\left(\frac{TI3}{60}\right)}$$

Where:

EPI3 = Energy use measured for Icemaking Test Period 3, expressed in kilowatt-hours;

TI3 = Length of time in minutes of Icemaking Test Period 3;

1,000 = conversion factor to adjust kilowatt-hours to watt-hours; and

60 = conversion factor to adjust minutes to hours.

8.3.5.4 Energy Use per Ice Mass. The energy use per mass of ice produced, EIM, expressed in kilowatt-hours per pound, shall be calculated as:

$$EIM = \frac{(PI3 - PI1) \times (EPI2)}{PI3 \times M_{ICE\_CYC} \times N_{CYC}}$$

Where:

PI3 is defined in section 8.3.5.3;

PI1 is defined in section 8.2.3;

EPI<sub>2</sub> = Energy use, expressed in kilowatt-hours, measured during Icemaking Test Period 2, defined in section 8.3.4.1;  
M<sub>ICE\_CYC</sub> is defined in section 8.3.3.4; and  
N<sub>CYC</sub> is defined in section 8.3.4.1;

8.3.6 The icemaking energy use per cycle, IET, expressed in kilowatt-hours per cycle, shall be calculated as:  
$$IET = 1.8 \times EIM$$
*Where:*

EIM = Energy use per ice mass, defined in section 8.3.4.3 or 8.3.5.4; and  
1.8 = Daily ice production in pounds.  
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**H.R. 475/P.L. 113-15**

To amend the Internal Revenue Code of 1986 to include vaccines against seasonal influenza within the definition of taxable vaccines. (June 25, 2013; 127 Stat. 476)

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