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

WHEN: Tuesday, November 19, 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

Contents

Federal Register

Vol. 78, No. 206

Thursday, October 24, 2013

Separate Parts In This Issue

Reader Aids

Consult the Reader Aids section at the end of this page for phone numbers, online resources, finding aids, reminders, and notice of recently enacted public laws.

To subscribe to the Federal Register Table of Contents LISTSERV electronic mailing list, go to http://listserv.access.gpo.gov and select Online mailing list archives, FEDREGTOC-L, Join or leave the list (or change settings); then follow the instructions.

CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

7 CFR
301 (2 documents) 63369
305.....63373

9 CFR

Proposed Rules:
2.....63408
3.....63408

10 CFR
72.....63375

Proposed Rules:
72.....63408
430.....63410

12 CFR
Ch. VI.....63380
610.....63379

14 CFR
71.....63380

Proposed Rules:
39 (2 documents) 63429, 63431

24 CFR
903.....63748
905.....63748
941.....63748
968.....63748
969.....63748

33 CFR
165.....63381

39 CFR

Proposed Rules:
20 (2 documents) 63433, 63434

40 CFR
52 (3 documents) 63383, 63388, 63394

Proposed Rules:
52 (3 documents) 63435, 63436, 63437

49 CFR

Proposed Rules:
821.....63438

50 CFR
17.....63796
217.....63396
648 (2 documents) 63405, 63406

Proposed Rules:
17 (2 documents) 63574, 63625
223.....63439

Rules and Regulations

Federal Register
Vol. 78, No. 206
Thursday, October 24, 2013

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. APHIS–2012–0075]

Gypsy Moth Generally Infested Areas; Additions in Wisconsin

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Affirmation of interim rule as final rule.

SUMMARY: We are adopting as a final rule, without change, an interim rule that amended the regulations to add areas in Wisconsin to the list of generally infested areas based on the detection of infestations of gypsy moth in those areas. The interim rule was necessary to prevent the artificial spread of the gypsy moth to noninfested areas of the United States.

DATES: Effective on October 24, 2013, we are adopting as a final rule the interim rule published at 78 FR 24665–24666 on April 26, 2013.

FOR FURTHER INFORMATION CONTACT: Ms. Julie S. Spaulding, National Policy Manager, Plant Health Programs, Plant Protection and Quarantine, APHIS, 4700 River Road Unit 137, Riverdale, MD 20737; (301) 851–2184.

SUPPLEMENTARY INFORMATION:

Background

The gypsy moth, *Lymantria dispar* (Linnaeus), is a destructive pest of forest, shade, and commercial trees such as nursery stock and Christmas trees. The gypsy moth regulations (contained in 7 CFR 301.45–1 through 301.45–12 and referred to below as the regulations) restrict the interstate movement of regulated articles from generally infested areas to prevent the artificial spread of the gypsy moth. Section 301.45–3 of the regulations lists generally infested areas.

In an interim rule [1] effective and published in the **Federal Register** on April 26, 2013 (78 FR 24665–24666, Docket No. APHIS–2012–0075), we amended § 301.45–3(a) by adding portions of Wisconsin to the list of generally infested areas. We also made editorial changes to § 301.45–1.

Comments on the interim rule were required to be received on or before June 25, 2013. We received no comments by that date. Therefore, for the reasons given in the interim rule, we are adopting the interim rule as a final rule without change.

This action also affirms the information contained in the interim rule concerning Executive Order 12866 and the Regulatory Flexibility Act, Executive Orders 12372 and 12988, and the Paperwork Reduction Act.

Further, for this action the Office of Management and Budget has waived its review under Executive Order 12866.

List of Subjects in 7 CFR Part 301

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

PART 301—DOMESTIC QUARANTINE NOTICES

Accordingly, we are adopting as a final rule, without change, the interim rule that amended 7 CFR part 301 and that was published at 78 FR 24665–24666 on April 26, 2013.

Done in Washington, DC, this 18th day of October 2013.

Kevin Shea,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2013–25018 Filed 10–23–13; 8:45 am]

BILLING CODE 3410–34–P

[1] To view the interim rule and its supporting economic analysis, go to *http://www.regulations.gov/#!docketDetail;D=APHIS-2012-0075.*

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. APHIS–2010–0048]

RIN 0579–AD29

Citrus Canker, Citrus Greening, and Asian Citrus Psyllid; Interstate Movement of Regulated Nursery Stock

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are adopting as a final rule, with nonsubstantive changes, an interim rule that amended the regulations governing the interstate movement of regulated articles from areas quarantined for citrus canker, citrus greening, and/or Asian citrus psyllid (ACP) to allow the movement of regulated nursery stock under a certificate to any area within the United States. In order to be eligible to move regulated nursery stock, a nursery had to enter into a compliance agreement with the Animal and Plant Health Inspection Service that specified the conditions under which the nursery stock must be grown, maintained, and shipped. The interim rule also amended the regulations that allow the movement of regulated nursery stock from an area quarantined for ACP, but not for citrus greening, to amend the existing regulatory requirements for the issuance of limited permits for the interstate movement of the nursery stock. The interim rule was necessary on an immediate basis in order to provide nursery stock producers in areas quarantined for citrus canker, citrus greening, and/or ACP with the ability to ship regulated nursery stock to markets within the United States that would otherwise be unavailable to them due to the prohibitions and restrictions contained in the regulations while continuing to provide adequate safeguards to prevent the spread of the three pests into currently unaffected areas of the United States.

DATES: *Effective Date:* November 25, 2013.

FOR FURTHER INFORMATION CONTACT: Ms. Lynn Evans-Goldner, National Policy Manager, Pest Management, Plant

Health Programs, PPQ, APHIS, 4700 River Road Unit 137, Riverdale, MD 20737; (301) 851–2286.

SUPPLEMENTARY INFORMATION:

Background

Under section 412(a) of the Plant Protection Act (7 U.S.C. 7701 *et seq.,* referred to below as the PPA), the Secretary of Agriculture may prohibit or restrict the movement in interstate commerce of any plant or plant product, if the Secretary determines that the prohibition or restriction is necessary to prevent the dissemination of a plant pest within the United States. Under the PPA, the Secretary may also issue regulations requiring plants and plant products moved in interstate commerce to be subject to remedial measures determined necessary to prevent the spread of the pest, or requiring the plants or plant products to be accompanied by a permit issued by the Secretary prior to movement.

Citrus canker is a plant disease that is caused by a complex of *Xanthomonas* spp. bacteria and that affects plants and plant parts of citrus and citrus relatives (Family Rutaceae). Citrus canker can cause defoliation and other serious damage to the leaves and twigs of susceptible plants. It can also cause lesions on the fruit of infected plants, which render the fruit unmarketable, and cause infected fruit to drop from the trees before reaching maturity. The aggressive A (Asiatic) strain of citrus canker can infect susceptible plants rapidly and lead to extensive economic losses in commercial citrus-producing areas. Citrus canker is known to be present in the United States in the State of Florida.

The regulations to prevent the interstate spread of citrus canker are contained in ''Subpart-Citrus Canker'' (7 CFR 301.75–1 through 301.75–17, referred to below as the citrus canker regulations). The citrus canker regulations designate the State of Florida as a quarantined area, and restrict the interstate movement of regulated articles from and through this area. Regulated articles are plants and plant parts of all species, clones, cultivars, strains, varieties, or hybrids of the genera *Citrus* and *Fortunella,* and all clones, cultivars, strains, varieties and hybrids of the species *Clausena lansium* and *Poncirus trifoliata.* Plants and plant parts include, among other articles, fruit, seed, and nursery stock. The provisions of the citrus canker regulations that pertain to the interstate movement of regulated nursery stock from areas quarantined for citrus canker are found in § 301.75–6.

Citrus greening, also known as Huanglongbing disease of citrus, is considered to be one of the most serious citrus diseases in the world. Citrus greening is a bacterial disease, caused by strains of the bacterial pathogen ''*Candidatus* Liberibacter asiaticus,'' that attacks the vascular system of host plants. The pathogen is phloem-limited, inhabiting the food-conducting tissue of the host plant, and causes yellow shoots, blotchy mottling and chlorosis, reduced foliage, and tip dieback of citrus plants. Citrus greening greatly reduces production, destroys the economic value of the fruit, and can kill trees. Once infected, there is no cure for a tree with citrus greening. In areas of the world where the disease is endemic, citrus trees decline and die within a few years and may never produce usable fruit. Citrus greening was first detected in the United States in Miami-Dade County, FL, in 2005, and is known to be present in the United States in Florida and Georgia, Puerto Rico, the U.S. Virgin Islands, two parishes in Louisiana, two counties in South Carolina, an area composed of portions of two counties in California, and portions of one county in Texas.

The bacterial pathogen causing citrus greening can be transmitted by grafting, and under laboratory conditions, by parasitic plants. There also is some evidence that seed transmission may occur. The pathogen can also be transmitted by two insect vectors in the family Psyllidae: *Diaphorina citri* Kuwayama, the Asian citrus psyllid (ACP), and *Trioza erytreae* (del Guercio), the African citrus psyllid. ACP can also cause economic damage to citrus in groves and nurseries by direct feeding. Both adults and nymphs feed on young foliage, depleting the sap and causing galling or curling of leaves. High populations feeding on a citrus shoot can kill the growing tip. ACP is currently present in Alabama, American Samoa, Florida, Georgia, Guam, Hawaii, Louisiana, Mississippi, the Northern Mariana Islands, Puerto Rico, Texas, the U.S. Virgin Islands, and portions of Arizona, California, and South Carolina. Regular surveys of domestic commercial citrus-producing areas indicate that the African citrus psyllid is not present in the United States.

The regulations to prevent the interstate spread of citrus greening and ACP are contained in ''Subpart-Citrus Greening and Asian Citrus Psyllid'' (7 CFR 301.76 through 301.76–11, referred to below as the citrus greening and ACP regulations). The citrus greening and ACP regulations quarantine the States of Florida and Georgia, Puerto Rico, the U.S. Virgin Islands, two parishes in Louisiana, two counties in South Carolina, an area composed of portions of two counties in California, and portions of one county in Texas due to the presence of citrus greening, and quarantine Alabama, American Samoa, Florida, Georgia, Guam, Hawaii, Louisiana, Mississippi, the Northern Mariana Islands, Puerto Rico, Texas, the U.S. Virgin Islands, and portions of Arizona, California, and South Carolina due to the presence of ACP. The regulations also place restrictions on the interstate movement of regulated articles from quarantined areas. Regulated articles include all plants and plant parts, except fruit, of host species within the family Rutaceae.

Because of the severity of citrus canker and citrus greening, and because the movement of citrus nursery stock is a well-documented pathway for the spread of these two diseases, the citrus canker and citrus greening and ACP regulations had generally prohibited the interstate movement of regulated nursery stock from areas quarantined for these diseases, with certain, limited exceptions.

On April 27, 2011, we published an interim rule [1] in the **Federal Register** (76 FR 23449–23459, Docket No. APHIS–2010–0048) that amended the citrus canker and citrus greening regulations to allow for the movement of regulated nursery stock under a certificate to any area within the United States. In order to be eligible to move regulated nursery stock, in addition to the other requirements of the citrus canker and/or citrus greening and ACP regulations, a nursery must enter into a compliance agreement with the Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture (USDA) that specified the conditions under which the nursery stock must be grown, maintained, and shipped. The minimum conditions that would be part of such a compliance agreement were contained in a protocol document that accompanied the interim rule. The interim rule also amended the regulations that allow the movement of regulated nursery stock from an area quarantined for ACP, but not for citrus greening, to amend the existing regulatory requirements for the issuance of limited permits for the interstate movement of the nursery stock.

We solicited comments concerning the interim rule for 60 days ending June 27, 2011. We received seven comments by that date, from nursery stock

[1] To view the interim rule, its supporting documents, and the comments that we received, go to *http://www.regulations.gov/#!docketDetail;D=APHIS–2010-0048.*

producers and a State department of agriculture. All commenters supported the rule but suggested some changes to or clarifications regarding either its provisions or those of the protocol document. We discuss the comments that we received immediately below.

Comments on the Interim Rule

The State department of agriculture pointed out that, in the preamble for the interim rule, we stated that the rule preempted all State and local laws that were inconsistent with the rule. The State department of agriculture stated that it was its understanding that the rule would not preempt existing State regulations that prohibited the movement of citrus nursery stock into its State.

Section 436 of the PPA provides that, with very limited exemptions, regulations issued by USDA pursuant to the PPA to prevent the dissemination of plant pests within the United States preempt State and local laws and regulations. Thus, we are bound by our statutory authority to claim such preemption.

However, it is worth noting that the preemption claimed by the interim rule extends only to laws and regulations that the State has issued to address the dissemination of citrus canker, citrus greening, and ACP. State laws or regulations that restrict or prohibit the movement of citrus nursery stock into the State in order to address other pests and diseases of citrus were not preempted by the interim rule.

One commenter stated that, while he produced citrus nursery stock, his markets were not out-of-State, but rather airport kiosks and souvenir stores within his State. However, since the nursery stock was marketed at these locations to tourists and other out-of-State visitors, the commenter asked whether movement of nursery stock to the kiosks and souvenir stores constituted interstate movement. The commenter pointed out that State regulations regarding the intrastate movement of nursery stock to such destinations varied considerably from the provisions of the interim rule.

Because this movement to kiosks and stores occurs entirely within a State, it is an intrastate movement. As such, it is not regulated by the interim rule.

Several commenters stated that, while they produced nursery stock, their primary markets were not for nursery stock itself, but for leaves and other plant parts from nursery stock. The commenters asked whether the rule could be expanded in scope to cover both nursery stock and articles derived from nursery stock.

In response to this request, we reexamined the provisions of the interim rule and accompanying protocol document and determined that the regulatory provisions that pertain to the production of nursery stock within a nursery would provide for the production of leaves and other plant parts that are free of citrus canker, citrus greening, and ACP. However, the requirements in the protocol document for safeguarding shipments of nursery stock, as well as the recordkeeping requirements, were specifically drafted for nursery stock. They were not intended for leaves and plant parts, which are often packaged in a different manner and moved in significantly different market channels than nursery stock, and cannot simply be extended to apply to these articles.

Moreover, our analysis of the environmental effects of the interim rule under the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) examined only the environmental impacts associated with the production and movement of nursery stock in accordance with the interim rule and protocol document. The conclusions reached by that analysis apply only to nursery stock, and further analysis would need to be conducted if we were to extend the scope of the regulations to articles, such as leaves, that are often sold for direct human consumption.

Accordingly, we do not consider it possible to extend the scope of the interim rule to cover leaves and other plants parts in this final rule, and we are making no change to the regulations in response to this comment.

We do, however, recognize that producers in areas quarantined for citrus canker, citrus greening, and/or ACP have suffered a significant loss of markets for citrus leaves as a result of those quarantines. To that end, APHIS has recently begun developing a systems approach protocol for citrus leaves that are intended for culinary purposes that would mitigate the risk that these leaves present of spreading citrus diseases or ACP.

Comments on the Protocol Document

As we mentioned earlier in this document, the interim rule was accompanied by a protocol document. This protocol document contained standards and requirements that are included in compliance agreements issued pursuant to the interim rule, and that a nursery must therefore meet in order to move citrus nursery stock interstate without restriction from an area quarantined for citrus canker, citrus greening, and/or ACP. We received several comments regarding the protocol document.

Section I of the protocol document contained general requirements. One of these stated that all budwood source material maintained at the nurseries had to meet the same facility standards as a State Certified Clean Stock Program.

One commenter stated that this provision effectively incorporated State Certified Clean Stock Program facility standards by reference. The commenter further pointed out that the facility standards contained in State Certified Clean Stock Program regulations in the commenter's State differ significantly from the facility standards contained in the protocol document, and are, in general, far more restrictive and costly than those contained in the protocol document.

We acknowledge that this provision was worded in a manner which could be construed as incorporating State Certified Clean Stock Program facility standards by reference. Our intent was to require nurseries to obtain budwood from a facility that meets State Certified Clean Stock Program standards; this ensures that the propagative material that enters the nursery and is used as a foundation block is free of citrus canker, citrus greening, and ACP. Nurseries are not required to maintain the budwood under these same facility standards, which we agree are often both significantly more restrictive and costly than those in the protocol document. We have amended the protocol document to clarify the intent of this provision.

Section II of the protocol document contained additional requirements for interstate movement of regulated nursery stock from areas quarantined for citrus canker. One of these requirements was that vehicles, equipment, and other articles used to handle or move citrus nursery stock be treated for citrus canker upon leaving the grove or premises.

One commenter suggested that this requirement be amended to require treatment upon entering and exiting the facility itself.

The requirement was intended to work in tandem with another requirement in Section II that required personnel to disinfect their hands and arms and spray clothing and footwear with a product approved by APHIS to be effective against citrus canker prior to entering the nursery or compartment within the nursery in which nursery stock is grown for interstate movement. We intended the treatment of vehicles, equipment, and articles for citrus canker to take place at the same time and in the

same location as this disinfection of personnel and clothing.

We never intended such treatment to take place upon leaving a grove or premises; this was an inadvertent editorial error, and we have not required treatment upon leaving a grove or premises since the interim rule was issued. We have amended the protocol document to reflect our original intent to require treatment upon entering the nursery.

We do not consider it necessary to require treatment of vehicles, equipment, and articles upon exiting the nursery or compartment. If the other provisions of the protocol document are adhered to, there should be no bacterium within the nursery or compartment.

In that same section of the protocol document, we required that all nursery stock for interstate movement from the facility must be visually inspected at 15-day intervals for symptoms of citrus canker.

Several commenters stated that requiring inspections to be conducted at 30-day intervals would allow them to dovetail with State-required inspections, lessening the burden on State regulatory personnel. The same commenters stated that, given the other requirements of the protocol, lengthening the duration between inspections to 30 days would be unlikely to increase the risk that nursery stock infected with citrus canker would be moved interstate under the provisions of the protocol.

We agree and have amended the protocol document accordingly.

Section IV of the protocol document contained additional requirements for interstate movement of nursery stock from areas quarantined for citrus greening. One of these requirements was that all nursery stock moved interstate from the nursery be treated with an APHIS-approved foliar spray no more than 10 days prior to shipment.

One commenter construed this requirement as requiring the entire nursery to be treated with an APHIS-approved foliar spray no more than 10 days prior to the shipment of any nursery stock from the nursery. Given the frequency of shipments that the commenter anticipated following issuance of the interim rule, the commenter stated that the aggregate number of pesticide applications would likely greatly exceed the maximum number allowed yearly at one premises by the U.S. Environmental Protection Agency.

This provision applies only to that nursery stock that is destined for shipment, not all nursery stock at the nursery.

Section V of the protocol document provided conditions for the issuance of limited permits for the interstate movement of regulated nursery stock from areas that are quarantined for ACP, but not for citrus greening.

One commenter stated that the protocol document should be amended to specify that these limited permits must be attached to the nursery stock.

Such a provision already exists in § 301.76–10 of the citrus greening and ACP regulations. Therefore, we do not consider it necessary to amend the protocol document in that manner.

A revised version of the protocol document that incorporates the changes discussed above is available on the Internet at *http://www.aphis.usda.gov/plant_health/plant_pest_info/citrus/index.shtml* and on Regulations.gov (see footnote 1 above), and may also be obtained by contacting the person listed earlier in this document beneath the heading **FOR FURTHER INFORMATION CONTACT**.

Miscellaneous

We are making two nonsubstantive changes to § 301.76–6 of the ACP and greening regulations in this final rule. Paragraph (c) of that section provides for the issuance of limited permits for the interstate movement of regulated nursery stock from areas quarantined only for ACP, subject to certain conditions. One of these conditions, found in paragraphs (c)(1) and (c)(2) of that section, prohibits the movement of such nursery stock to commercial citrus-producing areas of the United States that are not quarantined due to the presence of ACP or citrus greening.

The paragraphs had listed the Northern Mariana Islands as such an area. However, established populations of ACP have been detected in the Northern Mariana Islands, and we have, accordingly, quarantined the Northern Mariana Islands for ACP. Therefore, we are amending paragraphs (c)(1) and (c)(2) of § 301.76–6 to remove the Northern Mariana Islands from the list of commercial citrus-producing areas that are not quarantined due to the presence of ACP or citrus greening.

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

This final rule also affirms the information contained in the interim rule regarding Executive Orders 12372 and 12988 and the Paperwork Reduction Act.

Executive Order 12866 and the 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 5 U.S.C. 604, we have performed a final regulatory flexibility analysis, which is summarized below, regarding the economic effects of this rule on small entities. 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**.

Citrus canker, citrus greening, and ACP are among some of the most damaging citrus pests and diseases that have plagued the U.S. citrus industry. If their spread were not restricted, they would threaten the long-term profitability and vitality of the industry. The movement of infected citrus nursery stock is a primary means by which these citrus pests and diseases are newly introduced into citrus-producing areas.

In recent years, State and Federal regulatory measures have been implemented to mitigate the spread of these citrus pests to commercial citrus-producing areas where they are not known to exist. Prior to our April 2011 interim rule, the citrus canker and citrus greening regulations generally prohibited the interstate movement of regulated nursery stock from areas quarantined for those diseases, with certain limited exceptions. Restrictions were also placed on the interstate movement of nursery stock from areas quarantined for ACP because it is a vector of the bacterial pathogen that causes citrus greening.

The interim rule provided citrus nurseries in quarantined areas with access to previously unavailable markets throughout the United States. The majority of the citrus nurseries in quarantined areas were small entities. They benefitted from the rule by acquiring access to nationwide markets, although compliance costs may have reduced their competitiveness in comparison to suppliers of citrus nursery stock from non-quarantined areas.

This rule finalizes that interim rule with several nonsubstantive changes. These changes have the effect of removing a prohibition on the movement of regulated articles from areas quarantined only for ACP to the Northern Mariana Islands, which we have also quarantined for ACP.

Operationally, this prohibition was removed when we imposed a quarantine for ACP on the Northern Mariana Islands, and we are not aware of any movement of regulated articles from such quarantined areas to the Northern Mariana Islands since then.

Because the Northern Mariana Islands are geographically isolated from most of the United States, the producers most likely to benefit from market access to the Northern Mariana Islands are producers in Guam, the closest U.S. commercial citrus-producing area that is quarantined only for ACP.

List of Subjects in 7 CFR Part 301

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

Accordingly, the interim rule amending 7 CFR part 301 that was published at 76 FR 23449–23459 on April 27, 2011, is adopted as a final rule, with the following changes:

PART 301—DOMESTIC QUARANTINE NOTICES

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

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

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

§ 301.76–6 [Amended]

■ 2. In § 301.76–6, paragraph (c)(1) is amended by removing the words ''Northern Mariana Islands and'' and paragraph (c)(2) is amended by removing the words ''Northern Mariana Islands or''.

Done in Washington, DC, this 18th day of October 2013.

Kevin Shea,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2013–25019 Filed 10–23–13; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 305

[Docket No. APHIS–2012–0089]

Cold Treatment for Fresh Fruits and Vegetables; MidAmerica St. Louis Airport, Mascoutah, IL

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are amending the regulations to allow, under certain conditions, the cold treatment of imported fruits and vegetables upon arrival at the MidAmerica St. Louis Airport, Mascoutah, IL. We have determined that there are biological barriers at this port that, along with certain safeguards, would prevent the introduction of fruit flies and other insect pests into the United States in the unlikely event that they escape from shipments of fruits or vegetables before the fruits or vegetables undergo cold treatment. This action will facilitate the importation of fruit requiring cold treatment while continuing to provide protection against the introduction of fruit flies and other insect pests into the United States.

DATES: *Effective Date:* November 25, 2013.

FOR FURTHER INFORMATION CONTACT: Dr. Inder P. S. Gadh, Senior Risk Manager–Treatments, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737–1236; (301) 851–2018.

SUPPLEMENTARY INFORMATION:

Background

The phytosanitary treatments regulations in 7 CFR part 305 set out general requirements for certifying or approving treatment facilities and for performing treatments listed in the Plant Protection and Quarantine (PPQ) Treatment Manual [1] for fruits, vegetables, and other articles to prevent the introduction or dissemination of plant pests or noxious weeds into or through the United States. Within part 305, § 305.6 (referred to below as the regulations) sets out requirements for treatment procedures, monitoring, facilities, and enclosures needed for performing sustained refrigeration (cold treatment) sufficient to kill certain insect pests associated with imported fruits and vegetables and with regulated articles moved interstate from quarantined areas within the United States.

Most imported fruits or vegetables that require cold treatment undergo that treatment while in transit to the United States. However, the Animal and Plant Health Inspection Service (APHIS) also allows imported fruits or vegetables to undergo cold treatment at an approved cold treatment facility in either the country of origin or after arrival in the United States at a cold storage warehouse approved by the APHIS Administrator.

In § 305.6, paragraph (b) limits cold treatment facilities to those cold storage warehouses approved by the Administrator and located in the area north of 39° latitude and east of 104° longitude, or under special conditions at one of the following ports, which are outside the geographic area stipulated in the regulations: The maritime ports of Wilmington, NC; Seattle, WA; Corpus Christi, TX; and Gulfport, MS; Seattle-Tacoma International Airport, Seattle, WA; and Hartsfield-Atlanta International Airport, Atlanta, GA. The location restrictions serve as an additional safeguard against the possibility that fruit flies or other pests could escape from imported articles prior to treatment and become established in the United States.

As stated previously, the regulations do allow cold treatment facilities to be located outside the geographical area stipulated by the regulations. In order to approve those locations, APHIS conducts site-specific evaluations and determines whether regulated articles can be safely transported to cold treatment facilities under special conditions to mitigate the possible escape of pests of concern.

On May 13, 2013, we published in the **Federal Register** (78 FR 27864–27866, Docket No. APHIS–2012–0089) a proposal [2] to amend the regulations by adding the MidAmerica St. Louis Airport, Mascoutah, IL, to the list of ports that are designated as approved locations for cold treatment of imported fruits or vegetables. This proposal was based on our determination that there are biological barriers in the area of this port that, along with certain safeguards, would prevent the introduction of fruit flies and other insect pests in the unlikely event that they escape from shipments of fruits or vegetables before the fruits or vegetables undergo cold treatment.

[1] The PPQ Treatment Manual is available at *http://www.aphis.usda.gov/import_export/plants/manuals/ports/downloads/treatment.pdf.*

[2] To view the proposed rule and the comment we received, go to *http://www.regulations.gov/#!docketDetail;D=APHIS-2012-0089.*

We solicited comments concerning our proposal for 60 days ending July 12, 2013. We received one comment by that date from a private individual, which supported the proposed action. Therefore, for the reasons given in the proposed rule, we are adopting the proposed rule as a final rule, without change.

Executive Order 12866 and Regulatory Flexibility Act

This final rule is subject to Executive Order 12866. However, for this action, the Office of Management and Budget has waived its review under Executive Order 12866.

In accordance with 5 U.S.C. 604, we have performed a final regulatory flexibility analysis, which is summarized below, regarding the economic effects of this rule on small entities. Copies of the full analysis are available on the Regulations.gov Web site (see footnote 1 in this document for a link to Regulations.gov) or by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**.

This final rule will amend the regulations to allow a new cold treatment facility to be located at MidAmerica St. Louis Airport, Mascoutah, IL. The facility is expected to be used mainly to treat imported blueberries. While most if not all blueberry farms in the United States are small entities, the final rule will not significantly affect the market for blueberries because the facility is not projected to result in a significant increase in the quantity of blueberries imported by the United States. The United States is the world's largest producer of blueberries and U.S. blueberry exports exceed imports four-fold.

The cold treatment facility will benefit the MidAmerica St. Louis Airport and the local economy. The facility is expected to result in at least 800 flights of produce requiring cold treatment per year, raising at least $8 million in direct income for the airport. MidAmerica St. Louis Airport is classified as a small entity for which the small-entity standard is annual revenue of not more than $30 million.

Executive Order 12372

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

Executive Order 12988

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

Paperwork Reduction Act

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

List of Subjects in 7 CFR Part 305

Irradiation, Phytosanitary treatment, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements.

Accordingly, we are amending 7 CFR part 305 as follows:

PART 305—PHYTOSANITARY TREATMENTS

■ 1. The authority citation for part 305 continues to read as follows:

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

■ 2. Section 305.6 is amended as follows:

■ a. In paragraph (b), by adding the words ''MidAmerica St. Louis Airport, Mascoutah, IL;'' after the words ''Seattle-Tacoma International Airport, Seattle, WA;'' and

■ b. By adding a new paragraph (h)(5) to read as set forth below.

§ 305.6 Cold treatment requirements.

* * * * *

(h) * * *

(5) *Airport of Mascoutah, IL.* Consignments of fruits or vegetables arriving at the MidAmerica St. Louis Airport, Mascoutah, IL, for cold treatment, in addition to meeting all other applicable requirements of this section, must meet the following special conditions:

(i) Bulk and containerized consignments of fruits or vegetables arriving for cold treatment must be cold treated within the area over which the U.S. Department of Homeland Security is assigned the authority to accept entries of merchandise, to collect duties, and to enforce the various provisions of the customs and navigation laws in force.

(ii) APHIS will evaluate facility safeguards in light of the plant health risks involved and approve the operation of a facility in that location subject to the following conditions to be agreed upon by the involved parties and included in the compliance agreement required in § 305.6(f):

(A) The facility will only be certified if the Administrator determines that the regulated articles could be safely transported to the facility from the point of entry or origin without significant risk that plant pests will escape in transit to the facility or while the regulated articles are at the facility.

(B) Bulk consignments (those consignments which are stowed and unloaded by the case or bin) of fruit must arrive in pest-proof packaging that prevents the escape of the pests of concern.

(C) The facility must ensure that the pest-proof cartons are off-loaded from containers in a safeguarded environment and at no time are the articles to be removed from the cartons prior to treatment.

(D) Arrangements for treatment must be made before the departure of a consignment from its port of entry or points of origin in the United States. The cold treatment facility and APHIS must agree in advance on the route by which consignments are allowed to move between the aircraft on which they arrived at the airport and the cold treatment facility. The movement of consignments from aircraft to a cold treatment facility will not be allowed until an acceptable route has been agreed upon.

(E) The facility must have contingency plans, approved by the Administrator, for safely destroying or disposing of fruits or vegetables.

(F) The facility must maintain physical separation of treated articles from untreated articles and apply all required safeguards (e.g., larger consignments are broken up into smaller boxes following treatment and those treated articles are required to be packaged in pest-proof containers per an agreement between the treatment facility and the importer) before releasing to local markets or for movement to other States.

Done in Washington, DC, this 18th day of October 2013.

Kevin Shea,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2013–25005 Filed 10–23–13; 8:45 am]

BILLING CODE 3410–34–P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 72

[NRC–2012–0020]

RIN 3150–AJ10

List of Approved Spent Fuel Storage Casks: Transnuclear, Inc. Standardized NUHOMS® Cask System

AGENCY: Nuclear Regulatory Commission.

ACTION: Direct final rule.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is amending its spent fuel storage regulations by revising the Transnuclear, Inc. Standardized NUHOMS® Cask System listing within the ''List of Approved Spent Fuel Storage Casks'' to include Amendment No. 11 to Certificate of Compliance (CoC) No. 1004. Amendment No. 11 revises authorized contents to include: adding a new transfer cask (TC), the OS197L, for use with the 32PT and 61BT dry shielded canisters (DSC); and converting the CoC No. 1004 Technical Specifications (TS) to the format in NUREG–1745, ''Standard Format and Content for Technical Specifications for 10 CFR [Title 10 of the *Code of Federal Regulations*] Part 72 Cask Certificates of Compliance.'' In addition, the amendment makes several other changes as described under the ''Discussion of Changes'' heading in the **SUPPLEMENTARY INFORMATION** section of this document.

DATES: The final rule is effective January 7, 2014, unless significant adverse comments are received by November 25, 2013. If the rule is withdrawn as a result of such comments, timely notice of the withdrawal will be published in the **Federal Register.** Comments received after this date will be considered if it is practical to do so, but the NRC staff is able to ensure consideration only for comments received on or before this date.

ADDRESSES: Please refer to Docket ID NRC–2012–0020 when contacting the NRC about the availability of information for this final rule. You may access information and comment submittals related to this final rulemaking, 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–2012–0020. Address questions about NRC dockets to Carol Gallagher, telephone: 301–287–3422, email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURHTER INFORMATION CONTACT** section of this document.
- NRC's Agencywide Documents Access and Management System (ADAMS): You may access publicly available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''ADAMS Public Documents'' and then select *''Begin Web-based ADAMS Search.''* For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced in this document (if that document is available in ADAMS) is provided the first time that a document is referenced. The proposed CoC and preliminary safety evaluation report (SER) are available in ADAMS under Package Accession No. ML120130550. The ADAMS Accession No. for the Transnuclear, Inc. Standardized NUHOMS® Cask System Amendment No. 11 application dated April 10, 2007, is ML071240088.
- NRC's PDR: You may examine and purchase copies of public documents at the NRC's PDR, Room O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Gregory R. Trussell, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–6445, email: *Gregory.Trussell@nrc.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Procedural Background

This rule is limited to the changes contained in Amendment No. 11 to CoC No. 1004 and does not include other aspects of the Transnuclear, Inc. Standardized NUHOMS® Cask System design. The NRC is using the ''direct final rule procedure'' to issue this amendment because it represents a limited and routine change to an existing CoC that is expected to be noncontroversial. Adequate protection of public health and safety continues to be ensured. The amendment to the rule will become effective on January 7, 2014. However, if the NRC receives significant adverse comments on this direct final rule by November 25, 2013, then the NRC will publish a document that withdraws this action and will subsequently address the comments received in a final rule as a response to the companion proposed rule published in the Proposed Rule section of this issue of the **Federal Register**. Absent significant modifications to the proposed revisions requiring republication, the NRC will not initiate a second comment period on this action.

A significant adverse comment is a comment where the commenter explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or would be ineffective or unacceptable without a change. A comment is adverse and significant if:

(1) The comment opposes the rule and provides a reason sufficient to require a substantive response in a notice-and-comment process. For example, a substantive response is required when:

(a) The comment causes the NRC staff to reevaluate (or reconsider) its position or conduct additional analysis;

(b) The comment raises an issue serious enough to warrant a substantive response to clarify or complete the record; or

(c) The comment raises a relevant issue that was not previously addressed or considered by the NRC staff.

(2) The comment proposes a change or an addition to the rule, and it is apparent that the rule would be ineffective or unacceptable without incorporation of the change or addition.

(3) The comment causes the NRC staff to make a change (other than editorial) to the rule, CoC, or TSs.

For detailed instructions on submitting comments, please see the companion proposed rule published in the Proposed Rule section of this issue of the **Federal Register**.

II. Background

Section 218(a) of the Nuclear Waste Policy Act (NWPA) of 1982, as amended, requires that ''the Secretary [of the Department of Energy] shall establish a demonstration program, in cooperation with the private sector, for the dry storage of spent nuclear fuel at civilian nuclear power reactor sites, with the objective of establishing one or more technologies that the [Nuclear Regulatory] Commission may, by rule, approve for use at the sites of civilian

nuclear power reactors without, to the maximum extent practicable, the need for additional site-specific approvals by the Commission.'' Section 133 of the NWPA states, in part, that ''[the Commission] shall, by rule, establish procedures for the licensing of any technology approved by the Commission under Section 219(a) [sic: 218(a)] for use at the site of any civilian nuclear power reactor.''

To implement this mandate, the Commission approved dry storage of spent nuclear fuel in NRC-approved casks under a general license by publishing a final rule in 10 CFR part 72, which added a new subpart K within 10 CFR part 72 entitled, ''General License for Storage of Spent Fuel at Power Reactor Sites'' (55 FR 29181; July 18, 1990). This rule also established a new subpart L within 10 CFR part 72 entitled, ''Approval of Spent Fuel Storage Casks,'' which contains procedures and criteria for obtaining NRC approval of spent fuel storage cask designs. The NRC subsequently issued a final rule on December 22,1994 (59 FR 65898), that approved the Standardized NUHOMS® Cask System design and added it to the list of NRC-approved cask designs in 10 CFR 72.214 as CoC No. 1004.

III. Discussion of Changes

On April 10, 2007 (ADAMS Accession No. ML071240088), and as supplemented on August 23, 2007 (ADAMS Accession No. ML072410293), December 21, 2007 (ADAMS Accession No. ML080020420), June 12, 2008 (ADAMS Accession No. ML081700238), August 14, 2009 (ADAMS Accession No. ML13149A438), August 5, 2010 (ADAMS Accession No. ML102230097), and February 25, 2011 (ADAMS Accession No. ML110590060), Transnuclear, Inc., the holder of CoC No. 1004, submitted to the NRC a request to amend CoC No. 1004. Specifically, Transnuclear, Inc. requested changes to: (1) add a new TC, the OS197L, for use with the 32PT and 61BT DSC; and (2) convert the CoC No. 1004 TS to the format in NUREG–1745. The previously approved payloads and the corresponding TSs have been retained ''as-is'' in the new format of the proposed TSs, including tables and figures. In addition, this change removes the bases for the Limiting Conditions for Operation and Surveillance Requirements from the TSs and relocates the bases to Chapter 10 of the Updated Final Safety Analysis Report (UFSAR). Specific changes to the TSs are:

- Converting the existing TSs for CoC No. 1004 proposed Amendment 10 TS, to the improved TS format and content consistent with NUREG–1745 requirements.
- Deleting the TC dose rates for all currently licensed payloads (TSs 1.2.11, 1.2.11 a, 1.2.11 b, 1.2.11 c, 1.2.11d, and 1.2.11e). These TS are redundant to TS 1.2.7 which regulates dose limits for a loaded DSC when stored inside a horizontal storage module where a payload resides during its 20 year licensed life span.
- Deleting DSC vacuum drying duration limits for all the licensed payloads (TSs 1.2.17, 1.2.17a, 1.2.17b, and 1.2.17c).
- Implementing the following NRC suggested revisions that were adopted by letter dated August 14, 2009 (ADAMS Accession No. ML092330146).
  - Adding Sections 4.4.1 and 4.4.2 to the proposed TSs to reflect additional restrictions for the use of the OS197L TC.
  - Revising Section 5.2.4, ''Radiation Protection Program,'' of the proposed TSs to include dose assessment for occupational exposures during loading operations. If remote handling devices are used for movement of a transfer cask during loading, then the dose assessment shall include recovery from a potential malfunction of these devices.
  - Adding Section 4.2.1 of the proposed TSs to reflect the additional restrictions for all horizontal storage modules if an independent spent fuel storage installation (ISFSI) is located in a coastal salt water marine environment.
- Changing the following conditions in the CoC:
  - Revising CoC Condition 6 to clarify that general licensees may use either the original issue of the certificate or use previously approved amendments of this certificate for storage under the provisions of 10 CFR 72.210.
  - Deleting CoC Conditions 7 and 8 as they have been moved to proposed TSs 5.5 and 5.6, respectively.
- Revising the CoC and TSs to add requirements for the OS197L TC.

As documented in the SER (ADAMS Accession No. ML120130593), the NRC staff performed a detailed safety evaluation of the proposed CoC amendment request. There are no significant changes to cask design requirements in the proposed CoC amendment. Considering the specific design requirements for each accident condition, the design of the cask would prevent loss of containment, shielding, and criticality control. If there is no loss of containment, shielding, or criticality control, the environmental impacts would be insignificant. This amendment does not reflect a significant change in design or fabrication of the cask. In addition, any resulting occupational exposure or offsite dose rates from the implementation of Amendment No. 11 would remain well within the 10 CFR part 20 limits. Thus, the proposed CoC changes will not result in any radiological or non-radiological environmental impacts that significantly differ from the environmental impacts evaluated in the environmental assessment supporting the July 18, 1990, final rule. There will be no significant change in the types or significant revisions in the amounts of any effluent released, no significant increase in the individual or cumulative radiation exposure, and no significant increase in the potential for or consequences from radiological accidents.

This direct final rule revises the Standardized NUHOMS® Cask System listing in 10 CFR 72.214 by adding Amendment No. 11 to CoC No.1004. The amendment consists of the changes previously described, as set forth in the revised CoC and TSs. The revised TSs are identified in the SER.

The amended Standardized NUHOMS® cask design, when used under the conditions specified in the CoC, the TSs, and the NRC's regulations, will meet the requirements of 10 CFR part 72; thus, adequate protection of public health and safety will continue to be ensured. When this direct final rule becomes effective, persons who hold a general license under 10 CFR 72.210 may load spent nuclear fuel into Standardized NUHOMS® Cask Systems that meet the criteria of Amendment No. 11 to CoC No. 1004 under 10 CFR 72.212.

IV. Voluntary Consensus Standards

The National Technology Transfer and Advancement Act of 1995 (Pub. L. 104–113) requires that Federal agencies use technical standards that are developed or adopted by voluntary consensus standards bodies unless the use of such a standard is inconsistent with applicable law or otherwise impractical. In this direct final rule, the NRC will revise the Standardized NUHOMS® Cask System design listed in 10 CFR 72.214, ''List of Approved Spent Fuel Storage Casks.'' This action does not constitute the establishment of a standard that contains generally applicable requirements.

V. Agreement State Compatibility

Under the ''Policy Statement on Adequacy and Compatibility of Agreement State Programs'' approved by the Commission on June 30, 1997, and published in the **Federal Register** on September 3, 1997 (62 FR 46517), this rule is classified as Compatibility

Category ''NRC.'' Compatibility is not required for Category ''NRC'' regulations. The NRC program elements in this category are those that relate directly to areas of regulation reserved to the NRC by the Atomic Energy Act of 1954, as amended, or the provisions of 10 CFR. Although an Agreement State may not adopt program elements reserved to the NRC, it may wish to inform its licensees of certain requirements via a mechanism that is consistent with the particular State's administrative procedure laws, but does not confer regulatory authority on the State.

VI. Plain Writing

The Plain Writing Act of 2010 (Pub. L. 111–274) requires Federal agencies to write documents in a clear, concise, well-organized manner that also follows other best practices appropriate to the subject or field and the intended audience. The NRC has attempted to use plain language in promulgating this rule consistent with the Federal Plain Writing Act guidelines.

VII. Finding of No Significant Environmental Impact: Availability

A. The Action

The action is to amend 10 CFR 72.214 to revise the Transnuclear, Inc. Standardized NUHOMS® Cask System listing within the ''List of Approved Spent Fuel Storage Casks'' to include Amendment No. 11 to CoC No. 1004.

Under the National Environmental Policy Act of 1969, as amended, and the NRC regulations in subpart A of 10 CFR part 51, the NRC has determined that this rule, if adopted, would not be a major Federal action significantly affecting the quality of the human environment and, therefore, an environmental impact statement is not required. The NRC has made a finding of no significant impact on the basis of this environmental assessment.

B. The Need for the Action

This rule amends the CoC for the Standardized NUHOMS® Cask System design within the list of approved spent fuel storage casks that power reactor licensees can use to store spent fuel at reactor sites under a general license. Specifically, Transnuclear, Inc. requested changes to revise authorized contents to include: (1) adding a new TC, the OS197L, for use with the 32PT and 61BT DSC; and (2) converting the CoC No. 1004 TSs to the format in NUREG–1745, ''Standard Format and Content for Technical Specifications for 10 CFR Part 72 Cask Certificates of Compliance.'' The previously approved payloads and the corresponding TSs have been retained ''as-is'' in the new format of the proposed TSs, including tables and figures. In addition, this change removes the bases for the Limiting Conditions for Operation and Surveillance Requirements from the TSs and relocates the bases to Chapter 10 of the UFSAR.

C. Environmental Impacts of the Action

On July 18, 1990 (55 FR 29181), the NRC issued an amendment to 10 CFR part 72 to provide for the storage of spent nuclear fuel under a general license in cask designs approved by the NRC. The potential environmental impact of using NRC approved storage casks was initially analyzed in the environmental assessment for the 1990 final rule. The environmental assessment for this Amendment No. 11 tiers off of the environmental assessment for the July 18, 1990, final rule. Tiering on past environmental assessments is a standard process under the National Environmental Policy Act.

Standardized NUHOMS® Cask Systems are designed to mitigate the effects of design basis accidents that could occur during storage. Design basis accidents account for human-induced events and the most severe natural phenomena reported for the site and surrounding area. Postulated accidents analyzed for an ISFSI, the type of facility at which a holder of a power reactor operating license would store spent fuel in casks in accordance with 10 CFR part 72, include tornado winds and tornado-generated missiles, a design basis earthquake, a design basis flood, an accidental cask drop, lightning effects, fire, explosions, and other incidents.

Based upon its review, the NRC staff has reasonable assurance that the design of the shielding system associated with the OS197L light weight transfer cask (a component of the Standardized NUHOMS® System), as currently proposed, and when limited to use of the 61BT and 32PT DSCs, is in compliance with 10 CFR part 72 and that the applicable design and acceptance criteria, including 10 CFR part 20, have been satisfied. The evaluation of the shielding design provides reasonable assurance that the OS197L light weight transfer cask will allow safe transfer of spent fuel to dry storage in accordance with 10 CFR 72.236(d). Considering the specific design requirements for each accident condition, the design of the cask would prevent loss of containment, shielding, and criticality control. If there is no loss of containment, shielding, or criticality control, the environmental impacts would be insignificant. This amendment does not reflect a significant change in design or fabrication of the cask. There are no significant changes to cask design requirements in the proposed CoC amendment. In addition, any resulting occupational exposure or offsite dose rates from the implementation of Amendment No. 11 would remain well within the 10 CFR part 20 limits. Therefore, the proposed CoC changes will not result in any radiological or non-radiological environmental impacts that significantly differ from the environmental impacts evaluated in the environmental assessment supporting the July 18, 1990, final rule. There will be no significant change in the types or significant revisions in the amounts of any effluent released, no significant increase in the individual or cumulative radiation exposure, and no significant increase in the potential for or consequences from radiological accidents.

The staff documented its findings in a safety evaluation report which is available in ADAMS under Accession No. ML120130550.

D. Alternative to the Action

The alternative to this action is to deny approval of Amendment No. 11 and end the final rulemaking. Consequently, any 10 CFR part 72 general licensee that seeks to load spent nuclear fuel into the Standardized NUHOMS® Cask System in accordance with the changes described in proposed Amendment No. 11 would have to request an exemption from the requirements of 10 CFR 72.212 and 72.214. Under this alternative, interested licensees would have to prepare, and the NRC would have to review, a separate exemption request, thereby increasing the administrative burden upon the NRC and the costs to each licensee. Therefore, the environmental impacts would be the same or less than the action.

E. Alternative Use of Resources

Approval of Amendment No. 11 to CoC No. 1004 would result in no irreversible commitments of resources.

F. Agencies and Persons Contacted

No agencies or persons outside the NRC were contacted in connection with the preparation of this environmental assessment.

G. Finding of No Significant Impact

The environmental impacts of the action have been reviewed under the requirements in 10 CFR part 51.

Based on the foregoing environmental assessment, the NRC concludes that this

rulemaking entitled, ''List of Approved Spent Fuel Storage Casks: Standardized NUHOMS® Cask System,'' will not have a significant effect on the human environment. Therefore, the NRC has determined that an environmental impact statement is not necessary for this rule.

Documents related to this rulemaking, including comments received by the NRC, may be examined at the NRC Public Document Room, Room O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

VIII. Paperwork Reduction Act Statement

This rule does not contain any information collection requirements and, therefore, is not subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). Existing requirements were approved by the Office of Management and Budget (OMB), Approval Number 3150–0132.

Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to a request for information or an information collection requirement unless the requesting document displays a currently valid OMB control number.

IX. Regulatory Analysis

On July 18, 1990 (55 FR 29181), the NRC issued an amendment to 10 CFR part 72 to provide for the storage of spent nuclear fuel under a general license in cask designs approved by the NRC. Any nuclear power reactor licensee can use NRC-approved cask designs to store spent nuclear fuel if it notifies the NRC in advance, the spent fuel is stored under the conditions specified in the cask's CoC, and the conditions of the general license are met. A list of NRC-approved cask designs is contained in 10 CFR 72.214. On December 22, 1994 (59 FR 65898), the NRC issued an amendment to 10 CFR part 72 that approved the Standardized NUHOMS® Cask System design by adding it to the list of NRC-approved cask designs in 10 CFR 72.214.

On April 10, 2007 (ADAMS Accession No. ML071240088), and as supplemented on August 23, 2007 (ML072410293), December 21, 2007 (ML080020420), June 12, 2008 (ML081700238), August 14, 2009 (ML13149A438), August 5, 2010 (ML102230097), and February 25, 2011 (ML110590060), Transnuclear, Inc. submitted an application to amend the Standardized NUHOMS® Cask System as described in Section III.

The alternative to this action is to withhold approval of Amendment No. 11 and to require any 10 CFR part 72 general licensee seeking to load spent nuclear fuel into Standardized NUHOMS® Cask Systems under the changes described in Amendment No. 11 to request an exemption from the requirements of 10 CFR 72.212 and 72.214. Under this alternative, each interested 10 CFR part 72 licensee would have to prepare, and the NRC would have to review, a separate exemption request, thereby increasing the administrative burden upon the NRC and the costs to each licensee.

Approval of the direct final rule is consistent with previous NRC actions. Further, as documented in the SER and the environmental assessment, the direct final rule will have no adverse effect on public health and safety or the environment. This direct final rule has no significant identifiable impact or benefit on other Government agencies. Based on this regulatory analysis, the NRC concludes that the requirements of the direct final rule are commensurate with the NRC's responsibilities for public health and safety and the common defense and security. No other available alternative is believed to be as satisfactory, and therefore, this action is recommended.

X. Regulatory Flexibility Certification

Under the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)), the NRC certifies that this rule will not, if issued, have a significant economic impact on a substantial number of small entities. This direct final rule affects only nuclear power plant licensees and Transnuclear, Inc. These entities do not fall within the scope of the definition of small entities set forth in the Regulatory Flexibility Act or the size standards established by the NRC (10 CFR 2.810).

XI. Backfitting and Issue Finality

The NRC has determined that the backfit rule (10 CFR 72.62) does not apply to this direct final rule. Therefore, a backfit analysis is not required. This direct final rule revises the CoC No. 1004 for the Transnuclear, Inc. Standardized NUHOMS® Cask System, as currently listed in 10 CFR 72.214, ''List of Approved Spent Fuel Storage Casks.'' The revision consists of Amendment No. 11, which: (i) Adds a new transfer cask, the OS197L, for use with the 32PT and 61BT dry shielded canisters, and associated changes to address the use of the new transfer cask; (ii) converts the TS in the CoC to the format in NUREG–1745, ''Standard Format and Content for Technical Specifications for 10 CFR [Title 10 of the *Code of Federal Regulations*] Part 72 Cask Certificates of Compliance;'' (iii) deletes the TC dose rates for all currently licensed payloads, which are redundant to TS 1.2.7 (regulating dose limits for a loaded DSC when stored inside a horizontal storage module where a payload resides during its 20 year licensed life span); (iv) deletes DSC vacuum drying duration limits for all the licensed payloads; (v) revises Section 5.2.4, ''Radiation Protection Program,'' of the TS to include dose assessment for occupational exposures during loading operations, and require that if remote handling devices are used for movement of a transfer cask during loading, then the dose assessment shall include recovery from a potential malfunction of these devices; (vi) adds Section 4.2.1 to the TSs to reflect additional restrictions for all horizontal storage modules if an ISFSI is located in a coastal salt water marine environment; (vii) revises CoC Condition 6 to clarify that general licensees may use either the original issue of the certificate or use previously approved amendments of this certificate for storage; and (vi) deletes CoC Conditions 7 and 8 as they are moved to TSs 5.5 and 5.6, respectively.

Amendment 11 to CoC No. 1004 for the Standardized NUHOMS® Cask System was initiated by Transnuclear, Inc. and was not submitted in response to new NRC requirements, or an NRC request for amendment. Amendment 11 applies only to new casks fabricated and used under Amendment 11. These changes do not affect existing users of the Standardized NUHOMS® Cask System, and the current amendment (10) continues to be effective for existing users, consistent with new CoC Condition 6. While current CoC users may comply with the new requirements in Amendment 11, this would be a voluntary decision on the part of current users. For these reasons, Amendment 11 to CoC No. 1004 does not constitute backfitting under 10 CFR 72.62, 10 CFR 50.109(a)(1), or otherwise represent an inconsistency with the issue finality provisions applicable to combined licenses in Part 52. Accordingly, no backfit analysis or additional documentation addressing the issue finality criteria in Part 52 has been prepared by the staff.

XII. Congressional Review Act

The Office of Management and Budget has not found this to be a major rule as defined in the Congressional Review Act.

List of Subjects in 10 CFR Part 72

Administrative practice and procedure, Criminal penalties, Manpower training programs, Nuclear materials, Occupational safety and health, Penalties, Radiation protection, Reporting and recordkeeping requirements, Security measures, Spent fuel, Whistleblowing.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; the Nuclear Waste Policy Act of 1982, as amended; and 5 U.S.C. 552 and 553; the NRC is adopting the following amendments to 10 CFR part 72.

PART 72—LICENSING REQUIREMENTS FOR THE INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL, HIGH-LEVEL RADIOACTIVE WASTE, AND REACTOR-RELATED GREATER THAN CLASS C WASTE

■ 1. The authority citation for part 72 continues to read as follows:

Authority: Atomic Energy Act secs. 51, 53, 57, 62, 63, 65, 69, 81, 161, 182, 183, 184, 186, 187, 189, 223, 234, 274 (42 U.S.C. 2071, 2073, 2077, 2092, 2093, 2095, 2099, 2111, 2201, 2232, 2233, 2234, 2236, 2237, 2238, 2273, 2282, 2021); Energy Reorganization Act sec. 201, 202, 206, 211 (42 U.S.C. 5841, 5842, 5846, 5851); National Environmental Policy Act sec. 102 (42 U.S.C. 4332); Nuclear Waste Policy Act secs. 131, 132, 133, 135, 137, 141 148 (42 U.S.C. 10151, 10152, 10153, 10155, 10157, 10161, 10168); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); Energy Policy Act of 2005, Pub. L. No. 109–58, 119 Stat. 549 (2005).

Section 72.44(g) also issued under secs. Nuclear Waste Policy Act 142(b) and 148(c), (d) (42 U.S.C. 10162(b), 10168(c), (d)). Section 72.46 also issued under Atomic Energy Act sec. 189 (42 U.S.C. 2239); Nuclear Waste Policy Act sec. 134 (42 U.S.C. 10154). Section 72.96(d) also issued under Nuclear Waste Policy Act sec. 145(g) (42 U.S.C. 10165(g)). Subpart J also issued under Nuclear Waste Policy Act secs. 117(a), 141(h) (42 U.S.C. 10137(a), 10161(h)). Subpart K is also issued under sec. 218(a) (42 U.S.C. 10198).

■ 2. In § 72.214, Certificate of Compliance 1004 is revised to read as follows:

§ 72.214 List of approved spent fuel storage casks.

* * * * *

Certificate Number: 1004.

Initial Certificate Effective Date: January 23, 1995.

Amendment Number 1 Effective Date: April 27, 2000.

Amendment Number 2 Effective Date: September 5, 2000.

Amendment Number 3 Effective Date: September 12, 2001.

Amendment Number 4 Effective Date: February 12, 2002.

Amendment Number 5 Effective Date: January 7, 2004.

Amendment Number 6 Effective Date: December 22, 2003.

Amendment Number 7 Effective Date: March 2, 2004.

Amendment Number 8 Effective Date: December 5, 2005.

Amendment Number 9 Effective Date: April 17, 2007.

Amendment Number 10 Effective Date: August 24, 2009.

Amendment Number 11 Effective Date: January 7, 2014.

SAR Submitted by: Transnuclear, Inc.

SAR Title: Final Safety Analysis Report for the Standardized NUHOMS® Horizontal Modular Storage System for Irradiated Nuclear Fuel.

Docket Number: 72–1004.

Certificate Expiration Date: January 23, 2015.

Model Number: NUHOMS® –24P, –24PHB, –24PTH, –32PT, –32PTH1, –52B, –61BT, and –61BTH.

* * * * *

Dated at Rockville, Maryland, this 2nd day of October 2013.

For the Nuclear Regulatory Commission.

Mark A. Satorius,

Executive Director for Operations.

[FR Doc. 2013–24906 Filed 10–23–13; 8:45 am]

BILLING CODE 7590–01–P

FARM CREDIT ADMINISTRATION

12 CFR Part 610

RIN 3052–AC78

Registration of Mortgage Loan Originators; Effective Date

AGENCY: Farm Credit Administration.

ACTION: Notice of effective date.

SUMMARY: The Farm Credit Administration (FCA) repealed its regulations that govern the registration of residential mortgage loan originators employed by Farm Credit System (FCS or System) institutions. We repealed these regulations because the Bureau of Consumer Financial Protection (CFPB), pursuant to its authority under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), is consolidating and recodifying the regulations that six Federal agencies jointly enacted to implement the Secure and Fair Enforcement for Mortgage Licensing Act (S.A.F.E. Act), which require residential mortgage loan originators at banks, savings associations, credit unions, FCS institutions, and their subsidiaries to register with the National Mortgage Licensing System and Registry (NMLSR or Registry) and obtain a unique identifier. Repealing these regulations avoids duplication, which is likely to cause confusion at FCS institutions. The FCA received no comments on the interim rule, and we now adopt it as final. In accordance with the law, the effective date of the rule is 30 days from the date of publication in the **Federal Register** during which either or both Houses of Congress are in session.

DATES: *Effective Date:* Under the authority of 12 U.S.C. 2252, the regulation amending 12 CFR part 610 published on August 20, 2013 (78 FR 51046) is effective October 14, 2013.

FOR FURTHER INFORMATION CONTACT:

Gaylon J. Dykstra, Assistant to the Director, Office of Regulatory Policy, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4498, TTY (703) 883–4056;

or

Richard A. Katz, Senior Counsel, Office of General Counsel, Farm Credit Administration, McLean, Virginia 22102–5090, (703) 883–4020, TTY (703) 883–4056.

SUPPLEMENTARY INFORMATION: The Farm Credit Administration repealed its regulations that govern the registration of residential mortgage loan originators employed by Farm Credit System (FCS or System) institutions. We repealed these regulations because the Bureau of Consumer Financial Protection (CFPB), pursuant to its authority under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), is consolidating and recodifying the regulations that six Federal agencies jointly enacted to implement the Secure and Fair Enforcement for Mortgage Licensing Act (S.A.F.E. Act), which require residential mortgage loan originators at banks, savings associations, credit unions, FCS institutions, and their subsidiaries to register with the National Mortgage Licensing System and Registry (NMLSR or Registry) and obtain a unique identifier. Repealing these regulations avoids duplication, which is likely to cause confusion at FCS institutions. The FCA received no comments on the interim rule, and we now adopt it as final. In accordance with 12 U.S.C. 2252, the effective date of the rule is 30 days from the date of publication in the **Federal Register** during which either or both Houses of Congress are in session. Based on the records of the sessions of Congress, the effective date of the regulations is October 14, 2013.

(**Authority:** 12 U.S.C. 2252(a)(9) and (10))

Dated: October 18, 2013.

Dale L. Aultman,

Secretary, Farm Credit Administration Board.

[FR Doc. 2013–25041 Filed 10–23–13; 8:45 am]

BILLING CODE 6705–01–P

FARM CREDIT ADMINISTRATION

12 CFR Chapter VI

Farm Credit Administration Board Policy Statements

AGENCY: Farm Credit Administration.

ACTION: Notice of policy statements and index.

SUMMARY: The Farm Credit Administration (FCA), as part of its annual public notification process, is publishing for notice an index of the 18 Board policy statements currently in existence. Most of the policy statements remain unchanged since our last **Federal Register** notice on October 25, 2012 (77 FR 65098), except for one with minor updates on Equal Employment Opportunity and Diversity.

DATES: October 24, 2013.

FOR FURTHER INFORMATION CONTACT:

Dale L. Aultman, Secretary to Board, Farm Credit Administration, 1501 Farm Credit Drive, McLean, Virginia 22102–5090, (703) 883–4009, TTY (703) 883–4056;

or

Wendy R. Laguarda, Assistant General Counsel, Office of General Counsel, Farm Credit Administration, 1501 Farm Credit Drive, McLean, Virginia 22102–5090, (703) 883–4020, TTY (703) 883–4020.

SUPPLEMENTARY INFORMATION: A list of the 18 FCA Board policy statements is set forth below. FCA Board policy statements may be viewed online at *www.fca.gov/handbook.nsf.*

On August 13, 2013, the FCA Board reaffirmed, and made minor updates only, to FCA–PS–62 on, ''Equal Employment Opportunity and Diversity.'' The policy was changed to explicitly state that FCA provides reasonable religious accommodations consistent with Title VII and to clarify that opposition to or participation in the equal employment opportunity process may be a basis for reprisal claims. The policy was published in the **Federal Register** on August 20, 2013 (78 FR 51187). The FCA will continue to publish new or revised policy statements in their full text.

FCA Board Policy Statements

FCA–PS–34 Disclosure of the Issuance and Termination of Enforcement Documents
FCA–PS–37 Communications During Rulemaking
FCA–PS–41 Alternative Means of Dispute Resolution
FCA–PS–44 Travel
FCA–PS–53 Examination Philosophy
FCA–PS–59 Regulatory Philosophy
FCA–PS–62 Equal Employment Opportunity and Diversity
FCA–PS–64 Rules for the Transaction of Business of the Farm Credit Administration Board
FCA–PS–65 Release of Consolidated Reporting System Information
FCA–PS–67 Nondiscrimination on the Basis of Disability in Agency Programs and Activities
FCA–PS–68 FCS Building Association Management Operations Policies and Practices
FCA–PS–71 Disaster Relief Efforts by Farm Credit Institutions
FCA–PS–72 Financial Institution Rating System (FIRS)
FCA–PS–77 Borrower Privacy
FCA–PS–78 Official Names of Farm Credit Institutions
FCA–PS–79 Consideration and Referral of Supervisory Strategies and Enforcement Actions
FCA–PS–80 Cooperative Operating Philosophy—Serving the Members of Farm Credit System Institutions
FCA–PS–81 Ethics, Independence, Arm's-Length Role, Ex Parte Communications and Open Government

Dated: October 18, 2013.

Dale L. Aultman,

Secretary, Farm Credit Administration Board.

[FR Doc. 2013–25065 Filed 10–23–13; 8:45 am]

BILLING CODE 6705–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2013–0600; Airspace Docket No. 13–ANM–18]

Amendment of Class E Airspace; St. George, UT

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends Class E airspace at St. George Municipal Airport, St. George, UT, by removing the operating hours established by a Notice to Airmen (NOTAM) due to the airport changing from a part time to a full time facility. This improves the safety and management of Instrument Flight Rules (IFR) operations at the airport.

DATES: Effective date, 0901 UTC, December 12, 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: Eldon Taylor, Federal Aviation Administration, Operations Support Group, Western Service Center, 1601 Lind Avenue SW., Renton, WA, 98057; telephone (425) 203–4537.

SUPPLEMENTARY INFORMATION:

History

On July 29, 2013, the FAA published in the **Federal Register** a notice of proposed rulemaking (NPRM) to amend controlled airspace at St. George, UT (78 FR 45473). 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 6002, of FAA Order 7400.9X dated August 7, 2013, and effective September 15, 2013, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in that Order.

The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) Part 71 by amending Class E surface airspace, at St. George Municipal Airport, St. George, UT. Due to increased air traffic, controlled airspace is now continuous 24 hours, no longer requiring a NOTAM. The boundaries of the controlled airspace area remain the same. This action enhances the safety and management of aircraft operations at St. George Municipal Airport.

The FAA has determined this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that only affects air traffic procedures and air navigation, it is certified 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 discusses the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends controlled airspace at St. George Municipal Airport, St. George, UT.

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 7400.9X, Airspace Designations and Reporting Points, dated August 7, 2013, and effective September 15, 2013 is amended as follows:

Paragraph 6002 Class E airspace designated as surface areas.

* * * * *

ANM UT E2 St. George, UT [Amended]

St. George Municipal Airport, UT
(Lat. 37°02′11″ N., long. 113°30′37″ W.)

Within a 4.5-mile radius of St. George Municipal Airport.

Issued in Seattle, Washington, on September 26, 2013.

Johanna Forkner,

Acting Manager, Operations Support Group, Western Service Center.

[FR Doc. 2013–24702 Filed 10–23–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2013–0021]

RIN 1625–AA00

Safety Zones; Hawaiian Island Commercial Harbors, HI

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is establishing nine (9) permanent safety zones encompassing Hawaii's commercial harbors (Nawiliwili and Port Allen, Kauai; Barber's Point and Honolulu Harbor, Oahu; Kaunakakai, Molokai; Kaumalapau, Lanai; Kahului, Maui and Kawaihae and Hilo on the Island of Hawaii). The purpose of these safety zones is to expedite the evacuation of the harbors in the event a tsunami warning is issued for the main Hawaiian Islands.

DATES: This rule is effective on November 25, 2013. This rule will be enforced when the Captain of the Port, Honolulu issues the order to evacuate any or all of Hawaii's nine commercial harbors in response to a tsunami warning. A written notice will be issued and a radio broadcast will be made when the Captain of the Port issues the evacuation order. This final rule will be enforced until the Captain of the Port lifts the evacuation order.

ADDRESSES: Documents mentioned in this preamble are part of docket USCG–2013–0021. 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 Lieutenant Commander Scott O. Whaley, Waterways Management Division, U.S. Coast Guard Sector Honolulu; telephone (808) 522–8264 (ext. 3352), email *Scott.O.Whaley@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

DHS Department of Homeland Security
FR Federal Register

A. Regulatory History and Information

The Coast Guard met with industry partners, commercial mariners, and recreational boaters during the creation of this rule. The Coast Guard then published a Notice of proposed rulemaking on May 17, 2013. No public meeting was requested and none was held. The Coast Guard received a total of one (1) comment during the notice and comment period which is addressed below.

B. Basis and Purpose

The statutory *basis* for this rulemaking is 33 U.S.C. 1231, which gives the Coast Guard, under a delegation from the Secretary of Homeland Security, regulatory authority to enforce the Ports and Waterways Safety Act. A safety zone is a water area, shore area, or water and shore area, for safety or environmental purposes, access is limited to authorized persons, vehicles, or vessels.

The *purpose* for this rule is to evacuate and close Hawaii's commercial harbors, collectively or individually, when a tsunami warning has been issued, in order to minimize the amount of vessel and port damage and a potential harbor blockage from a tsunami's destructive forces.

C. Discussion of Comments, Changes and the Final Rule

The Coast Guard received a total of one comment on the referenced Notice of proposed rulemaking published May 17, 2013. What follows is a review of, and the Coast Guard's response to, the issues and questions that were presented by this commenter concerning the Notice of proposed rulemaking.

The commenter recommended defining the boundary of each safety zone. In response to this comment, latitude/longitudes have been included for each individual safety zone as detailed in the ''Location'' section of this rule.

D. Discussion of Final Rule

This rule will create safety zones encompassing each of Hawaii's commercial harbors. In the event a tsunami warning is issued, the Coast Guard will enforce these safety zones, closing those harbors within the anticipated impact area of the tsunami. When the safety zones are activated for enforcement, no vessels will be permitted to enter the closed harbors. Enforcement of these safety zones will also trigger an immediate evacuation of commercial vessels from the closed harbors. Once the threat has passed and harbors have been assessed as safe for reentry and commercial navigation, the safety zones will be deactivated allowing vessels to transit the harbors in accordance with already established regulations.

E. Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes or 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. These safety zones will only be activated for enforcement in the event the state of Hawaii is issued a tsunami warning for the safety of lives and property.

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 received no comments from the Small Business Administration on this rule. 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. These safety zones would be activated, and thus subject to enforcement only when a tsunami warning is issued for the Main Hawaiian Islands. Once the threat has passed and harbors have been assessed as safe for reentry, the safety zones will be deactivated allowing vessels to transit the harbors in accordance with already established regulations.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

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 would 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 would 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 From Environmental Health Risks

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 would not create an environmental risk to health or risk to safety that might 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 would 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 rule 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.lD, 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 will evacuate commercial harbors which anticipate tsunami impact.

This rule is categorically excluded from further review under paragraph 34(g) 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**.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

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. 1231; 46 U.S.C. Chapter 701; 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.

■ 2. Add § 165. 14–1414 to read as follows:

§ 165. 14–1414 Safety Zones; Hawaiian Islands Commercial Harbors; HI.

(a) *Location.* The following commercial harbors are safety zones:

(1) All waters of Nawiliwili Harbor, Kauai inland from a line drawn between 21° 56′58″ N, 159° 21′28″ W and 21° 57′11″ N, 159° 21′10″ W;

(2) All waters of Port Allen, Kauai immediately adjacent to the Department of Transportation commercial pier (located at 21° 53′59″ N, 157° 35′21″ W) extending out to 100 yards from the piers faces;

(3) All waters of Barber's Point Harbor, Oahu inland from a line drawn between 21° 19′30″ N, 158° 07′14″ W and 21° 19′18″ N, 158° 07′18″ W;

(4) All waters of Honolulu Harbor, Oahu inland from a line drawn between 21° 17′56″ N, 157° 52′15″ W and 21° 17′45″ N, 157° 52′10″ W;

(5) All waters of Kaunakakai Harbor, immediately adjacent to the Interisland Cargo Terminal or Ferry Terminal Pier out to 100 yards of the west face of the pier;

(6) All waters of Kaumalapau Harbor, Lanai inland from a line drawn between 20° 47′10″ N, 156° 59′32″ W and 21° 47′01″ N, 156° 59′31″ W;

(7) All waters of Kahului Harbor, Maui inland from a line drawn between 20° 54′01″ N, 156° 28′26″ W and 20° 54′02″ N, 156° 28′18″ W;

(8) All waters of Kawaihae Harbor, Hawaii immediately adjacent to commercial piers 1 and 2 extending out to 100 yards from the piers faces.

(9) All waters of Hilo Harbor, Hawaii immediately adjacent to commercial piers 1 and 2 extending out to 100 yards from the piers faces.

(10) The activation of these safety zones may include any combination of these harbors, or all of these harbors, dependent upon details in the tsunami warning. These safety zones extend from the surface of the water to the ocean floor.

(b) *Regulations.* When the safety zones are activated and, therefore, subject to enforcement, no person or vessel may enter or remain in the safety zone except for support vessels, support personnel, and other vessels authorized by the Captain of the Port, Sector Honolulu (COTP), or a designated representative of the COTP. All commercial vessels must evacuate the harbor and transit seaward beyond the 50 fathom (300 foot) curve. These commercial harbors will remain closed to all transiting vessels until the Captain of the Port Honolulu lifts the evacuation order. All other applicable regulations in 33 CFR 165 remain in effect and subject to enforcement. You may contact the Coast Guard on VHF Channel 16 (156.800 MHz) or at telephone number 808–842–2600 to obtain clarification on safety zone transits and locations. Coast Guard patrol boats will be enforcing the safety zones and providing on-scene direction. Any vessel not capable of evacuating must contact the Coast Guard Sector Command Center at (808) 842–2601 to request a waiver from evacuating the harbor.

(c) *Enforcement period.* Paragraph (b) of this section will be enforced when a tsunami warning has been issued for the Hawaiian Islands. The COTP will notify the public of any enforcement through the following means to ensure the widest publicity: Broadcast notice to mariners, notices of enforcement, press releases and the Coast Guard's Homeport Web site. Following the passage of the tsunami or tsunami threat and harbor assessments as required, de-activation of these safety zones will be conducted through radio broadcast by the U.S. Coast Guard.

(d) *Penalties.* Vessels or persons violating this rule would be subject to the penalties set forth in 33 U.S.C. 1232.

Dated: September 16, 2013.

S.N. Gilreath,

Captain, U.S. Coast Guard, Captain of the Port Honolulu.

[FR Doc. 2013–24904 Filed 10–23–13; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R01–OAR–2011–0148; A–1–FRL–9901–71–Region 1]

Approval and Promulgation of Air Quality Implementation Plans; Rhode Island: Prevention of Significant Deterioration; Greenhouse Gas Permitting Authority and Tailoring Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve certain revisions to the Rhode Island State Implementation Plan (SIP) primarily relating to regulation of Greenhouse Gases (GHGs) under Rhode Island's Prevention of Significant Deterioration (PSD) preconstruction permitting program. EPA is also taking direct final action to approve the State's definition of ''$PM_{2.5}$'' (fine particulate matter) specific to permitting. Certain of the State's revisions consist of definitions that also relate more broadly to the State's PSD and nonattainment new source review (NSR) preconstruction permitting requirements, i.e., to stationary sources that also emit regulated new source review pollutants other than GHGs. EPA

is also taking direct final action to conditionally approve those definitions as they relate to the non-GHG pollutants, for the reasons described in more detail later in this notice. All of the revisions in question were submitted by Rhode Island, through the Rhode Island Department of Environmental Management (RI DEM) Office of Air Resources, on January 18, 2011. They are primarily intended to align Rhode Island's regulations with EPA's ''Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule.'' Finally, EPA is not taking action on certain other SIP revisions contained in RI DEM's January 18, 2011 submittal.

DATES: This direct final rule will be effective December 23, 2013, unless EPA receives adverse comments by November 25, 2013. If adverse comments are 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 Number EPA–R01–OAR–2011–0148 by one of the following methods:

1. *www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *Email: dahl.donald@epa.gov.*
3. *Fax:* (617) 918–0167.
4. *Mail:* ''Docket Identification Number EPA–R01–OAR–2011–0148'', Donald Dahl, U.S. Environmental Protection Agency, EPA New England Regional Office, Office of Ecosystem Protection, Air Permits, Toxics, and Indoor Programs Unit, 5 Post Office Square—Suite 100, (Mail code OEP05–2), Boston, MA 02109–3912.
5. *Hand Delivery or Courier:* Deliver your comments to: Donald Dahl, U.S. Environmental Protection Agency, EPA New England Regional Office, Office of Ecosystem Protection, Air Permits, Toxics, and Indoor Programs Unit, 5 Post Office Square—Suite 100, (mail code OEP05–2), Boston, MA 02109—3912. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding legal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R01–OAR–2011–0148. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit through *www.regulations.gov,* or email, information that you consider to be CBI or otherwise protected. The *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 *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.

Docket: All documents in the electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at Office of Ecosystem Protection, U.S. Environmental Protection Agency, EPA New England Regional Office, 5 Post Office Square—Suite 100, Boston, MA. EPA requests that if at all possible, you contact the contact listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding legal holidays.

In addition, copies of the state submittal and EPA's technical support document are also available for public inspection during normal business hours, by appointment at the State Air Agency; Office of Air Resources, Department of Environmental Management, 235 Promenade Street, Providence, RI 02908–5767.

FOR FURTHER INFORMATION CONTACT: For information regarding the Rhode Island SIP, contact Donald Dahl, U.S. Environmental Protection Agency, EPA New England Regional Office, Office of Ecosystem Protection, Air Permits, Toxics, and Indoor Programs Unit, 5 Post Office Square—Suite 100, (mail code OEP05–2), Boston, MA 02109—3912. Mr. Dahl's telephone number is (617) 918–1657; email address: *dahl.donald@epa.gov.*

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

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

Table of Contents

I. What is the background for the action by EPA in this notice?

The following sections briefly summarize EPA's recent GHG-related actions that provide the background for today's action as it relates to permitting requirements for GHGs. More detailed discussion of the background is found in the preambles for those actions. In particular, the background is contained in what we call the GHG PSD SIP Narrowing Rule,[1] and in the preambles to the actions cited therein.

A. GHG-Related Actions

EPA has recently undertaken a series of actions pertaining to the regulation of GHGs that, although for the most part distinct from one another, establish the overall framework for today's action on the Rhode Island SIP. Four of these actions include, as they are commonly called, the ''Endangerment Finding'' and ''Cause or Contribute Finding,'' which EPA issued in a single final action,[2] the ''Johnson Memo Reconsideration,'' [3] the ''Light-Duty Vehicle Rule,'' [4] and the ''Tailoring

[1] ''Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans; Final Rule.'' 75 FR 82536 (Dec. 30, 2010).

[2] ''Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act.'' 74 FR 66496 (Dec. 15, 2009).

[3] ''Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs.'' 75 FR 17004 (Apr. 2, 2010).

[4] ''Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule.'' 75 FR 25324 (May 7, 2010).

Rule.'' [5] Taken together and in conjunction with the CAA, these actions established regulatory requirements for GHGs emitted from new motor vehicles and new motor vehicle engines; determined that such regulations, when they took effect on January 2, 2011, subjected GHGs emitted from stationary sources to PSD requirements; and limited the applicability of PSD requirements to GHG sources on a phased-in basis. EPA took this last action in the Tailoring Rule, which, more specifically, established appropriate GHG emission thresholds for determining the applicability of PSD requirements to GHG-emitting sources.

PSD is implemented through the SIP system. In December 2010, EPA promulgated several rules to implement the new GHG PSD SIP program. Recognizing that some states had approved SIP PSD programs that did not apply PSD to GHGs, EPA issued a SIP call and, for some of these states, a Federal Implementation Plan (FIP).[6] Recognizing that other states had approved SIP PSD programs that do apply PSD to GHGs, but that do so for sources that emit as little as 100 or 250 tpy of GHG, and that do not limit PSD applicability to GHGs to the higher thresholds in the Tailoring Rule, EPA issued the GHG PSD SIP Narrowing Rule. Under that rule, EPA withdrew its approval of the affected SIPs to the extent those SIPs covered GHG-emitting sources below the Tailoring Rule thresholds. EPA based its action primarily on the ''error correction'' provisions of CAA section 110(k)(6).

B. Rhode Island's Actions

On August 3, 2010, Rhode Island provided a letter to EPA, in accordance with a request to all States from EPA in the Tailoring Rule, with confirmation that the State has the authority to regulate GHGs in its PSD program. The letter also confirmed that current Rhode Island rules require regulating GHGs at the existing 100/250 tpy threshold, rather than at the higher thresholds set in the Tailoring Rule. See the docket for this rulemaking for a copy of Rhode Island's letter.

In the SIP Narrowing Rule, published on December 30, 2010, EPA withdrew its approval of Rhode Island's SIP (among other SIPs) to the extent the SIP applies PSD permitting requirements to GHG emissions from sources emitting at levels below those set in the Tailoring Rule.[7] As a result, Rhode Island's current approved SIP provides the state with authority to regulate GHGs, but only at and above the Tailoring Rule thresholds; and requires new and modified sources to receive a PSD permit based on GHG emissions only if they emit at or above the Tailoring Rule thresholds.

The basis for this SIP revision is that limiting PSD applicability to GHG sources to the higher thresholds in the Tailoring Rule is consistent with the SIP provisions that provide required assurances of adequate resources, and thereby addresses the flaw in the SIP that led to the SIP Narrowing Rule. Specifically, CAA section 110(a)(2)(E) includes as a requirement for SIP approval that States provide ''necessary assurances that the State . . . will have adequate personnel [and] funding . . . to carry out such [SIP].'' In the Tailoring Rule, EPA established higher thresholds for PSD applicability to GHG-emitting sources on grounds that the states generally did not have adequate resources to apply PSD to GHG-emitting sources below the Tailoring Rule thresholds,[8] and no State, including Rhode Island, asserted that it did have adequate resources to do so.[9] In the SIP Narrowing Rule, EPA found that the affected states, including Rhode Island, had a flaw in their SIPs at the time they submitted their PSD programs, which was that the applicability of the PSD programs was potentially broader than the resources available to them under their SIPs.[10] Accordingly, for each affected state, including Rhode Island, EPA concluded that EPA's action in approving the SIP was in error, under CAA section 110(k)(6), and EPA rescinded its approval to the extent the PSD program applies to GHG-emitting sources below the Tailoring Rule thresholds.[11] EPA recommended that States adopt a SIP revision to incorporate the Tailoring Rule thresholds, thereby (i) assuring that under State law, only sources at or above the Tailoring Rule thresholds would be subject to PSD; and (ii) avoiding confusion under the federally approved SIP by clarifying that the SIP applies to only sources at or above the Tailoring Rule thresholds.[12]

II. What is EPA's analysis of Rhode Island's SIP revision?

Rhode Island is currently a SIP-approved state for the PSD program. In a letter provided to EPA on August 3, 2010, Rhode Island notified EPA of its interpretation that the State currently has the authority to regulate GHGs under its PSD regulations. The current Rhode Island program (adopted prior to the promulgation of EPA's Tailoring Rule) applies to major stationary sources (having the potential to emit at least 100 tpy or 250 tpy or more of any air pollutant, depending on the type of source) or modifications constructing in areas designated attainment or unclassifiable with respect to the National Ambient Air Quality Standards (NAAQS).

The regulatory revisions that RI DEM submitted on January 18, 2011 included Air Pollution Control (APC) Regulations 9, 28, and 29, each in their entirety. In correspondence dated February 11, 2011, however, RI DEM clarified that it was withdrawing its SIP revision request in relation to APC Regulations 28 and 29 because those regulations establish the State's CAA Title V operating permit program, which is not a SIP program under the CAA. Consequently, EPA's action today does not include taking action to approve Rhode Island's changes to Regulations 28 and 29, but only includes certain changes to APC Regulation 9.

The State's January 18, 2011 submittal also contained amendments to several other sections of APC Regulation 9 as last approved into Rhode Island's SIP on December 2, 1999 (64 FR 67495). With the exception of the State's definition of ''$PM_{2.5}$,'' EPA is not taking action on these revisions, which do not affect GHG PSD permitting requirements.

[5] ''Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule.'' 75 FR 31514 (June 3, 2010).

[6] Specifically, by notice dated December 13, 2010, EPA finalized a ''SIP Call'' that would require those states with SIPs that have approved PSD programs but do not authorize PSD permitting for GHGs to submit a SIP revision providing such authority. ''Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call,'' 75 FR 77698 (Dec. 13, 2010). EPA has made findings of failure to submit that would apply in any state unable to submit the required SIP revision by its deadline, and finalized FIPs for such states. *See, e.g.,* ''Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Failure To Submit State Implementation Plan Revisions Required for Greenhouse Gases,'' 75 FR 81874 (Dec. 29, 2010); ''Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Federal Implementation Plan,'' 75 FR 82246 (Dec. 30, 2010). Because Rhode Island's SIP already authorizes Rhode Island to regulate GHGs once GHGs became subject to PSD requirements on January 2, 2011, Rhode Island was not subject to the proposed SIP Call or FIP.

[7] ''Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans; Final Rule.'' 75 FR 82536 (Dec. 30, 2010).

[8] Tailoring Rule, 75 FR 31517.

[9] SIP Narrowing Rule, 75 FR 82540.

[10] *Id.* at 82542.

[11] *Id.* at 82544.

[12] *Id.* at 82540.

The SIP revisions EPA is taking action on today consist (with one exception) of definitions within APC Regulation 9 that are necessary for the purpose of the GHG PSD permitting requirements discussed in this notice. Some of these definitions also apply to PSD and nonattainment new source review permitting requirements applicable to regulated new source review pollutants other than GHG. One of the definitions only relates to $PM_{2.5}$ (fine particulate matter). Specifically, the changes that EPA is taking action on today are definitions of the following terms contained in APC Regulation 9: (1) ''Major modification''; (2) ''Net emissions increase''; (3) ''Regulated NSR pollutant''; (4) ''Significant emissions increase''; (5) ''Subject to Regulation''; (6) ''Baseline actual emissions''; (7) ''Significant''; (8) ''$PM_{2.5}$''; and (9) ''Major Stationary Source''. Definitions for the first eight of these terms appear in APC Regulation Section 9.1, while the last definition appears in APC Regulation Section 9.5.1(f). These changes to Rhode Island's preconstruction permitting program regulations include the same amendments to the federal PSD regulatory provisions found in EPA's Tailoring Rule for GHG, with the exception that Rhode Island's PSD and nonattainment new source review preconstruction permitting programs do not include the new source review reforms (NSR Reforms) promulgated by EPA in 2002.[13] Because of that exception, Rhode Island has submitted to EPA, pursuant to 40 CFR 51.166(a)(7), a technical demonstration, dated September 18, 2013 and entitled ''State Implementation Plan Equivalency Demonstration For Greenhouse Gas Emissions under the PSD Program,'' showing that its PSD permitting requirements, as they apply to stationary sources of GHGs, are more stringent than, or are at least as stringent in all respects as, the corresponding provisions of EPA's NSR Reforms. *See* 40 CFR 51.166(a)(7). EPA is therefore taking action to approve fully Rhode Island's PSD GHG SIP revisions. Rhode Island's September 18, 2013 technical demonstration can be found in the Docket for this action. EPA is also taking action to approve fully the State's definition of ''$PM_{2.5}$.''[14]

However, insofar as those same definitions also apply to PSD and nonattainment new source review for major stationary sources and modifications involving regulated NSR pollutants other than GHGs, EPA is today conditionally approving Rhode Island's requested SIP revisions pending submission by Rhode Island of a technical demonstration, pursuant to 40 CFR 51.166(a)(7), that Rhode Island's PSD and nonattainment new source review permitting programs are more stringent than, or at least as stringent in all respects as, EPA's NSR Reform provisions for stationary sources of regulated NSR pollutants other than GHGs.

Under section 110(k)(4) of the Act, EPA may conditionally approve a plan based on a commitment from a State to adopt specific enforceable measures by a date certain, but not later than one year from the date of approval. EPA is conditionally approving in this direct final rulemaking Rhode Island's SIP revisions (as they apply to major stationary sources of regulated NSR pollutants other than GHGs) based on the State's commitment to submit the technical demonstration identified above within one year of the approval. If Rhode Island fails to do so in a timely manner, our conditional approval will, by operation of law, become a disapproval one year from this direct final conditional approval. EPA would notify Rhode Island by letter that such action had occurred. At that time, the SIP revisions in question would not be a part of Rhode Island's approved SIP. If that were to occur, EPA would subsequently publish a document in the **Federal Register** notifying the public the conditional approval automatically converts to a disapproval. If Rhode Island meets its commitment within the applicable time frame, however, EPA would subsequently publish a document in the **Federal Register** notifying the public that EPA intends to convert the conditional approval to a full approval. By letter dated September 18, 2013, Rhode Island committed to submitting that demonstration to EPA no later than one year from the effective date of this approval. On December 29, 2005, Rhode Island submitted a technical demonstration to EPA Region 1 asserting the State's PSD and nonattainment new source review permitting programs were, at that time, at least as stringent as the federal program (including NSR Reform). EPA concluded, however, that the State's technical demonstration did not contain all of the elements needed and so could not be accepted for its intended purpose. Hence, EPA's conclusion, described in this notice, that the State must submit a revised technical demonstration within one year of today's action. The December 29, 2005 submittal can be found in the Docket for this action.

III. Final Action

Pursuant to section 110 of the CAA, EPA is fully approving Rhode Island's January 18, 2011 SIP revisions as they relate to major new and modified stationary sources of GHG. EPA is also fully approving the State's definition of ''$PM_{2.5}$''. The GHG-related revisions establish appropriate emissions thresholds for determining PSD applicability with respect to major new or modified GHG-emitting stationary sources, in accordance with EPA's June 3, 2010, Tailoring Rule. With this approval, EPA also amends 40 CFR 52.2072 by removing subsection (b).

Pursuant to section 110(k)(4) of the CAA, EPA is conditionally approving Rhode Island's January 18, 2011 SIP revisions as they relate to major new and modified stationary sources of regulated NSR pollutants other than GHGs (with the exception, noted earlier in this notice, that EPA is fully approving the State's definition of ''$PM_{2.5}$'').

The EPA is publishing this action without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. However, in the proposed rules section of this **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the SIP revisions should relevant adverse comments be filed. This rule will be effective December 23, 2013 without further notice unless the Agency receives relevant adverse comments by November 25, 2013.

If the EPA receives such comments, then EPA will publish a notice withdrawing today's final rule and informing the public that the rule will

[13] Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects; Final Rule'' 67 FR 80186 (Dec. 31, 2002).

[14] Note that Rhode Island's definition of ''regulated NSR pollutant'' does not explicitly contain the language in 40 CFR 51.166((b)(49)(i) addressing the inclusion of the gaseous, condensable portions of $PM_{2.5}$ and PM_{10} for the purposes of major stationary source preconstruction permitting applicability determinations and establishing permit limits. However, by letter submitted to EPA Region 1 and dated September 18, 2013, Rhode Island explained that its major stationary source preconstruction permitting program does, in fact, require inclusion of the condensable portion of PM_{10} and $PM_{2.5}$. That is because APC Regulation 9 of the State's regulations defines those two pollutants in terms of an amount measured at ambient air conditions. Consequently, because the gaseous, condensable portions of PM_{10} and $PM_{2.5}$ would have converted to condensed form at ambient air conditions, Rhode Island's requirements meet the corresponding federal requirements.

not take effect. All public comments received will then be addressed in a subsequent final rule based on the proposed rule. The EPA will not institute a second comment period on the proposed rule. All parties interested in commenting on the proposed rule should do so at this time. If no such comments are received, the public is advised that this rule will be effective on December 23, 2013 and no further action will be taken on the proposed rule. 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.

IV. Statutory and Executive Order Reviews

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

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

Dated: September 20, 2013.

H. Curtis Spalding,

Regional Administrator, EPA New England.

Part 52 of chapter I, title 40 of the Code of Federal Regulations 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 OO—Rhode Island

■ 2. In § 52.2070 the table in paragraph (c) is amended by revising entry for ''Air Pollution Control Regulation 9'' to read as follows:

§ 52.2070 Identification of plan.

(c) EPA Approved regulations.

EPA-APPROVED RHODE ISLAND REGULATIONS

State citation	Title/subject	State effective date	EPA approval date	Explanations
*	*	*	*	*
Air Pollution Control Regulation 9.	Air pollution control permits.	1/31/2011	10/24/2013 [Insert FEDERAL REGISTER page number where the document begins].	Definitions of ''Major modification''; ''Significant''; and ''Net emissions increase'' are amended in Section 9.1. Definitions of ''Regulated NSR pollutant''; ''Significant emissions increase''; ''Baseline actual emissions''; and ''Subject to Regulation'' are added to Section 9.1. Definition of ''Major stationary source'' is amended in Section 9.5.1(f). Definition of ''$PM_{2.5}$'' is added to Section 9.1.
*	*	*	*	*

* * * * *

§ 52.2072 [Amended]

■ 3. Section 52.2072 is amended by removing and reserving paragraph (b).

[FR Doc. 2013–24847 Filed 10–23–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2013–0136, EPA–R05–OAR–2013–0215, EPA–R05–OAR–2013–0344, EPA–R05–OAR–2013–0378; FRL–9901–61–Region5]

Approval and Promulgation of Air Quality Implementation Plans; Ohio; Dayton-Springfield, Steubenville-Weirton, Toledo, and Parkersburg-Marietta; 1997 8-Hour Ozone Maintenance Plan Revision to Approved Motor Vehicle Emissions Budgets

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: Under the Clean Air Act (CAA), EPA is approving requests by Ohio to revise the 1997 8-hour ozone maintenance air quality state implementation plan (SIP) for the Dayton-Springfield area, the Toledo area, and the Ohio portions of the Parkersburg-Marietta and Steubenville-Weirton, West Virginia-Ohio areas, to replace onroad emissions inventories and motor vehicle emissions budgets (budgets) with inventories and budgets developed using EPA's Motor Vehicle Emissions Simulator (MOVES) emissions model. The Dayton-Springfield area consists of Clark, Greene, Miami, and Montgomery Counties. The Ohio portion of the Steubenville-Weirton, West Virginia-Ohio area consists of Jefferson County, Ohio. The Toledo area consists of Lucas and Wood Counties. The Ohio portion of the Parkersburg-Marietta, West Virginia-Ohio area consists of Washington County. Ohio submitted the SIP revision requests on the following dates: Dayton-Springfield on February 11, 2013; Steubenville-Weirton on March 15, 2013; Toledo on April 18, 2013; Parkersburg-Marietta on April 26, 2013.

DATES: This direct final rule will be effective December 23, 2013, unless EPA receives adverse comments by November 25, 2013. If adverse comments are 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 Nos. EPA–R05–OAR–2013–0136 (Dayton-Springfield), EPA–R05–OAR–2013–0215 (Steubenville-Weirton), EPA–R05–OAR–2013–0344 (Toledo), EPA–R05–OAR–2013–0378 (Parkersburg-Marietta), by one of the following methods:

1. *www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *Email: blakley.pamela@epa.gov*
3. *Fax:* (312) 692–2450.
4. *Mail:* Pamela Blakley, Chief, Control Strategies Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.
5. *Hand Delivery:* Pamela Blakley, Chief, Control Strategies Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Instructions: Direct your comments to Docket ID Nos. EPA–R05–OAR–2013–0136, EPA–R05–OAR–2013–0215, EPA–R05–OAR–2013–0344, EPA–R05–OAR–2013–0378. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *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 *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. *Docket:* All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other

material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the 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 Anthony Maietta, Environmental Protection Specialist, at (312) 353–8777 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Anthony Maietta, Environmental Protection Specialist, Control Strategies Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353–8777, *maietta.anthony@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 EPA approving?

EPA is approving new MOVES2010a-based onroad emissions inventories and budgets for the Dayton-Springfield and Toledo areas, and the Ohio portions of the Steubenville-Weirton and Parkersburg-Marietta, West Virginia-Ohio 1997 8-hour ozone maintenance areas, that will replace MOBILE-based inventories and budgets in the SIP. These areas were redesignated to attainment of the 1997 8-hour ozone standard effective June 15, 2007 (72 FR 26648, 44784, 27652, 27640), and MOBILE6.2-based onroad emissions inventories and budgets were approved in those actions. Upon effective date of approval of the MOVES-based budgets, they must then be used in future transportation conformity analyses for the area as required by section 176(c) of the CAA. See the official release of the MOVES2010 emissions model (75 FR 9411–9414) for background, and section II.(c) below for details.

II. What is the background for this action?

a. SIP Budgets and Transportation Conformity

Under the CAA, states are required to submit, at various times, control strategy SIP revisions and maintenance plans for nonattainment and maintenance areas for a given national ambient air quality standard (NAAQS). These SIP revisions and maintenance plans include budgets of onroad mobile source emissions for criteria pollutants and/or their precursors. Transportation plans and projects ''conform'' to (i.e., are consistent with) the SIP when they will not cause or contribute to air quality violations, or delay timely attainment of the NAAQS or an interim milestone.

b. Prior Approval of Budgets

EPA previously approved MOBILE6.2-based budgets for the Dayton-Springfield and Toledo areas, and the Ohio portions of the Parkersburg-Marietta and Steubenville-Weirton, West Virginia-Ohio 8-hour ozone maintenance areas, for volatile organic compounds (VOCs) and nitrogen oxides (NO_X). The Dayton-Springfield area's ozone maintenance plan established 2005 and 2018 budgets. The Toledo area and the Ohio portions of the Parkersburg-Marietta and Steubenville-Weirton areas' ozone maintenance plans established 2009 and 2018 budgets. These budgets demonstrated a reduction in emissions from the monitored attainment year.

c. The MOVES Emissions Model

The MOVES model is EPA's state of the art tool for estimating highway emissions. EPA announced the release of MOVES2010 in March 2010 (75 FR 9411). Use of the MOVES model is required for regional emissions analyses for transportation conformity determinations outside of California that begin after March 2, 2013.

MOVES2010a was used to estimate emissions in the areas for the same milestone years as the original onroad emissions inventories and budgets in the SIP. The Ohio Environmental Protection Agency (OEPA) is revising the onroad emissions inventories and budgets using the latest planning assumptions, including population and employment updates. In addition, newer vehicle registration data has been used to update the age distribution of the vehicle fleet. Since future demonstrations of conformity will use emissions estimates derived with MOVES, it is appropriate to establish benchmarks based on MOVES. The interagency consultation group has had extensive consultation on the requirements and need for new budgets.

d. Submission of New Budgets Based on MOVES2010a

Ohio submitted final budgets based on MOVES2010a that cover the Dayton-Springfield (submitted February 11, 2013) and Toledo (submitted April 18, 2013) areas and the Ohio portions of the Parkersburg-Marietta (submitted April 26, 2013) and Steubenville-Weirton (submitted March 15, 2013), West Virginia-Ohio areas. Ohio did not receive any comments for the Toledo, Dayton-Springfield, or Parkersburg-Marietta submittals. Ohio received comments requesting clarification on the Steubenville-Weirton submittal from the West Virginia Division of Air Quality and provided responses to the clarifications requested.

For the Dayton-Springfield area, the new MOVES2010a-based budgets are for the years 2005 and 2018 for both VOCs and NO_X. For the Toledo area and the Ohio portions of the Parkersburg-Marietta and Steubenville-Weirton areas, the new MOVES2010a-based budgets are for the years 2009 and 2018 for both VOCs and NO_X. The budgets for these areas are detailed later in this notice. Ohio also provided the areas' total emissions, including onroad mobile emissions inventories based on MOVES2010a, for the attainment year, the interim budget year, and the maintenance year. The combined emissions reduction from all sectors between the attainment year and the maintenance year is shown as well. Total emissions include point, area, nonroad mobile and onroad mobile sources. The total emissions and combined emissions reduction from all sectors from 2005 to 2018 for VOC and NO_X for the area is shown in tables 1 and 2. In tables 1 through 8, for onroad emissions of both VOC and NO_X for the years noted with an asterisk, a 15% safety margin[1] has been applied to reach the values shown.

[1] The safety margin is achieved by adding a certain percentage of emissions, in tons per day, onto the MOVES-based onroad emissions budgets. In this case, Ohio chose to add a 15% safety margin to their budgets. The safety margin cannot exceed the combined emissions reduction for the area.

TABLE 1—TOTAL VOC EMISSIONS WITH MOVES2010A MOBILE EMISSIONS IN DAYTON-SPRINGFIELD-SPRINGFIELD, OHIO (CLARK, GREENE, MIAMI, AND MONTGOMERY COUNTIES)

[tons per day]

Sector	2005 Attainment	2009 Interim	2018* Maintenance	Combined emissions reduction (2005–2018)
Point	3.45	3.47	3.72	
Area	46.23	47.76	52.75	
Onroad	55.37	43.02	19.44	
Nonroad	12.16	9.62	7.91	
Total	115.21	103.87	83.82	31.39

TABLE 2—TOTAL NO_X EMISSIONS WITH MOVES2010A MOBILE EMISSIONS IN DAYTON-SPRINGFIELD-SPRINGFIELD, OHIO (CLARK, GREENE, MIAMI, AND MONTGOMERY COUNTIES)

[tons per day]

Sector	2005 Attainment	2009 Interim	2018* Maintenance	Combined emissions reduction (2005–2018)
Point	36.64	36.24	37.93	
Area	4.65	5.09	5.45	
Onroad	20.24	16.68	9.84	
Nonroad	84.66	69	28.23	
Total	146.19	127.01	81.45	64.74

TABLE 3—TOTAL VOC EMISSIONS WITH MOVES2010A MOBILE EMISSIONS IN TOLEDO, OHIO (LUCAS AND WOOD COUNTIES)

[tons per day]

Sector	2004 Attainment	2009* Interim	2018* Maintenance	Combined emissions reduction (2004–2018)
Point	7.87	7.21	7.99	
Area	30.55	30.40	32.60	
Onroad	26.86	18.79	8.14	
Nonroad	10.31	7.78	0.57	
Total	75.59	64.18	49.30	26.29

TABLE 4—TOTAL NO_X EMISSIONS WITH MOVES2010A MOBILE EMISSIONS IN TOLEDO, OHIO (LUCAS AND WOOD COUNTIES)

[tons per day]

Sector	2004 Attainment	2009* Interim	2018* Maintenance	Combined emissions reduction (2004–2018)
Point	35.54	27.22	12.90	
Area	1.70	1.91	1.97	
Onroad	55.12	40.68	15.34	
Nonroad	24.82	19.76	9.65	
Total	117.18	89.57	39.86	77.32

TABLE 5—TOTAL VOC EMISSIONS WITH MOVES2010A MOBILE EMISSIONS IN THE OHIO PORTION OF PARKERSBURG-MARIETTA, WEST VIRGINIA-OHIO (WASHINGTON COUNTY, OHIO)

[tons per day]

Sector	2004 Attainment	2009* Interim	2018* Maintenance	Combined emissions reduction (2004–2018)
Point	2.06	2.28	2.70	
Area	2.92	2.81	2.90	
Onroad	4.88	4.15	1.93	
Nonroad	1.17	0.96	0.77	
Total	11.03	10.20	8.30	2.73

TABLE 6—TOTAL NO_X EMISSIONS WITH MOVES2010A MOBILE EMISSIONS IN THE OHIO PORTION OF PARKERSBURG-MARIETTA, WEST VIRGINIA-OHIO (WASHINGTON COUNTY, OHIO)

[tons per day]

Sector	2004 Attainment	2009* Interim	2018* Maintenance	Combined emissions reduction (2004–2018)
Point	71.87	15.07	21.96	
Area	0.22	0.24	0.25	
Onroad	8.30	7.33	3.25	
Nonroad	5.00	4.17	3.59	
Total	85.39	26.81	29.05	56.34

TABLE 7—TOTAL VOC EMISSIONS WITH MOVES2010A MOBILE EMISSIONS IN THE OHIO PORTION OF STEUBENVILLE-WEIRTON, WEST VIRGINIA-OHIO (JEFFERSON COUNTY, OHIO)

[tons per day]

Sector	2004 Attainment	2009* Interim	2018* Maintenance	Combined emissions reduction (2004–2018)
Point	1.15	1.25	1.26	
Area	3.06	2.91	2.91	
Onroad	5.62	4.83	2.14	
Nonroad	0.93	0.87	0.60	
Total	10.76	9.86	6.91	3.85

TABLE 8—TOTAL NO_X EMISSIONS WITH MOVES2010A MOBILE EMISSIONS IN THE OHIO PORTION OF STEUBENVILLE-WEIRTON, WEST VIRGINIA-OHIO (JEFFERSON COUNTY, OHIO)

[tons per day]

Sector	2004 Attainment	2009* Interim	2018* Maintenance	Combined emissions reduction (2004–2018)
Point	154.73	66.40	46.38	
Area	0.18	0.21	0.21	
Onroad	6.69	5.91	2.43	
Nonroad	2.25	1.93	1.58	
Total	163.85	74.45	50.60	133.25

The metropolitan planning organizations for these areas added only a portion of the overall safety margin available for NO_X and VOCs to the budgets for the years indicated with an asterisk in tables 1 through 8. As shown in tables 1 through 8, the submittals demonstrate how the areas' emissions decline from the attainment year to maintain the 1997 8-hour ozone standard.

No additional control measures were needed to maintain the 1997 8-hour ozone standard in the Dayton-Springfield and Toledo areas, and the Ohio portions of the Parkersburg-Marietta and Steubenville-Weirton,

West Virginia-Ohio areas. An appropriate safety margin for NO_X and VOCs was selected by the interagency consultation groups for each area, which consist of representatives from the Federal Highway Administration, OEPA, Ohio Department of Transportation, and EPA. The submitted budgets for these areas are addressed later in this notice.

III. What are the criteria for approval?

EPA requires that revisions to existing SIPs and budgets continue to meet applicable requirements (e.g., reasonable further progress, attainment, or maintenance). The SIP must also meet any applicable SIP requirements under CAA section 110. In addition, adequacy criteria found at 40 CFR 93.118(e)(4) must be satisfied before EPA can find submitted budgets adequate and approve them for conformity purposes.

Areas can revise their budgets and inventories using MOVES without revising their entire SIP if (1) the SIP continues to meet applicable requirements when the previous motor vehicle emissions inventories are replaced with MOVES base year and milestone, attainment, or maintenance year inventories, and (2) the state can document that growth and control strategy assumptions for non-motor vehicle sources continue to be valid and any minor updates do not change the overall conclusions of the SIP. The submittals meet this requirement as described below in the next section.

For more information, see EPA's latest ''Policy Guidance on the Use of MOVES2010 for SIP Development, Transportation Conformity, and Other Purposes'' (April 2012), available online at: *www.epa.gov/otaq/stateresources/transconf/policy.htm#models.*

IV. What is EPA's analysis of the state's submittals?

a. The Revised Inventories

The SIP revision requests for these areas' 1997 ozone maintenance plans seek to revise only the onroad mobile source inventories. OEPA has certified that the control strategies for each area remain the same as in the original SIP, and that no other control strategies are necessary. OEPA finds that growth and control strategy assumptions for non-mobile sources (i.e., area, nonroad, and point) have not changed significantly from the original submittals. This is confirmed by the monitoring data for the areas, which continue to monitor attainment for the 1997 8-hour ozone standard.

OEPA's submittals confirm that the total emissions in the revised SIP (which includes MOVES2010a emissions from mobile sources) as shown in tables 1 through 8 demonstrate that emissions in the areas continue to decline and remain below the attainment levels.

Ohio has submitted MOVES2010a-based budgets for the Dayton-Springfield and Toledo areas, and the Ohio portions of the Parkersburg-Marietta and Steubenville-Weirton, West Virginia-Ohio areas that are clearly identified in the submittals. The budgets are displayed in tables 9 through 12.

TABLE 9—MOVES-BASED BUDGETS FOR THE DAYTON-SPRINGFIELD 1997 OZONE AREA (CLARK, GREENE, MIAMI, AND MONTGOMERY COUNTIES, OHIO)

[tons per day]

Year	2005	2018
VOC	53.37	22.35
NO_X	84.66	32.47

TABLE 10—MOTOR MOVES-BASED BUDGETS FOR THE TOLEDO 1997 OZONE AREA (LUCAS AND WOOD COUNTIES)

[tons per day]

Year	2009	2018
VOC	21.61	9.36
NO_X	46.78	17.64

TABLE 11—MOTOR MOVES-BASED BUDGETS FOR THE OHIO PORTION OF THE PARKERSBURG-MARIETTA 1997 OZONE AREA (WASHINGTON COUNTY, OHIO)

[tons per day]

Year	2009	2018
VOC	4.15	1.93
NO_X	7.33	3.25

TABLE 12—MOVES-BASED BUDGETS FOR THE OHIO PORTION OF THE STEUBENVILLE-WEIRTON 1997 OZONE AREA (JEFFERSON COUNTY, OHIO)

[tons per day]

Year	2009	2018
VOC	4.83	2.14
NO_X	5.91	2.43

b. Approvability of the MOVES2010a-based Budgets

EPA is approving the MOVES2010a-based budgets submitted by Ohio for use in determining transportation conformity in the Dayton-Springfield and Toledo areas, and the Ohio portions of the Parkersburg-Marietta and Steubenville-Weirton, West Virginia-Ohio 1997 ozone maintenance areas. EPA evaluated the MOVES-based budgets submitted using the adequacy criteria found in 40 CFR 93.118(e)(4) and our in-depth evaluation of the state's submittals and SIP requirements.

Before submitting the revised budgets, OEPA followed all necessary conformity procedures. The budgets are clearly identified and precisely quantified in the submittals. The budgets, when considered with other emissions sources, are consistent with continued maintenance of the 1997 ozone standard. The budgets are clearly related to the emissions inventories and control measures in the SIP. The changes from the previous budgets are clearly explained with the change in the model from MOBILE6.2 to MOVES2010a and the revised and updated planning assumptions. The inputs to the model are detailed in the Appendices to the submittals. EPA has reviewed the inputs to the MOVES2010a modeling and participated in the consultation process. The Federal Highway Administration and the Ohio Department of Transportation have taken a lead role in working with the areas' metropolitan planning organizations to provide accurate, timely information and inputs to the MOVES2010a model runs. The state has documented that growth and control strategy assumptions for non-motor vehicle sources (i.e. area, nonroad, and point) continue to be valid and any minor updates do not change the overall conclusions of the SIP.

Ohio's submissions confirm that the SIP continues to demonstrate maintenance of the 1997 ozone standard because the total emissions in the revised SIP (including MOVES2010a emissions for onroad mobile sources) continue to decrease from the attainment year to the final year of the maintenance plans for these areas, as shown in tables 1 through 8. As tables 1 through 12 show, the submitted budgets include an appropriate margin of safety while still maintaining total emissions below the attainment level.

Based on our review of the SIP and the new budgets provided, EPA has determined that the SIP will continue to meet the requirements if the revised motor vehicle emissions inventories are

replaced with MOVES2010a inventories.

c. Applicability of MOBILE6.2-based Budgets

Upon the effective date of the approval of the revised budgets, the state's existing MOBILE6.2-based budgets for these areas will no longer be applicable for transportation conformity purposes.

V. What action is EPA taking?

EPA is approving the submitted onroad mobile source emissions inventories and the submitted budgets for the Dayton-Springfield (submitted February 11, 2013) and Toledo (submitted April 18, 2013), and the Ohio portions of the Parkersburg-Marietta (submitted April 26, 2013) and Steubenville-Weirton (submitted March 15, 2013), West Virginia-Ohio 1997 ozone maintenance plans. We are publishing this action without prior proposal because we view this as a noncontroversial amendment and anticipate no adverse comments. However, in the proposed rules section of this **Federal Register** publication, we are publishing a separate document that will serve as the proposal to approve the state plan if relevant adverse written comments are filed. This rule will be effective December 23, 2013 without further notice unless we receive relevant adverse written comments by November 25, 2013. If we receive such comments, we will withdraw this action before the effective date by publishing a subsequent document that will withdraw the final action. All public comments received will then be addressed in a subsequent final rule based on the proposed action. EPA will not institute a second comment period. Any parties interested in commenting on this action should 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. If we do not receive any comments, this action will be effective December 23, 2013.

VI. 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 December 23, 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, Nitrogen dioxide, Ozone, Volatile organic compounds.

Dated: September 19, 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. Section 52.1885 is amended by adding paragraphs (ff)(17), (18), (19), and (20) to read as follows:

§ 52.1885 Control strategy: Ozone.

* * * * *

(ff) * * *

(17) Approval—On February 11, 2013, Ohio submitted a request to revise the approved MOBILE6.2 onroad mobile source emissions inventories and motor vehicle emission budgets (budgets) in the 1997 8-hour ozone maintenance

plan for the Dayton-Springfield, Ohio area. The inventories and budgets are being revised with inventories and budgets developed with the MOVES2010a model. The 2005 budgets for the Dayton-Springfield, Ohio area are 53.37 tons per day (tpd) VOC and 84.66 tpd NO_X. The 2018 budgets for the Dayton-Springfield, Ohio area are 22.35 tpd VOC and 32.47 tpd NO_X.

(18) Approval—On March 15, 2013, Ohio submitted a request to revise the approved MOBILE6.2 onroad mobile source emissions inventories and motor vehicle emission budgets (budgets) in the 1997 8-hour ozone maintenance plan for the Ohio portion of the Steubenville-Weirton, West Virginia-Ohio area. The inventories and budgets are being revised with inventories and budgets developed with the MOVES2010a model. The 2009 budgets for the Ohio portion of the Steubenville-Weirton, West Virginia-Ohio area are 4.83 tons per day (tpd) VOC and 5.91 tpd NO_X. The 2018 budgets for the Ohio portion of the Steubenville-Weirton, West Virginia-Ohio area are 2.14 tpd VOC and 2.43 tpd NO_X.

(19) Approval—On April 18, 2013, Ohio submitted a request to revise the approved MOBILE6.2 onroad inventories and motor vehicle emission budgets (budgets) in the 1997 8-hour ozone maintenance plan for the Toledo, Ohio area. The inventories and budgets are being revised with budgets developed with the MOVES2010a model. The 2009 budgets for the Toledo, Ohio area are 21.61 tons per day (tpd) VOC and 46.78 tpd NO_X. The 2018 budgets for the Toledo, Ohio area are 9.36 tpd VOC and 17.64 tpd NO_X.

(20) Approval—On April 26, 2013, Ohio submitted a request to revise the approved MOBILE6.2 onroad mobile source emissions inventories and motor vehicle emission budgets (budgets) in the 1997 8-hour ozone maintenance plan for the Ohio portion of the Parkersburg-Marietta, West Virginia-Ohio area. The inventories and budgets are being revised with inventories and budgets developed with the MOVES2010a model. The 2009 budgets for the Ohio portion of the Parkersburg-Marietta, West Virginia-Ohio area are 4.15 tons per day (tpd) VOC and 7.33 tpd NO_X. The 2018 budgets for the Ohio portion of the Parkersburg-Marietta, West Virginia-Ohio area are 1.93 tpd VOC and 3.25 tpd NO_X.

* * * * *

[FR Doc. 2013–24706 Filed 10–23–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R10–OAR–2013–0548, FRL–9901–76–Region 10]

Approval and Promulgation of Implementation Plans; Idaho: State Board Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is taking final action to approve a revision to the Idaho State Implementation Plan (SIP) submitted by the State of Idaho on September 16, 2013, for approval into the Idaho SIP for purposes of meeting the state board requirements of the Clean Air Act (CAA). The EPA is also approving the September 16, 2013, revision as meeting the corresponding state board infrastructure requirements of the CAA for the 1997 ozone National Ambient Air Quality Standards (NAAQS). On August 1, 2013, the EPA proposed to approve the July 16, 2013, draft of this revision submitted for parallel processing. Because the final SIP revision submitted by Idaho to the EPA on September 16, 2013 is consistent with the July 16, 2013, submittal, the Idaho SIP will, upon the effective date of this final approval, contain the required provisions regarding board composition and disclosure of potential conflicts of interest. The EPA is taking final action to approve this revision because it satisfies the requirements of the Clean Air Act (CAA).

DATES: This final rule is effective on November 25, 2013.

ADDRESSES: The EPA has established a docket for this action under Docket Identification No. EPA–R10–OAR–2013–0548. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information may not be publicly available, i.e., Confidential Business Information or other information the disclosure of which is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at EPA Region 10, Office of Air, Waste, and Toxics, AWT–107, 1200 Sixth Avenue, Seattle, Washington 98101. The EPA requests that you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Kristin Hall at (206) 553–6357, *hall.kristin@epa.gov,* or by using the above EPA, Region 10 address.

SUPPLEMENTARY INFORMATION: Throughout this document, wherever ''we,'' ''us,'' or ''our'' are used, it is intended to refer to the EPA.

Table of Contents

I. Background

On July 16, 2013, the State of Idaho submitted a SIP revision for purposes of meeting the state board requirements of CAA section 128 and the corresponding state board infrastructure SIP requirements for the 1997 ozone NAAQS. Specifically, Idaho submitted Executive Order 2013–06, dated June 26, 2013, and Idaho Code §§ 59–701 through 705, Ethics in Government Act, and requested parallel processing on the submittal. Under the parallel processing procedure, a state submits a SIP revision to the EPA before final adoption by the state. The EPA reviews this proposed state action and prepares a notice of proposed rulemaking. The EPA publishes its notice of proposed rulemaking in the **Federal Register** and solicits public comment in approximately the same time frame during which the state is completing its rulemaking action.

After submitting the draft July 16, 2013, revision to the EPA, Idaho provided a public comment period on the draft, and a public hearing. Idaho's comment period began July 12, 2013 and ended August 13, 2013. The public hearing was held on August 13, 2013. No comments or testimony were received. In parallel, on August 1, 2013, the EPA proposed approval of the July 16, 2013, draft SIP revision (78 FR 46549). An explanation of the CAA requirements and implementing regulations that are met by this SIP revision, a detailed explanation of the revision, and the EPA's reasons for approving it were provided in the notice of proposed rulemaking on August 1, 2013, and will not be restated here (78 FR 46549). The public comment period for the EPA's proposed approval ended on September 3, 2013 and we received no comments. Subsequently, Idaho submitted the final SIP revision to the EPA on September 16, 2013. Because the September 16, 2013, final SIP revision is consistent with the July 16,

2013, draft SIP revision and we received no comments on our proposal, we are finalizing our approval in this action.

II. Final Action

The EPA is approving the September 16, 2013, SIP revision from the State of Idaho as meeting the state board requirements of the Clean Air Act.

III. 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, the 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 this action does not involve technical standards; and does not provide the 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 the 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. The EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 23, 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. 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, Ozone, Reporting and recordkeeping requirements.

Dated: September 24, 2013.

Dennis J. McLerran,

Regional Administrator, Region 10.

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 N—Idaho

■ 2. Amend the table in § 52.670(e) entitled ''EPA-Approved Nonregulatory Provisions and Quasi-Regulatory Measures'' by adding the following entries to the end to read as follows:

§ 52.670 Identification of plan.

* * * * *

(e) * * *

EPA-Approved Idaho Nonregulatory Provisions and Quasi-Regulatory Measures

Name of SIP provision	Applicable geographic or nonattainment area	State submittal date	EPA approval date	Comments
*	*	*	*	* * *
Idaho State Board SIP Revision; Executive Order 2013–06; dated June 26, 2013.	Statewide	9/16/2013	10–24–13 [Insert page number where the document begins].	To satisfy the requirements of CAA section 128(a)(1) and CAA section 110(a)(2)(E)(ii) for all criteria pollutants. Executive Order 2013–06 expires June 26, 2017, unless renewed by subsequent Executive Order.
Idaho State Board SIP Revision; Idaho Code §§ 59–701 through 705; Ethics in Government Act.	Statewide	9/16/2013	10–24–13 [Insert page number where the document begins].	To satisfy the requirements of CAA section 128(a)(2) and CAA section 110(a)(2)(E)(ii) for all criteria pollutants.

* * * * *

[FR Doc. 2013–24703 Filed 10–23–13; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 217

[130325286–3653–01]

RIN 0648–BC69

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Replacement of the Elliott Bay Seawall in Seattle, Washington

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS, upon application from the City of Seattle's Department of Transportation (SDOT), is issuing regulations to govern the unintentional taking of marine mammals incidental to construction associated with the replacement of the Elliott Bay Seawall in Seattle, Washington, for the period October 2013 to October 2018. These regulations allow for the issuance of Letters of Authorization (LOAs) for the incidental take of marine mammals during the described activities and specified timeframes, and prescribe the permissible methods of taking and other means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat, as well as requirements pertaining to the monitoring and reporting of any takings.

DATES: Effective October 21, 2013, through October 21, 2018.

ADDRESSES: A copy of SDOT's application and other supplemental documents, may be obtained by visiting the internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications.* Documents cited in this notice may also be viewed, by appointment, during regular business hours, at the Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225.

FOR FURTHER INFORMATION CONTACT: Michelle Magliocca, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined 'negligible impact' in 50 CFR 216.103 as ''an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Except with respect to certain activities not pertinent here, the MMPA defines 'harassment' as: ''any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [''Level A harassment'']; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [''Level B harassment''].''

Summary of Request

On September 17, 2012, NMFS received a complete application from SDOT requesting authorization for the take of nine marine mammal species incidental to replacement of the Elliott Bay Seawall in Seattle, Washington, over the course of 5 years. The purpose of the project is to reduce the risks of coastal storm and seismic damage and to protect public safety, critical infrastructure, and associated economic activities in the area. Additionally, the project would improve the degraded ecosystem functions and processes of the Elliott Bay nearshore around the existing seawall. Noise produced during pile installation and removal activities has the potential to take marine mammals. SDOT requested, and NMFS will authorize through associated Letters of Authorization (LOAs), the take of nine marine mammal species by Level B harassment only: Pacific harbor seal (*Phoca vitulina*), California sea lion (*Zalophus californianus*), Steller sea lion (*Eumetopias jubatus*), harbor porpoise (*Phocoena phocoena*), Dall's porpoise (*Phocoenoides dalli*), southern resident and transient killer whales (*Orcinus orca*), humpback whale (*Megaptera novaengliae*), and gray whale (*Eschrichtius jubatus*). Injury or mortality is unlikely during the project, and take by Level A harassment (including injury) or mortality is not authorized.

Description of the Specified Activity

The proposed rule contains a complete description of SDOT's specified activities that are covered by these final regulations, and for which the associated incidental take of marine mammals will be authorized in the related LOAs (78 FR 22096, April 12, 2013). In summary, SDOT proposes to replace the Elliott Bay Seawall from South Washington Street to Broad Street, along the Seattle waterfront abutting Elliott Bay in King County, Washington. The purpose of the project is to reduce the risks of coastal storm and seismic damages and to protect public safety, critical infrastructure, and associated economic activities along Seattle's central waterfront. Additionally, the project will improve nearshore ecosystem functions and processes in the vicinity of the existing seawall. The project will be constructed in two phases: Phase 1 will extend for about 3,600 linear feet (ft) (1 kilometer (km)) from South Washington Street to Virginia Street, and Phase 2 will extend for about 3,500 linear ft (1 km) from Virginia to Broad Streets.

The new seawall will be constructed landward of the existing seawall face and result in a net setback of the wall from its existing location. The majority of seawall construction will occur behind a temporary steel sheet pile containment wall that will be placed waterward of the existing seawall complex and extend the full length of the construction work area during each construction season. The narrative description of the project contained in the proposed rule has not changed and is not repeated in full here. Tables 1, 2, and 3 below list the methods, durations, and locations of pile driving activities.

TABLE 1—TEMPORARY CONTAINMENT WALL INSTALLATION AND REMOVAL

[Steel sheet piles only]

Construction phase	Pile pairs [1] (10% contingency included)	Maximum duration (days)	Maximum hours per day	Installation/ removal method
Installation				
Phase 1 (Years 1–3)	1,023	60	12	vibratory.
Estimated number of piles that would require proofing [2]	205	[3] 4	10	impact.
Phase II (Years 4–5)	717	40	12	vibratory.
Estimated number of piles that would require proofing [2]	143	[4] 3	10	impact.
Removal				
Phase I	1,023	25	12	vibratory.
Phase II	717	15	12	vibratory.
Total Installed/Removed	1,740			

[1] Steel sheet pile pairs only (48 inches wide), which are two interlocking sheet piles installed as one unit.
[2] Number equals 20 percent of estimated number of piles installed per phase.
[3] Total estimated installation time is 8 hours of actual impact driving.
[4] Total estimated installation time is 12 hours of actual impact driving.

TABLE 2—EXISTING PILE REMOVAL

[Timber and concrete piles only]

Construction phase	Piles [1]	Pile type	Justification for removal	Maximum duration (days)	Maximum hours per day	Removal method
Phase 1 (Excluding Washington Street Boat Landing).	20	Creosote-treated timber [2]	Currently not used; from previous uses along wall.	2	12	vibratory.
Phase I (Washington Street Boat Landing Only).	8	Creosote-treated timber [2]	Support existing pier structure.	1	12	vibratory.
Phase II	49	Creosote-treated timber [2]	Currently not used; from previous uses along wall.	2	12	vibratory.
Phase II	3	Concrete [3]	Currently not used; from previous uses along wall.	1	12	vibratory.
Total Removed	80			6		

[1] Number includes 10 percent contingency.
[2] Assumed to be 14-in diameter.
[3] Assumed to be 18-in diameter.

TABLE 3—PERMANENT PILE INSTALLATION

[16.5-in-diameter (42-cm) precast concrete octagonal piles only]

Construction phase	Piles	Justification for installation	Maximum duration (days)	Maximum hours per day	Installation method
Phase I (Excluding Washington Street Boat Landing).	92	To support sidewalk, viewing areas, and vehicular traffic access.	11	10	impact.
Phase I (Washington Street Boat Landing Only).	15	To support new pier structure	2	10	impact.
Phase II	83	To support sidewalk and viewing areas.	10	10	impact.
Total Installed	190		23		

Dates and Duration of Specified Activity

Seawall construction is expected to occur in two phases: Phase 1, which includes the area of the Central Seawall, and Phase 2, which includes the area of the North Seawall (Table 4). Phase 1 includes three construction segments, and Phase 2 includes two construction segments; each segment represents 1 to 2 years of construction. Construction is scheduled to begin with Phase I work in fall 2013. The three segments of Phase 1 will be constructed over three construction seasons with two summer shutdown periods from Memorial Day weekend through Labor Day weekend to accommodate the primary tourist and business season. Phase 2 construction is expected to begin following completion of Phase 1 and will occur over two 2-

year construction seasons with a summer shutdown period each year. SDOT's request covers the construction period from 2013 to 2018, from the start of Phase 1, Segment 1 to the end of Phase 2, Segment 1. A request for another MMPA authorization would be submitted for any further construction.

TABLE 4—PROPOSED PROJECT CONSTRUCTION SCHEDULE

Phase	Segment	Duration
1 (Central Seawall)	I	Year 1 (Fall 2013–Spring 2014).
	II	Year 2 (Fall 2014–Spring 2015).
	III	Year 3 (Fall 2015–Spring 2016).
2 (North Seawall)	I	Years 4 and 5 (Fall 2016–Spring 2018).
	II	Years 6 and 7 (Fall 2018–Spring 2020).*

***Note:** Years 6 and 7 will not be covered under this LOA request because the MMPA limits incidental take authorizations to 5-year periods.

Specified Geographical Region

The description of the specified geographical region has not changed from the proposed rule and a summarized version is provided here. The Elliott Bay Seawall runs along the downtown Seattle waterfront in King County, Washington. SDOT's project will occur between South Washington Street and Broad Street, which abut Elliott Bay, a 21-square kilometer (km^2) urban embayment in central Puget Sound. This is an important industrial region and home to the Port of Seattle, which ranked as the nation's sixth busiest U.S. seaport in 2010.

The region of the specified activity (or ''area of potential effects,'' as described in SDOT's application) is the area in which elevated sound levels from pile-related activities could result in the take of marine mammals. This area includes the proposed construction zone, Elliott Bay, and a portion of Puget Sound. The area of in-water pile installation and removal activities will be restricted to the length of the seawall and waterward to within 15 ft (4.6 m) of the seawall face, and to depths less than 30 feet (9.1 m). Sounds from vibratory pile installation may propagate up to 2.5 miles (4 km) from the sound source with high enough sound levels to meet NMFS' acoustic threshold criteria for marine mammal harassment (see Sound Thresholds section below).

Brief Background on Sound

The proposed rule contains a section that provides a brief background on the principles of sound that are frequently referred to in this rulemaking (78 FR 22096, pages 22099–22102). This section also includes a discussion of the functional hearing ranges of the different groups of marine mammals (by frequency) as well as a discussion of the two main sound metrics used in NMFS' analysis (sound pressure level and sound energy level), a description of the sound produced by different pile installation/removal methods (pulsed vs. non-pulsed sounds), and how NMFS' acoustic threshold criteria applies to SDOT's project. The information in the proposed rule has not changed and is not repeated here.

Description of Marine Mammals in the Area of the Specified Activity

Nine marine mammal species, including ESA-listed distinct population segments, have the potential to occur in the area of the specified activity (Table 5). All nine species have been observed in Puget Sound at certain periods of the year. The proposed rule contains a discussion of each species' description, status, behavior and ecology, and vocalizations. The Description of Marine Mammals in the Area of the Specified Activity has not changed from what was in the proposed rule (78 FR 22096, pages 22102–22108).

TABLE 5—MARINE MAMMAL SPECIES OR ESA-LISTED DISTINCT POPULATION SEGMENTS THAT COULD OCCUR IN THE PROPOSED PROJECT AREA

Common name	Scientific name	ESA status	MMPA status	Abundance	Population status	Likelihood of occurrence	Seasonality
Pinnipeds							
Pacific harbor seal	*Phoca vitulina*			n/a	unknown	Occasional	Year-round
California sea lion	*Zalophus californianus*			296,750	increasing	Occasional	August–April
Steller sea lion	*Eumetopias jubatus*	Threatened	Depleted	58,334–72,223	increasing	Rare	August–April
Cetaceans							
Harbor porpoise	*Phocoena phocoena*			unknown	unknown	Rare	Year-round
Dall's porpoise	*Phocoenoides dalli*			42,000	unknown	Rare	Winter–Spring
Southern resident killer whale DPS.	*Orcinus orca*	Endangered		84	unknown	Occasional	Year-round
Transient killer whale	*Orcinus orca*			346	unknown	Rare	Year-round
Humpback whale	*Megaptera novaengliae.*	Endangered	Depleted	2,043	increasing	Rare	February–June
Gray whale	*Eschrichtius robustus*			18,000	increasing	Rare	January–September

Potential Effects of the Specified Activity on Marine Mammals

In the Potential Effects of the Specified Activity on Marine Mammals section of the proposed rule, NMFS included a qualitative discussion of the different ways that in-water construction activities associated with the Elliott Bay Seawall project may potentially affect marine mammals (78 FR 22096, pages 22108–22113). Marine mammals may experience direct physiological effects (such as threshold shift), acoustic masking, impaired communications, stress responses, and behavioral disturbance. The information contained in this section of the proposed rule has not changed and is not repeated here.

Mitigation

In order to issue an incidental take authorization under section 101(a)(5)(A) of the MMPA, NMFS must, where applicable, set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for certain subsistence uses (where relevant).

NMFS reviewed the proposed Elliott Bay Seawall project activities and the proposed mitigation measures as described in SDOT's application to determine if they would result in the least practicable adverse effect on marine mammals. The proposed rule included a list of proposed mitigation measures, which were carried over to the regulatory text of this document and are listed below. In addition, boat-based observers may be used to monitor the exclusion zones during poor visibility in areas of open water. Exclusion zones and thresholds located close to the source of pile-related noise will be demarcated with temporary buoys, as feasible.

Based on our evaluation of the proposed measures and other measures considered by NMFS or recommended by the public during the public comment period, NMFS has determined that the required mitigation measures (including the Adaptive Management component, see below) constitute means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance. The proposed rule contains further support for this finding in the Mitigation Conclusion section (78 FR 22096, page 22115). During the public comment period, one mitigation measure not previously considered was recommended, and is included in the Comments and Responses section of this document. In summary, SDOT will implement the following mitigation measures:

- Limited impact pile driving;
- Containment of impact pile driving;
- Additional attenuation measures (e.g., bubble curtains, as necessary);
- Ramp-up of pile driving operations;
- Marine mammal exclusion zones;
- Shutdown and delay procedures; and
- Boat-based mitigation monitoring, as necessary.

Monitoring

In order to issue an incidental take authorization for an activity, section 101(a)(5)(A) of the MMPA states that NMFS must set forth, where applicable, ''requirements pertaining to the monitoring and reporting of such taking.'' The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for incidental take authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present.

NMFS reviewed the proposed monitoring plan as described in SDOT's application. The proposed rule included a list of proposed monitoring measures, which have been carried over in the regulatory text of this document. During the public comment period, a monitoring measure not previously considered was recommended, and is included in the Comments and Responses section of this document. SDOT's required monitoring measures are as follows:

- Shore-based visual monitoring; and
- Acoustic monitoring to confirm estimated noise levels.

Adaptive Management

In accordance with 50 CFR 216.105(c), regulations for the specified activity must be based on the best available information. The use of adaptive management allows NMFS to consider new information from different sources to determine if mitigation or monitoring measures should be modified (including additions or deletions) if new data suggest that such modifications are appropriate. The following are some of the possible sources of applicable data:

- Results from SDOT's monitoring from the previous year;
- Results from general marine mammal and sound research; or
- Any information revealing that marine mammals may have been taken in a manner, extent, or number not authorized by these regulations or subsequent LOAs.

Reporting

In order to issue an incidental take authorization for an activity, section 101(a)(5)(A) of the MMPA states that NMFS must set forth ''requirements pertaining to the monitoring and reporting of such taking.'' Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring. The proposed rule contains the reporting requirements for SDOT, and these requirements remain unchanged (78 FR 22096, pages 22116–22117).

Comments and Responses

On April 12, 2013 (78 FR 22096), NMFS published a proposed rule in response to SDOT's request to take marine mammals incidental to the Elliott Bay Seawall project and solicited comments, information, and suggestions concerning the proposed rule. NMFS received one comment letter from the Marine Mammal Commission (Commission). The comments are summarized and addressed below.

Comment 1: The Commission recommended that NMFS (1) Justify its conclusion that taking up to 19 percent of the southern resident killer whale population each year would be considered ''small numbers,'' (2) provide a basis for that threshold, and (3) work with the Fish and Wildlife Service and the Commission to develop a policy that sets forth the criteria and/or thresholds for determining what constitutes ''small numbers'' and ''negligible impact'' for the purpose of authorizing incidental takes of marine mammals.

Response: Section 101(a)(5)(A) of the MMPA allows for the incidental take of small numbers of marine mammals of a species or population stock. Since there are only 84 animals (the proposed rule mistakenly said 86, but 84 is considered the best available data from the Center for Whale Research in Friday Harbor, Washington; this does not change our small numbers finding) in the Eastern North Pacific Southern Resident stock, 16 animals equates to 19 percent of the stock. We believe the take of 16 animals represents a small number relative to the affected species or stock. This is consistent with small numbers

determinations that NMFS has made in the past for this stock (see, e.g., 78 FR 23910, April 23, 2013).

During vibratory pile driving, sound levels that meet NMFS' current acoustic threshold for Level B harassment may extend 6,276 meters (3.9 miles) from the seawall and into Puget Sound. The Eastern North Pacific Southern Resident stock of killer whales is known to transit this portion of Puget Sound and may be in the area during in-water pile driving activities. Because it is not practicable for SDOT to shut down or delay pile driving activities whenever a large whale is anywhere within almost 4 miles from the seawall, NMFS decided to authorize the take of 16 southern resident killer whales by Level B behavioral harassment. The southern resident killer whales most likely to be in the area are part of the J-pod, which has 26 members. The entire J-pod may transit through the action area more than once in a single year. However, here killer whales tend to stay near the open channel, farther away from the sound source; moreover, the size and sightability of the animals makes shutdown/delay of pile driving operations feasible even out to the edge of the Level B harassment isopleth for vibratory pile driving. So, killer whales are not expected to enter zones where harassment may occur often, but effective mitigation is in place to minimize take to the degree necessary. Although shutting down is possible, because it incurs a cost to activity effectiveness, the applicant requested NMFS authorize the Level B take of 16 animals. Because this percentage of the stock (19 percent) is relatively small and we were able to make a negligible impact determination, NMFS is authorizing that take.

NMFS has required numerous mitigation measures that apply to large whales, including exclusion zones during impact and vibratory pile driving to prevent the take of large whales by Level A harassment and reduce the take of large whales by Level B harassment. While the large whale exclusion zone (3,981 m [2.5 miles]) does not extend to the Level B harassment isopleth for vibratory pile driving, it does cover a majority of the radius and allows for protected species observers to easily monitor the entrance of Elliott Bay from land. The entire J-pod (26 animals) may travel together, but once 16 individuals enter the Level B harassment zone (which will be continuously monitored by visual observers) during vibratory pile driving activities over a 1-year period, SDOT will shutdown or delay pile driving operations for the remainder of the year if a southern resident killer whale approaches the Level B harassment zone (i.e., only 16 southern resident killer whales may be exposed to sound levels equating to Level B harassment each year).

The rationale for our decisions on each authorization requested, including our negligible impact and small numbers determinations, is provided in the required **Federal Register** notice and underlying administrative records. NMFS strives to ensure that decisions across our program are systematic, consistent, and transparent. As we have done in the past, NMFS will continue to collaborate with the Commission and U.S. Fish and Wildlife Service on a variety of MMPA issues, including small numbers and negligible impact, to strengthen our collective understanding of how activities affect marine mammal species and stocks.

Comment 2: The Commission recommended that NMFS require the applicant to implement ramp-up procedures (1) after 15 minutes, if pile driving or removal is delayed or shutdown due to the presence of a pinniped or small cetacean within or approaching the exclusion zone, or (2) after 30 minutes, if pile driving or removal is delayed or shutdown due to the presence of a medium- or large-sized cetacean.

Response: NMFS has added a mitigation measure requiring the applicant to implement ramp-up procedures (1) after 15 minutes, if pile driving or removal is delayed or shutdown due to the presence of a small cetacean within or approaching the exclusion zone, or (2) after 30 minutes, if pile driving or removal is delayed or shutdown to the presence of a larger cetacean. However, due to the observed behavior of pinnipeds near the seawall, NMFS is not requiring the applicant to implement ramp-up procedures after 15 minutes following delay or shutdown because of the presence of a pinniped within or approaching the exclusion zone. Previous activities around Elliott Bay have shown that many pinnipeds do not respond to pile driving activities and will remain in the surrounding area despite construction noise. Further delays during pile driving may prove impracticable for the construction schedule and NMFS does not believe ramp-up procedures would necessarily provide better protection for pinnipeds in this case.

Comment 3: The Commission recommended that NMFS require the applicant to monitor for marine mammals not only before and during pile driving and removal activities, but for 30 minutes after all pile driving and removal activities have ended.

Response: NMFS has added 30 minutes of monitoring following pile driving and removal activities.

Changes to the Proposed Rule

As described in the Comments and Responses section above and summarized here, NMFS added two measures to the proposed rule (78 FR 22096, April 12, 2013) as a result of the public comment period:

- Implementation of ramp-up procedures (1) after 15 minutes, if pile driving or removal is delayed or shutdown due to the presence of a small cetacean within or approaching the exclusion zone, or (2) after 30 minutes, if pile driving or removal is delayed or shutdown to the presence of a larger cetacean; and
- Visual monitoring for 30 minutes following pile driving and removal activities.

Otherwise, there are no changes to mitigation, monitoring, or the results of NMFS' analysis.

Estimated Take by Incidental Harassment

Except with respect to certain activities not pertinent here, the MMPA defines 'harassment' as: ''any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].'' Take by Level B harassment only is anticipated as a result of the installation and removal of piles via impact and vibratory methods. No take by injury, serious injury, or death is anticipated.

In the Estimated Take by Incidental Harassment section of the proposed rule, NMFS related the potential effects to marine mammals from pile driving activities to the MMPA statutory definitions of Level A and Level B harassment and provided a quantitative estimate of the number of takes of marine mammals predicted from the Elliott Bay Seawall project. The information in the proposed rule has not changed and is summarized in Table 6 below.

TABLE 6—ESTIMATED MARINE MAMMAL TAKES FOR PROPOSED AUTHORIZATION

Species	Estimated maximum number of takes per Day	Average number of pile driving days per year	Estimated number of takes per year	Percentage of stock that may be taken
Harbor seal	20	35 (vibratory + impact)	700	4.8
California sea lion	5	35 (vibratory + impact)	175	< 0.1
Steller sea lion	5	35 (vibratory + impact)	175	0.3
Harbor porpoise	9	29 (vibratory)	315	2.9
Dall's porpoise	2	29 (vibratory)	70	0.2
Killer whale (Southern resident)			16	19
Killer whale (transient)			24	6.9
Gray whale			8	< 0.1
Humpback whale			4	0.2

Effects on Marine Mammal Habitat

NMFS' proposed rule includes a section that addresses the effects of the Elliott Bay Seawall project on marine mammal habitat (78 FR 22096, pages 22113–22114). The analysis preliminarily concluded that pile driving activities would have minimal effects on marine mammal habitat. No changes have been made to the discussion contained in this section of the proposed rule and NMFS has concluded there would be minimal effects on marine mammal habitat.

Negligible Impact and Small Numbers Analyses and Determinations

As a preliminary matter, we typically include our negligible impact and small numbers analyses and determinations under the same section heading of our **Federal Register** notices. Despite co-locating these terms, we acknowledge that negligible impact and small numbers are distinct standards under the MMPA and treat them as such. The analyses presented below do not conflate the two standards; instead, each standard has been considered independently and we have applied the relevant factors to inform our negligible impact and small numbers determinations.

NMFS has defined 'negligible impact' in 50 CFR 216.103 as ''an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.'' In making a negligible impact determination, NMFS considers a variety of factors, including but not limited to: (1) The number of anticipated mortalities; (2) the number and nature of anticipated injuries; (3) the number, nature, intensity, and duration of Level B harassment; and (4) the context in which the takes occur.

In this section of the proposed rule, NMFS discussed the potential for exposure, severity of the anticipated effects on marine mammals, including species-specific discussions, to preliminarily determine that the Elliott Bay Seawall project would have a negligible impact on marine mammal species and stocks present in Elliott Bay. No changes have been made to the discussion contained in the proposed rule (78 FR 22096, pages 22118–22119). In summary, NMFS believes that the estimated take represents a worst-case scenario: any potential for injury is discountable due to the small size of the zones in which injury may occur and the required mitigation zones, any behavioral changes for marine mammals would be short-term, and any adverse effects to marine mammal habitat or prey species would be temporary and unlikely to have a significant impact on marine mammals. Furthermore, the estimated numbers of marine mammals taken is relatively small for each species or stock (19 percent for southern resident killer whales and less than 7 percent for all other species or stocks). Based on the analysis summarized here and detailed in the proposed rule (and other related documents) of the likely effects of the specified activity on marine mammals and their habitat, and considering the implementation of mitigation and monitoring measures, NMFS finds that the total taking from pile driving activities in Elliott Bay are not expected to impact annual rates of recruitment or survival. Therefore, the total taking will have a negligible impact on the affected species or stocks.

Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses

In this section of the proposed rule, NMFS discussed historical subsistence harvest of marine mammals in the region of the specified activity and there are no changes to that information (78 FR 22096, pages 22119–22120). NMFS determined that the total taking of affected species or stocks from the Elliott Bay Seawall project will not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes. We have further determined the issuance of these regulations and subsequent LOAs will not affect the availability of affected species or stocks for taking for any subsistence uses specified under section 101(a)(5)(A)(i)(I). The activities will be limited to Elliott Bay, Washington, and there are no cooperative agreements in force under the MMPA or the Whaling Convention Act of 1949 with any Pacific Northwest treaty Indian tribes for subsistence uses of marine mammals in this area. Moreover, the taking of marine mammals incidental to the Elliott Bay Seawall project will not affect subsistence uses of marine mammals by Alaska Natives.

Endangered Species Act (ESA)

Steller sea lions are listed as threatened under the ESA as two distinct population segments (DPSs). The eastern DPS was proposed for delisting under the ESA on April 18, 2012 (77 FR 23209), based on observed annual rates of increase. NMFS has not yet made a final decision. The Eastern North Pacific Southern resident stock of killer whales and humpback whales are listed as endangered under the ESA. The applicant initiated section 7 consultation with NMFS Northwest Regional Office, and NMFS Office of Protected Resources, Permits and Conservation Division also consulted on its proposed incidental take regulations. NMFS Northwest Regional Office issued a Biological Opinion that concluded the Elliott Bay Seawall project and NMFS' authorization of incidental take are not likely to jeopardize the continued existence of threatened or endangered species under NMFS' jurisdiction or destroy or adversely modify any designated critical habitat.

National Environmental Policy Act (NEPA)

The Army Corps of Engineers prepared an Environmental Assessment (EA) for the regulatory permit (section 404/10) required for Elliott Bay Seawall project. NMFS prepared an independent NEPA analysis, which included an EA and Finding of No Significant Impact (FONSI). These documents are available on our Web site at *http://www.nmfs.noaa.gov/pr/permits/incidental.htm# applications.* NMFS determined that issuance of the rulemaking and subsequent LOAs will not significantly impact the quality of the human environment and that preparation of an Environmental Impact Statement is not required.

Classification

The Office of Management and Budget (OMB) has determined that this rule is not significant for purposes of Executive Order 12866.

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA), the Chief Counsel for Regulation of the Department of Commerce certified at the proposed rule stage to the Chief Counsel for Advocacy of the Small Business Administration (SBA) that this rule will not have a significant economic impact on a substantial number of small entities (78 FR 22096, April 12, 2013). No comments were received on the certification. As a result, a regulatory flexibility analysis is not required and none has been prepared.

Notwithstanding any other provision of law, no person is 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 (PRA) unless that collection of information displays a currently valid OMB control number. This rule contains collection-of-information requirements subject to the provisions of the PRA. These requirements have been approved by OMB under control number 0648–0151 and include applications for regulations and subsequent LOAs, and monitoring reports. Send comments regarding any aspect of this data collection, including suggestions for reducing the burden, to NMFS and the OMB Desk Officer (see **ADDRESSES**).

The Assistant Administrator for Fisheries has determined that there is good cause under the Administrative Procedure Act (5 U.S.C. 553(d)(3)) to waive the 30-day delay in effective date of the measures contained in the final rule. Clearance of this rule was delayed due to unforeseen changes in the description of the applicant's action for section 7 purposes under the Endangered Species Act. Delaying the effectiveness of this rule would be contrary to the public interest, because it would delay construction activities. SDOT needs to begin pile driving activities as soon as possible in order to maintain their multi-year construction schedule, especially considering that construction is shutdown each summer to accommodate the primary tourist and business season. Therefore, these measures will become effective upon publication.

List of Subjects in 50 CFR Part 217

Imports, Marine mammals, Reporting and recordkeeping requirements.

Dated: October 18, 2013.

Alan Risenhoover,

Director, Office of Sustainable Fisheries, performing the functions and duties of the Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For reasons set forth in the preamble, 50 CFR Part 217 will be amended as follows:

PART 217—REGULATIONS GOVERNING THE TAKE OF MARINE MAMMALS INCIDENTAL TO SPECIFIED ACTIVITIES

■ 1. The authority citation for part 217 continues to read as follows:

Authority: 16 U.S.C. 1361 et seq.

■ 2. Subpart W is added to part 217 to read as follows:

Subpart W—Taking and Importing Marine Mammals; Elliott Bay Seawall Project

Sec.

Subpart W—Taking of Marine Mammals Incidental to the Elliott Bay Seawall Project

§ 217.220 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to the Elliott Bay Seawall project and those persons it authorizes to conduct activities on its behalf for the taking of marine mammals that occurs in the area outlined in paragraph (b) of this section incidental to seawall construction associated with the Elliott Bay Seawall project.

(b) The taking of marine mammals by the City of Seattle's Department of Transportation (SDOT) may be authorized in a Letter of Authorization (LOA) only if it occurs in Elliott Bay, Washington.

§ 217.221 Effective dates.

This subpart is effective October 21, 2013, through October 21, 2018.

§ 217.222 Permissible methods of taking.

(a) Under LOAs issued pursuant to §§ 216.106 and 217.226 of this chapter, the Holder of the LOA (hereinafter ''SDOT'' and ''City'') may incidentally, but not intentionally, take marine mammals within the area described in § 217.220(b), provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate LOA.

(b) The incidental take of marine mammals under the activities identified in § 217.220(a) is limited to the indicated number of Level B harassment takes of the following species/stocks:

(1) Harbor seal (*Phoca vitulina*)—3,500 (an average of 700 animals per year)

(2) California sea lion (*Zalophus californianus*)—875 (an average of 175 animals per year)

(3) Steller sea lion (*Eumetopias jubatus*)—875 (an average of 175 animals per year)

(4) Harbor porpoise (*Phocoena phocoena*)—1,575 (an average of 315 animals per year)

(5) Dall's porpoise (*Phocoenoides dalli*)—350 (an average of 70 animals per year)

(6) Killer whale (*Orcinus orca*), Eastern North Pacific Southern resident—80 (a maximum of 16 animals per year)

(7) Killer whale (*Orcinus orca*), Eastern North Pacific transient—120 (an average of 24 animals per year)

(8) Gray whale (*Eschrichtius robustus*)—40 (an average of 8 animals per year)

(9) Humpback whale (*Megaptera novaeangliae*)—20 (an average of 4 animals per year)

§ 217.223 Prohibitions.

Notwithstanding takings contemplated in § 217.222(b) and authorized by an LOA issued under § 216.106 and § 217.226 of this chapter, no person in connection with the activities described in § 217.220 may:

(a) Take any marine mammal not specified in § 217.222(b);

(b) Take any marine mammal specified in § 217.222(b) other than by

incidental, unintentional Level B harassment;

(c) Take a marine mammal specified in § 217.222(b) if NMFS determines such taking results in more than a negligible impact on the species or stock of such marine mammal; or

(d) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or an LOA issued under §§ 216.106 and 217.226 of this chapter.

§ 217.224 Mitigation.

(a) When conducting the activities identified in § 217.220(a), the mitigation measures contained in the LOA issued under §§ 216.106 and 217.226 of this chapter must be implemented. These mitigation measures include:

(1) *Limited Impact Pile Driving.* (i) All sheet piles shall be installed using a vibratory driver, unless impact driving is required to install piles that encounter consolidated sediments or for proofing load bearing sections.

(ii) Any impact driver used in conjunction with vibratory pile driving shall employ sound attenuation devices, where applicable.

(iii) Any attenuation devices that become available for vibratory pile driving shall be considered for additional mitigation.

(2) *Containment of Impact Pile Driving.* The majority of permanent concrete piles shall be driven behind the temporary containment wall.

(3) *Additional Attenuation Measures.* In the event that underwater sound monitoring shows that noise generation from pile installation exceeds the levels originally expected, SDOT shall immediately notify NMFS so it can evaluate the need for implementation of additional attenuation devices or other mitigation measures.

(4) *Ramp-up.* (i) Ramp-up shall be used at the beginning of each day's in-water pile-related activities or if pile driving has ceased for more than 1 hour.

(ii) If a vibratory hammer is used, contractors shall initiate sound from vibratory hammers for 15 seconds at reduced energy followed by a 1-minute waiting period. This procedure shall be repeated two additional times before full energy may be achieved.

(iii) If a non-diesel impact hammer is used, contractors shall provide an initial set of strikes from the impact hammer at reduced energy, followed by a 1-minute waiting period, then two subsequent sets.

(iv) Ramp-up shall be implemented if pile driving or removal is delayed or shutdown for >15 minutes due to the presence of a delphinid or pinniped within or approaching the exclusion zone, or if pile driving or removal is delayed or shutdown for >30 minutes due to the presence of a large whale.

(5) *Marine Mammal Exclusion Zones.* (i) The following exclusion zones shall be established to prevent the Level A harassment of all marine mammals and to reduce the Level B harassment of large whales:

(A) An exclusion zone for delphinids or pinnipeds shall be established with a radius of 200 feet (61 meters) waterward of each steel sheet pile during impact pile driving;

(B) An exclusion zone for delphinids and pinnipeds shall be established with a radius of 50 feet (15 meters) waterward of each concrete pile during impact pile driving;

(C) An exclusion zone for large whales shall be established with a radius of 3,280 feet (1,000 meters) waterward of each steel sheet or concrete pile during impact pile driving;

(D) An exclusion zone for large whales shall be established with a radius of 2.5 miles (3,981 meters) waterward of each steel sheet pile during vibratory pile driving.

(ii) Temporary buoys shall be used, as feasible, to mark the distance to each exclusion zone during in-water pile-related activities.

(iii) The exclusion zones shall be used to provide a physical threshold for the shutdown of in-water pile-related activities.

(iv) At the start of in-water pile related activities each day, a minimum of one qualified protected species observer shall be staged on land (or an adjacent pier) near the location of in-water pile-related activities to document and report any marine mammal that approaches or enters a relevant exclusion zone throughout the day.

(v) Additional land-based observers shall be deployed if needed to ensure the construction area is adequately monitored.

(vi) Observers shall monitor for the presence of marine mammals 30 minutes before, during, and for 30 minutes after any in-water pile-related activities.

(vii) In-water pile-related activities shall not occur if any part of the exclusion zones are obscured by fog or poor lighting conditions.

(6) *Shutdown and Delay Procedures.* (i) If a marine mammal is seen approaching or entering a relevant exclusion zone (as specified in § 217.224(5)(i)), observers will immediately notify the construction personnel operating the pile-related equipment to shut down pile-related activities.

(ii) If a marine mammal(s) is present within the applicable exclusion zone prior to in-water pile-related activities, pile driving/removal shall be delayed until the animal(s) has left the exclusion zone or until 15 minutes (pinniped or small cetacean) or 30 minutes (large cetacean) have elapsed without observing the animal.

(7) Additional mitigation measures as contained in an LOA issued under §§ 216.106 and 217.226 of this chapter.

§ 217.225 Requirements for monitoring and reporting.

(a) When conducting the activities identified in § 217.220(a), the monitoring and reporting measures contained in the LOA issued under §§ 216.106 and 217.226 of this chapter must be implemented. These measures include:

(1) *Visual Monitoring.* (i) In addition to the mitigation monitoring described in § 217.224 of this chapter, at least two protected species observers shall be positioned on land near the 2.5 mile exclusion zone to monitor for marine mammals during vibratory pile-related activities or any other construction activities that may pose a threat to marine mammals.

(A) Observers shall use the naked eye, wide-angle binoculars with reticles, and any other necessary equipment to scan the Level B harassment isopleth.

(B) Observers shall work, on average, eight hours per day and shall be relieved by a fresh observer if pile driving lasts longer than usual (i.e., 12–16 hours).

(C) The number of observers shall be increased and/or positions changed to ensure full visibility of the Level B harassment isopleth.

(D) Land-based visual monitoring shall be conducted during all days of vibratory pile driving.

(E) All land-based monitoring shall begin at least 30 minutes prior to the start of in-water pile-related activities, and continue during active construction and for 30 minutes following the end of in-water pile-related activities.

(ii) At a minimum, observers shall record the following information:

(A) Date of observation period, monitoring type (land-based/boat-based), observer name and location, climate and weather conditions, and tidal conditions;

(B) Environmental conditions that could confound marine mammal detections and when/where they occurred;

(C) For each marine mammal sighting, the time of initial sighting and duration to the end of the sighting period;

(D) Observed species, number, group composition, distance to pile-related activities, and behavior of animals throughout the sighting;

(E) Discrete behavioral reactions, if apparent;

(F) Initial and final sighting locations marked on a grid map; and

(G) Pile-related activities taking place during each sighting and if/why a shutdown was or was not triggered.

(2) *Acoustic Monitoring.* (i) Acoustic monitoring shall be conducted during in-water pile-related activities to identify or confirm noise levels for pile-related activities during in-water construction.

(A) Acoustic data shall be collected using hydrophones connected to a drifting boat to reduce the effect of flow noise and an airborne microphone. There shall be a direct line of acoustic transmission through the water column between the pile and the hydrophones in all cases, without any interposing structures, including other piles.

(B) A stationary two-channel hydrophone recording system shall be deployed to record a representative sample (subset of piles) during the monitoring period. Acoustic data shall be collected 1 m below the water surface and 1 m above the sea floor.

(ii) Background noise recordings (in the absence of pile driving) shall be collected to provide a baseline background noise profile. The results and conclusions of the study shall be summarized and presented to NMFS with recommendations for any modifications to the monitoring plan or exclusion zones.

(iii) All sensors, signal conditioning equipment, and sampling equipment shall be calibrated at the start of the monitoring period and rechecked at the start of each day.

(iv) Prior to monitoring, water depth measurements shall be taken to ensure that hydrophones do not drag on the bottom during tidal changes.

(v) Underwater and airborne acoustic monitoring shall occur for the first five steel sheet pile and the first five concrete piles during the duration of pile driving. If a representative sample has not been achieved after the five piles have been monitored (e.g., if there is high variability of sound levels between pilings), acoustic monitoring shall continue until a representative acoustic sample has been collected.

(vi) Acoustic data shall be downloaded periodically (i.e., daily or on another appropriate schedule) and analyzed following the first year of construction. Post-analysis of underwater sound level signals shall include the following:

(A) RMS values (average, standard deviation/error, minimum, and maximum) for each recorded pile. The 10-second RMS averaged values will be used for determining the source value and extent of the 120 dB underwater isopleth;

(B) Frequency spectra for each functional hearing group; and

(C) Standardized underwater source levels to a reference distance of 10 m (33 ft).

(vii) Post-analysis of airborne noise would be presented in an unweighted format and include:

(A) The unweighted RMS values (average, minimum, and maximum) for each recorded pile. The average values would be used for determining the extent of the airborne isopleths relative to species-specific criteria;

(B) Frequency spectra from 10 Hz to 20 kHz for representative pile-related activity; and

(C) Standardized airborne source levels to a reference distance of approximately 15 m (50 ft).

(viii) In the event noise levels surpass estimated levels for extended periods of time, construction shall be stopped and NMFS shall be contacted to discuss the cause and potential solutions.

(3) *General Reporting.* (i) All marine mammal sightings shall be documented by observers on a NMFS-approved sighting form.

(ii) Marine mammal reporting shall include all data described previously under Proposed Monitoring, including observation dates, times, and conditions, and any correlations of observed marine mammal behavior with activity type and received levels of sound, to the extent possible.

(iii) A report with the results of all acoustic monitoring shall include the following:

(A) Size and type of piles;

(B) A detailed description of any sound attenuation device used, including design specifications;

(C) The impact hammer energy rating used to drive the piles, make and model of the hammer(s), and description of the vibratory hammer;

(D) A description of the sound monitoring equipment;

(E) The distance between hydrophones and depth of water and the hydrophone locations;

(F) The depth of the hydrophones;

(G) The distance from the pile to the water's edge;

(H) The depth of water in which the pile was driven;

(I) The depth into the substrate that the pile was driven;

(J) The physical characteristics of the bottom substrate into which the pile were driven;

(K) The total number of strikes to drive each pile;

(L) The results of the hydroacoustic monitoring, including the frequency spectrum, ranges and means for the peak and RMS sound pressure levels, and an estimation of the distance at which RMS values reach the relevant marine mammal thresholds and background sound levels.

(M) Vibratory driving results would include the maximum and overall average RMS calculated from 30-s RMS values during the drive of the pile; and

(N) A description of any observable marine mammal behavior in the immediate area and, if possible, correlation to underwater sound levels occurring at that time.

(iv) An annual report on monitoring and mitigation shall be submitted to NMFS, Office of Protected Resources, and NMFS, Northwest Regional Office. The annual reports shall summarize include data collected for each marine mammal species observed in the project area, including descriptions of marine mammal behavior, overall numbers of individuals observed, frequency of observation, any behavioral changes and the context of the changes relative to activities would also be included in the annual reports, date and time of marine mammal detections, weather conditions, species identification, approximate distance from the source, and activity at the construction site when a marine mammal is sighted.

(v) A draft comprehensive report on monitoring and mitigation shall be submitted to NMFS, Office of Protected Resources, and NMFS, Northwest Regional Office, 180 days prior to the expiration of the regulations. The comprehensive technical report shall provide full documentation of methods, results, and interpretation of all monitoring during the first 4.5 years of the regulations. A revised final comprehensive technical report, including all monitoring results during the entire period of the regulations, shall be due 90 days after the end of the period of effectiveness of the regulations.

(4) *Reporting Injured or Dead Marine Mammals.* (i) In the unanticipated event that the specified activity clearly causes the take of a marine mammal in a manner prohibited by an LOA (if issued), such as an injury (Level A harassment), serious injury, or mortality, the Holder shall immediately cease the specified activities and report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, and the Northwest Regional Stranding Coordinator. The report must include the following information:

(A) Time and date of the incident;

(B) Description of the incident;

(C) Environmental conditions (e.g., wind speed and direction, Beaufort sea state, cloud cover, and visibility);

(D) Description of all marine mammal observations in the 24 hours preceding the incident;

(E) Species identification or description of the animal(s) involved;

(F) Fate of the animal(s); and

(G) Photographs or video footage of the animal(s).

(ii) Activities shall not resume until NMFS is able to review the circumstances of the prohibited take. NMFS will work with the Holder to determine what measures are necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. The Holder may not resume their activities until notified by NMFS.

(iii) In the event that the Holder discovers an injured or dead marine mammal, and the lead protected species observer determines that the cause of the injury or death is unknown and the death is relatively recent (e.g., in less than a moderate state of decomposition), the Holder shall immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, and the Northwest Regional Stranding Coordinator. The report must include the same information identified in § 217.225(a)(3) of this chapter. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with the Holder to determine whether additional mitigation measures or modifications to the activities are appropriate.

(iv) In the event that the Holder discovers an injured or dead marine mammals, and the lead protected species observer determines that the injury or death is not associated with or related to the activities authorized in the LOA (e.g., previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), the Holder shall report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, and the Northwest Regional Stranding Coordinator, within 24 hours of the discovery. The Holder shall provide photographs or video footage or other documentation of the stranding animal sighting to NMFS.

§ 217.226 Letters of Authorization.

(a) To incidentally take marine mammals pursuant to these regulations, the applicant must apply for and obtain an LOA.

(b) An LOA, unless suspended or revoked, may be effective for a period of time not to exceed the expiration date of these regulations.

(c) If an LOA expires prior to the expiration date of these regulations, the Holder must apply for and obtain a renewal of the LOA.

(d) In the event of projected changes to the activity or to mitigation and monitoring measures required by an LOA, the Holder must apply for and obtain a modification of the LOA as described in § 217.227.

(e) The LOA shall set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact (i.e., mitigation) on the species and its habitat; and

(3) Requirements for monitoring and reporting.

(f) Issuance of the LOA shall be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under these regulations.

(g) Notice of issuance or denial of an LOA shall be published in the **Federal Register** within 30 days of a determination.

§ 217.227 Renewals and Modifications of Letters of Authorization.

(a) An LOA issued under §§ 216.106 and 217.226 of this chapter for the activity identified in § 217.220(a) of this chapter shall be renewed or modified upon request by the applicant, provided that:

(1) The proposed specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for these regulations (excluding changes made pursuant to the adaptive management provision in § 217.227(c)(1)), and

(2) NMFS determines that the mitigation, monitoring, and reporting measures required by the previous LOA under these regulations were implemented.

(b) For LOA modification or renewal requests by the applicant that include changes to the activity or the mitigation, monitoring, or reporting (excluding changes made pursuant to the adaptive management provision in § 217.227(c)(1)) that do not change the findings made for the regulations or that result in no more than a minor change in the total estimated number of takes (or distribution by species or years), NMFS may publish a notice of proposed LOA in the **Federal Register**, including the associated analysis illustrating the change, and solicit public comments before issuing the LOA.

(c) An LOA issued under §§ 216.106 and 217.226 of this chapter for the activity identified in § 217.220(a) may be modified by NMFS under the following circumstances:

(1) Adaptive Management—NMFS may modify (including augment) the existing mitigation, monitoring, or reporting measures (after consulting with the Holder regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring set forth in the preamble for these regulations.

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in an LOA include the following:

(A) Results from the Holder's monitoring from the previous year(s);

(B) Results from other marine mammal and/or sound research or studies;

(C) Any information that reveals marine mammals may have been taken in a manner, extent, or number not authorized by these regulations or subsequent LOAs.

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS will publish a notice of proposed LOA in the **Federal Register** and solicit public comments.

(2) Emergencies—If NMFS determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in § 217.222(b), an LOA may be modified without prior notice or opportunity for public comment. Notice of such action will be published in the **Federal Register** within 30 days of the action.

[FR Doc. 2013–25089 Filed 10–21–13; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 120918468–3111–02]

RIN 0648–XC926

Fisheries of the Exclusive Economic Zone Off Alaska; Pollock in Statistical Area 620 in the Gulf of Alaska

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; modification of a closure.

SUMMARY: NMFS is opening directed fishing for pollock in Statistical Area 620 of the Gulf of Alaska (GOA). This action is necessary to fully use the 2013 total allowable catch of pollock in Statistical Area 620 of the GOA.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), October 22, 2013, through 1200 hrs, A.l.t., November 1, 2013. Comments must be received at the following address no later than 4:30 p.m., A.l.t., November 5, 2013.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2012–0180 by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2012-0180*, click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Address written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Mail comments to P.O. Box 21668, Juneau, AK 99802–1668.
- *Fax:* Address written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Fax comments to 907–586–7557.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

NMFS closed directed fishing for pollock in Statistical Area 620 of the GOA under § 679.20(d)(1)(iii) on October 7, 2013 (78 FR 61990, October 10, 2013).

As of October 17, 2013, NMFS has determined that approximately 3,553 metric tons of pollock remain in the directed fishing allowance for pollock in Statistical Area 620 of the GOA. Therefore, in accordance with § 679.25(a)(1)(i), (a)(2)(i)(C), and (a)(2)(iii)(D), and to fully utilize the 2013 TAC of pollock in Statistical Area 620 of the GOA, NMFS is terminating the previous closure and is reopening directed fishing pollock in Statistical Area 620 of the GOA, effective 1200 hrs, A.l.t., October 22, 2013.

The Administrator, Alaska Region (Regional Administrator) considered the following factors in reaching this decision: (1) The current catch of pollock in Statistical Area 620 of the GOA and, (2) the harvest capacity and stated intent on future harvesting patterns of vessels in participating in this fishery.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the opening of the directed pollock fishery in Statistical Area 620 of the GOA. Immediate notification is necessary to allow for the orderly conduct and efficient operation of this fishery, to allow the industry to plan for the fishing season, and to avoid potential disruption to the fishing fleet and processors. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of October 17, 2013.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

Without this inseason adjustment, NMFS could not allow pollock fishery in Statistical Area 620 of the GOA to be harvested in an expedient manner and in accordance with the regulatory schedule. Under § 679.25(c)(2), interested persons are invited to submit written comments on this action to the above address until November 5, 2013.

This action is required by § 679.25 and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: October 21, 2013.

Kelly Denit,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2013–25012 Filed 10–21–13; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 130408348–3835–02]

RIN 0648–XC906

Fisheries of the Northeastern United States; Atlantic Herring Fishery; Sub-Annual Catch Limit (ACL) Harvested for Management Area 3

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; closure.

SUMMARY: Effective 1200 hr, October 24, 2013, federally permitted vessels may not fish for, catch, possess, transfer, or land more than 2,000 lb (907.2 kg) of Atlantic herring (herring) per trip or calendar day in or from Management Area 3 until January 1, 2014, when the 2014 allocation for Area 3 becomes available. This action is required because NMFS projects that 92 percent of the catch limit for that area was caught as of October 18, 2013. Vessels that have entered port before 1200 hr, October 24, 2013, may possess, offload, and sell more than 2,000 lb of herring from Area 3, from that trip. Also effective 1200 hr, October 24, 2013, federally permitted dealers may not receive more than 2,000 lb (907.2 kg) of herring caught within Management Area 3 per trip or calendar day, unless it is from a trip landed by a vessel that entered port before 1200 hr, October 24, 2013.

DATES: Effective 1200 hr local time, October 24, 2013, through December 31, 2013.

FOR FURTHER INFORMATION CONTACT: Christopher Biegel, Fishery Management Specialist, (978) 281–9112.

SUPPLEMENTARY INFORMATION: The reader can find regulations governing the herring fishery at 50 CFR part 648. The regulations require annual specification of the overfishing limit, acceptable biological catch, annual catch limit (ACL), optimum yield, domestic harvest and processing, U.S. at-sea processing, border transfer, and sub-ACLs for each management area. The 2013 Domestic Annual Harvest is 107,800 metric tons (mt); the 2013 sub-ACL allocated to Area 3 is 42,000 mt, and 0 mt of the sub-ACL is set aside for research (October 4, 2013, 78 FR 61828).

The regulations at § 648.201 require that when the Administrator, Northeast Region, NMFS (Regional Administrator) projects herring catch will reach 92 percent of the sub-ACL allocated in any of the four management areas designated in the Atlantic Herring Fishery Management Plan (FMP), NMFS must prohibit herring vessel permit holders from fishing for, catching, possessing, transferring, or landing more than 2,000 lb (907.2 kg) of herring per trip or calendar day in or from the specified management area for the remainder of the fishing year. The Regional Administrator monitors the herring fishery catch in each of the management areas based upon dealer reports, state data, and other available information. NMFS must publish notification in the **Federal Register** of the date that the catch is projected to reach 92 percent of the management area sub-ACL and reduced trip limit period. Vessels that have entered port before the reduced trip limit period may offload and sell more than 2,000 lb (907.2 kg) of herring from Area 3, from that trip. During the reduced trip limit period, vessels may transit Area 3 with more than 2,000 lb (907.2 kg) of herring on board only under the conditions specified below.

The Regional Administrator has determined, based on dealer reports and other available information, that the herring fleet will have caught 92 percent of the total herring sub-ACL allocated to Area 3 by October 18, 2013. In order to give the herring fleet sufficient time to comply with this reduced trip limit, effective 1200 hr local time, October 24, 2013, federally permitted vessels may not fish for, catch, possess, transfer, or land more than 2,000 lb (907.2 kg) of herring per trip or calendar day, in or from Area 3 through December 31, 2013, except that vessels that have entered port before 1200 hr on October 24, 2013, may offload and sell more than 2,000 lb (907.2 kg) of herring from Area 3, from that trip after the closure. During the reduced trip limit period, a vessel may transit through Area 3 with more than 2,000 lb (907.2 kg) of herring on board, provided the vessel did not catch the herring in Area 3 and stows all fishing gear aboard, making it unavailable for immediate use as required by § 648.23(b). Effective 1200 hr on October 24, 2013, NMFS also advises federally permitted dealers that they may not receive herring from federally permitted herring vessels that harvest more than 2,000 lb (907.2 kg) of herring from Area 3 through 2400 hr local time, December 31, 2013, unless it is from a trip landed by a vessel that entered port before 1200 hr on October 24, 2013.

Classification

This action is required by 50 CFR part 648 and is exempt from review under Executive Order 12866.

NMFS finds good cause pursuant to 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comment because it would be contrary to the public interest and impracticable. This action reduces the trip limit to 2,000 lb (907.2 kg) for Management Area 3 until January 1, 2014, under current regulations. The regulations at § 648.201(a) require such action to ensure that herring vessels do not exceed the 2013 sub-ACL allocated to Area 3. The herring fishery opened for the 2013 fishing year on January 1, 2013. Data indicating the herring fleet will have landed at least 92 percent of the 2013 sub-ACL allocated to Area 3 have only recently become available. If implementation of this reduced trip limit period is delayed to solicit prior public comment, the sub-ACL for Area 3 for this fishing year may be exceeded, thereby undermining the conservation objectives of the FMP. If sub-ACLs are exceeded, the excess must also be deducted from a future sub-ACL and would reduce future fishing opportunities. NMFS further finds, pursuant to 5 U.S.C. 553(d)(3), good cause to waive the 30-day delayed effectiveness period for the reasons stated above.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: October 21, 2013.

Kelly Denit,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2013–24999 Filed 10–21–13; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 78, No. 206
Thursday, October 24, 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 AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Parts 2 and 3

[Docket No. APHIS–2012–0107]

Petition To Amend Animal Welfare Act Regulations To Prohibit Public Contact With Big Cats, Bears, and Nonhuman Primates

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice; reopening of comment period.

SUMMARY: We are reopening the comment period for a petition requesting amendments to the Animal Welfare Act regulations and standards, including to prohibit licensees from allowing individuals, with certain exceptions, from coming into direct or physical contact with big cats, bears, or nonhuman primates of any age, to define the term ''sufficient distance,'' and to prohibit the public handling of young or immature big cats, bears, and nonhuman primates and the separation of such animals from their dams before the species-typical age of weaning absent medical necessity. This action will allow interested persons additional time to prepare and submit comments.

DATES: The comment period for the notice published on August 5, 2013 (78 FR 47215) is reopened. We will consider all comments that we receive on or before November 18, 2013.

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

- Federal eRulemaking Portal: Go to *http://www.regulations.gov/#!documentDetail;D=APHIS–2012–0107–0001.*
- Postal Mail/Commercial Delivery: Send your comment to Docket No. APHIS–2012–0107, 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–2012–0107* 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: Dr. Barbara Kohn, DVM, Senior Staff Officer, USDA, APHIS, Animal Care, 4700 River Road Unit 84, Riverdale, MD 20737–1234; (301) 851–3751.

SUPPLEMENTARY INFORMATION: On August 5, 2013, we published in the **Federal Register** (78 FR 47215–47217, Docket No. APHIS–2012–0107) a notice [1] making available for comment a petition requesting amendments to the Animal Welfare Act regulations and standards, including to prohibit licensees from allowing individuals, with certain exceptions, from coming into direct or physical contact with big cats, bears, or nonhuman primates of any age, to define the term ''sufficient distance,'' and to prohibit the public handling of young or immature big cats, bears, and nonhuman primates and the separation of such animals from their dams before the species-typical age of weaning absent medical necessity.

Comments on the petition were required to be received on or before October 4, 2013. We are reopening the comment period on Docket No. APHIS–2012–0107 for an additional 45 days. This action will allow interested persons additional time to prepare and submit comments. We will also consider all comments received between October 5, 2013 (the day after the close of the original comment period) and the date of this notice.

Authority: 7 U.S.C. 2131–2159; 7 CFR 2.22, 2.80, and 371.7.

[1] To view the notice, petition, and the comments we have received, go to *http://www.regulations.gov/#!docketDetail;D=APHIS–2012–0107.*

Done in Washington, DC, this 18th day of October 2013.

Kevin Shea,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2013–25004 Filed 10–23–13; 8:45 am]

BILLING CODE 3410–34–P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 72

[NRC–2012–0020]

RIN 3150–AJ10

List of Approved Spent Fuel Storage Casks: Transnuclear, Inc. Standardized NUHOMS® Cask System

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is amending its spent fuel storage regulations by revising the Transnuclear, Inc. Standardized NUHOMS® Cask System listing within the ''List of Approved Spent Fuel Storage Casks'' to include Amendment No. 11 to Certificate of Compliance (CoC) No. 1004. Amendment No. 11 revises authorized contents to include: adding a new transfer cask, the OS197L, for use with the 32PT and 61BT dry shielded canisters; and converting the CoC No. 1004 Technical Specifications (TS) to the format in NUREG–1745, ''Standard Format and Content for Technical Specifications for 10 CFR [Title 10 of the *Code of Federal Regulations*] Part 72 Cask Certificates of Compliance.'' In addition, the amendment makes several other changes as described under the ''Discussion of Changes'' heading in the **SUPPLEMENTARY INFORMATION** section of the direct final rule published in the Rules and Regulations section of this issue of the **Federal Register**.

DATES: Submit comments by November 25, 2013. Comments received after this date will be considered if it is practical to do so, but the NRC staff is able to ensure consideration only for comments received on or before this date.

ADDRESSES: You may submit comments by any one of the following methods (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–2012–0020. Address questions about NRC dockets to Carol Gallagher, telephone: 301–287–3422, email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

• *Email comments to: Rulemaking.Comments@nrc.gov.* If you do not receive an automatic email reply confirming receipt, then contact us at 301–415–1677.

• *Fax comments to:* Secretary, U.S. Nuclear Regulatory Commission at 301–415–1101.

• *Mail comments to:* Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Rulemakings and Adjudications Staff.

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: Gregory R. Trussell, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–6445, email: *Gregory.Trussell@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Accessing Information and Submitting Comments

A. Accessing Information

Please refer to Docket ID NRC–2012–0020 when contacting the NRC about the availability of information for this proposed rule. You may access information related to this proposed rulemaking, 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–2012–0020.

• *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly-available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''ADAMS Public Documents'' and then select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced in this document (if that document is available in ADAMS) is provided the first time that a document is referenced. The proposed CoC and the preliminary Safety Evaluation Report are available in ADAMS under Package Accession No. ML120130550. The ADAMS Accession No. for the Transnuclear, Inc. Standardized NUHOMS® Cask System Amendment No. 11 dated April 10, 2007, is ML071240088.

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

B. Submitting Comments

Please include Docket ID NRC–2012–0020 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, and 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. Procedural Background

This rule is limited to the changes contained in Amendment No. 11 to CoC No. 1004 and does not include other aspects of the Transnuclear, Inc. Standardized NUHOMS® Cask System design. Because the NRC considers this action noncontroversial and routine, the NRC is publishing this proposed rule concurrently with a direct final rule in the Rules and Regulations section of this issue of the **Federal Register.** Adequate protection of public health and safety continues to be ensured. The direct final rule will become effective on January 7, 2014. However, if the NRC receives significant adverse comments on this proposed rule by November 25, 2013, then the NRC will publish a document that withdraws the direct final rule. If the direct final rule is withdrawn, the NRC will address the comments received in response to these proposed revisions in a subsequent final rule. Absent significant modifications to the proposed revisions requiring republication, the NRC will not initiate a second comment period on this action in the event the direct final rule is withdrawn.

A significant adverse comment is a comment where the commenter explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or would be ineffective or unacceptable without a change. A comment is adverse and significant if:

(1) The comment opposes the rule and provides a reason sufficient to require a substantive response in a notice-and-comment process. For example, a substantive response is required when:

(a) The comment causes the NRC staff to reevaluate (or reconsider) its position or conduct additional analysis;

(b) The comment raises an issue serious enough to warrant a substantive response to clarify or complete the record; or

(c) The comment raises a relevant issue that was not previously addressed or considered by the NRC staff.

(2) The comment proposes a change or an addition to the rule, and it is apparent that the rule would be ineffective or unacceptable without incorporation of the change or addition.

(3) The comment causes the NRC staff to make a change (other than editorial) to the rule, CoC, or TSs.

For additional procedural information and the regulatory analysis and the availability of the environmental assessment and finding of no significant impact, see the direct final rule published in the Rules and Regulations section of this issue of the **Federal Register**.

III. Plain Writing

The Plain Writing Act of 2010 (Pub. L. 111–274) requires Federal agencies to write documents in a clear, concise, and well-organized manner. The NRC has written this document to be consistent with the Plain Writing Act as well as the Presidential Memorandum, ''Plain Language in Government Writing,'' published June 10, 1998 (63 FR 31883). The NRC requests comment on the proposed rule with respect to the clarity and effectiveness of the language used.

List of Subjects in 10 CFR part 72

Administrative practice and procedure, Criminal penalties, Manpower training programs, Nuclear materials, Occupational safety and health, Penalties, Radiation protection,

Reporting and recordkeeping requirements, Security measures, Spent fuel, Whistleblowing.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; the Nuclear Waste Policy Act of 1982, as amended; and 5 U.S.C. 553; the NRC is proposing to adopt the following amendments to 10 CFR part 72.

PART 72—LICENSING REQUIREMENTS FOR THE INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL, HIGH-LEVEL RADIOACTIVE WASTE, AND REACTOR-RELATED GREATER THAN CLASS C WASTE

■ 1. The authority citation for part 72 continues to read as follows:

Authority: Atomic Energy Act secs. 51, 53, 57, 62, 63, 65, 69, 81, 161, 182, 183, 184, 186, 187, 189, 223, 234, 274 (42 U.S.C. 2071, 2073, 2077, 2092, 2093, 2095, 2099, 2111, 2201, 2232, 2233, 2234, 2236, 2237, 2238, 2273, 2282, 2021); Energy Reorganization Act sec. 201, 202, 206, 211 (42 U.S.C. 5841, 5842, 5846, 5851); National Environmental Policy Act sec. 102 (42 U.S.C. 4332); Nuclear Waste Policy Act secs. 131, 132, 133, 135, 137, 141, 148 (42 U.S.C. 10151, 10152, 10153, 10155, 10157, 10161, 10168); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); Energy Policy Act of 2005, Pub. L. No. 109–58, 119 Stat. 549 (2005).

Section 72.44(g) also issued under secs. Nuclear Waste Policy Act 142(b) and 148(c), (d) (42 U.S.C. 10162(b), 10168(c), (d)). Section 72.46 also issued under Atomic Energy Act sec. 189 (42 U.S.C. 2239); Nuclear Waste Policy Act sec. 134 (42 U.S.C. 10154). Section 72.96(d) also issued under Nuclear Waste Policy Act sec. 145(g) (42 U.S.C. 10165(g)). Subpart J also issued under Nuclear Waste Policy Act secs. 117(a), 141(h) (42 U.S.C. 10137(a), 10161(h)). Subpart K is also issued under sec. 218(a) (42 U.S.C. 10198).

■ 2. In § 72.214, Certificate of Compliance 1004 is revised to read as follows:

§ 72.214 List of approved spent fuel storage casks.

* * * * *

Certificate Number: 1004.

Initial Certificate Effective Date: January 23, 1995.

Amendment Number 1 Effective Date: April 27, 2000.

Amendment Number 2 Effective Date: September 5, 2000.

Amendment Number 3 Effective Date: September 12, 2001.

Amendment Number 4 Effective Date: February 12, 2002.

Amendment Number 5 Effective Date: January 7, 2004.

Amendment Number 6 Effective Date: December 22, 2003.

Amendment Number 7 Effective Date: March 2, 2004.

Amendment Number 8 Effective Date: December 5, 2005.

Amendment Number 9 Effective Date: April 17, 2007.

Amendment Number 10 Effective Date: August 24, 2009.

Amendment Number 11 Effective Date: January 7, 2014.

SAR Submitted by: Transnuclear, Inc.

SAR Title: Final Safety Analysis Report for the Standardized NUHOMS® Horizontal Modular Storage System for Irradiated Nuclear Fuel.

Docket Number: 72–1004.

Certificate Expiration Date: January 23, 2015.

Model Number: NUHOMS®–24P, –24PHB, –24PTH, –32PT, –32PTH1, –52B, –61BT, and –61BTH.

* * * * *

Dated at Rockville, Maryland, this 2nd day of October, 2013.

For the Nuclear Regulatory Commission.

Mark A. Satorius,

Executive Director for Operations.

[FR Doc. 2013–24905 Filed 10–23–13; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF ENERGY

10 CFR Part 430

[Docket Number EERE–2013–BT–TP–0004]

RIN 1904–AC94

Energy Conservation Program for Consumer Products: Test Procedures for Direct Heating Equipment and Pool Heaters

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) proposes to revise its test procedures for direct heating equipment and pool heaters established under the Energy Policy and Conservation Act. This rulemaking will fulfill DOE's statutory obligation to review its test procedures for covered products at least once every seven years. For direct heating equipment, the proposed amendments would add provisions for testing vented home heating equipment that utilizes condensing technology, and to incorporate by reference six industry test standards to replace the outdated test standards which are referred to in the existing DOE test procedure. These industry standards reflect the current practice in test set-up and test conditions for testing direct heating equipment. For pool heaters, the proposed amendments would incorporate by reference ANSI/Air-conditioning, Heating, and Refrigeration Institute (AHRI) Standard 1160–2009, ''Performance Rating of Heat Pump Pool Heaters,'' and ANSI/American Society of Heating, Refrigerating, and Air-conditioning Engineers (ASHRAE) Standard 146–2011, ''Method of Testing and Rating Pool Heaters,'' to establish a test method for electric pool heaters (including heat pump pool heaters). The proposed amendments would also clarify the test procedure's applicability to oil-fired pool heaters. DOE is also announcing a public meeting to discuss and receive comments on issues presented in this test procedure rulemaking.

DATES: *Comments:* DOE will accept comments, data, and information regarding this notice of proposed rulemaking (NOPR) before and after the public meeting, but no later than January 7, 2014. See section V, ''Public Participation,'' for details.

Meeting: DOE will hold a public meeting on Wednesday, December 4, 2013, from 9:00 a.m. to 4:00 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.

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. For more information, refer to section V, ''Public Participation,'' near the end of this notice of proposed rulemaking.

Interested persons are encouraged to submit comments using the Federal eRulemaking Portal at *www.regulations.gov.* Alternatively, interested persons may submit comments, identified by docket number EERE–2013–BT–TP–0004 and/or RIN 1904–AC94, by any of the following methods:

• *Email: DirectHeatingPoolHeaters2013TP0004@ee.doe.gov.* Include EERE–2013–BT–TP–0004 and/or RIN 1904–AC94 in the subject line of the message. Submit electronic comments in WordPerfect, Microsoft Word, PDF, or ASCII file format, and avoid the use of special characters or any form of encryption.

• *Postal 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 compact disc (CD), in which case it is not necessary to include printed copies.

• *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza SW., 6th Floor, Washington, DC 20024. Telephone: (202) 586–2945. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

For detailed instructions on submitting comments and additional information on the rulemaking process, see section V of this document (Public Participation).

Docket: A link to the docket Web page can be found at: *http://www.regulations.gov/#!docketDetail;D=EERE-2013-BT-TP-0004*. This Web page contains a link to the docket for this notice of proposed rulemaking on the *www.regulations.gov* site. The *www.regulations.gov* Web page contains simple instructions on how to access all documents, including **Federal Register** notices, public meeting attendee lists and transcripts, comments, and other supporting documents/materials in the docket. See section V, ''Public Participation,'' for information on how to submit comments through *www.regulations.gov.*

For 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.*

FOR FURTHER INFORMATION CONTACT: Mr. John Cymbalsky, 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. Telephone: (202) 287–1692. Email: *John.Cymbalsky@ee.doe.gov.*

Mr. Eric Stas, U.S. Department of Energy, Office of the General Counsel, GC–71, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–9507. Email: *Eric.Stas@hq.doe.gov.*

For information on how to submit or review public comments, contact Ms. Brenda Edwards, 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. Telephone: (202) 586–2945. Email: *Brenda.Edwards@ee.doe.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Authority and Background

Title III, Part B [1] of the Energy Policy and Conservation Act of 1975 (''EPCA'' or ''the Act''), Public Law 94–163 (*codified at* 42 U.S.C. 6291–6309) sets forth a variety of provisions designed to improve energy efficiency and establishes the Energy Conservation Program for Consumer Products Other Than Automobiles.[2] These include two covered products that are the subject of today's notice: direct heating equipment and pool heaters. (42 U.S.C. 6292(a)(9) and (11))

Under EPCA, this program generally consists of four parts: (1) Testing; (2) labeling; (3) establishing 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 making representations about the efficiency of those products, including representations to DOE of compliance with applicable energy conservation standards adopted pursuant to EPCA. (42 U.S.C. 6293(c); 42 U.S.C. 6295(s)) Similarly, DOE must use these test requirements 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 that 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)) Finally, in any rulemaking to amend a test procedure, DOE must determine the extent to which the proposed test procedure would alter the product's measured energy efficiency. (42 U.S.C. 6293(e)(1)) If DOE determines that the amended test procedure would alter the measured energy efficiency of a covered product, DOE must amend the applicable energy conservation standard accordingly. (42 U.S.C. 6293(e)(2))

Further, the Energy Independence and Security Act of 2007 (EISA 2007) amended EPCA to require that at least once every 7 years, DOE must review test procedures for all covered products and either amend test procedures (if the Secretary determines that amended test procedures would more accurately or fully comply with the requirements of 42 U.S.C. 6293(b)(3)) or publish notice in the **Federal Register** of any determination not to amend a test procedure. (42 U.S.C. 6293(b)(1)(A)) Under this requirement, DOE must review the test procedures for the

[1] For editorial reasons, upon codification in the U.S. Code, Part B was redesignated as Part A.

[2] 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).

various types of direct heating equipment and pool heaters not later than December 19, 2014 (*i.e.,* 7 years after the enactment of EISA 2007). The final rule resulting from this rulemaking will satisfy this requirement.

There are separate test procedures for the two types of direct heating equipment (*i.e.,* vented home heating equipment and unvented home heating equipment), specifically 10 CFR 430.23(g) and 10 CFR part 430, subpart B, appendix G for unvented home heating equipment (''unvented heater''); and 10 CFR 430.23(o) and 10 CFR part 430, subpart B, appendix O for vented home heating equipment (''vented heater''). The vented heater test procedures include provisions for determining energy efficiency (annual fuel utilization efficiency (AFUE)), as well as annual energy consumption. Unvented heaters are broken into two groups: those used as the primary heating source for the home and those not used for this purpose. There are no provisions for calculating either the energy efficiency or annual energy consumption of unvented heaters that are not used as the primary heating source for the home. For unvented heaters that are used as the primary heating source for the home, there is a calculation of annual energy consumption based on a single assignment of active mode hours; there is no provision for calculation of energy efficiency.

DOE's test procedures for pool heaters are found at 10 CFR 430.23(p) and 10 CFR part 430, subpart B, appendix P. The test procedures include provisions for determining two energy efficiency descriptors (*i.e.,* thermal efficiency and integrated thermal efficiency), as well as annual energy consumption.

In addition to the test procedure review provision discussed above, EISA 2007 also amended EPCA to require DOE to amend its test procedures for all covered products to include measurement of standby mode and off mode energy consumption. (42 U.S.C. 6295(gg)(2)(A)) DOE recently completed a rulemaking to consider amending its test procedures for direct heating equipment and pool heaters to include provisions for measuring the standby mode and off mode energy consumption of those products. DOE published a notice of proposed rulemaking (NOPR) in the **Federal Register** on August 30, 2010, which proposes amendments to the DOE test procedures for heating products to account for the standby mode and off mode energy consumption of these products, as required under EPCA.[3] 75 FR 52892. DOE published a supplemental notice of proposed rulemaking (SNOPR) in the **Federal Register** on September 13, 2011, which calls for the use of the second edition of International Electrotechnical Commission (IEC) Standard 62301, ''Household Electrical Appliances—Measurement of standby power,'' in lieu of the first edition and also provides guidance on rounding and sampling. 76 FR 56347. DOE published a final rule adopting standby mode and off mode provisions for heating products in the **Federal Register** on December 17, 2012. 77 FR 74559. That rulemaking was limited to test procedure amendments to address standby mode and off mode requirements; it did not address several other potential issues in DOE's existing test procedures for the covered products. DOE addresses these non-standby/off mode issues separately in today's NOPR.

On October 12, 2011, DOE published in the **Federal Register** a request for information (RFI) that identified and requested comment on a number of issues regarding the test procedures for direct heating equipment and pool heaters. 76 FR 63211.[4] DOE accepted comments and information on the October 2011 RFI until November 28, 2011 and considered all feedback received when developing the proposals contained in this notice of proposed rulemaking. Each of the issues raised in the October 2011 RFI are discussed in detail in section III, along with comments received on the issues and DOE's responses. In addition, several topics not addressed in the October 2011 RFI, but brought up by interested parties in their comments, are discussed in section III of this NOPR.

II. Summary of the Notice of Proposed Rulemaking

In this NOPR, DOE proposes to modify the current test procedures for direct heating equipment and pool heaters. For direct heating equipment, the proposed amendments would add provisions for testing vented home heating equipment that utilizes condensing technology, and update all references in the existing test procedure. For pool heaters, the proposed amendments would incorporate by reference ANSI/Air-conditioning, Heating, and Refrigeration Institute (AHRI) Standard 1160–2009, ''Performance Rating of Heat Pump Pool Heaters,'' and ANSI/American Society of Heating, Refrigerating, and Air-conditioning Engineers (ASHRAE) Standard 146–2011, ''Method of Testing and Rating Pool Heaters,'' to establish testing procedures for electric (including heat pump) pool heaters. The proposed amendments for pool heaters would also clarify the test procedure's applicability to gas-fired and oil-fired pool heaters. The following paragraphs summarize these proposed changes for both product types.

For direct heating equipment, DOE proposes in today's NOPR to incorporate by reference the following six current industry standards to replace the outdated standards referenced in the existing DOE test procedure: (1) ANSI/ASHRAE 103–2007, ''Method of Test for Annual Fuel Utilization Efficiency of Residential Central Furnaces and Boilers''; (2) ANSI Z21.86–2008, ''Gas-Fired Space Heating Appliances''; (3) ASTM D2156–09, ''Standard Test Method for Smoke Density in Flue Gases from Burning Distillate Fuels''; (4) UL 729–2003, ''Standard for Safety for Oil-Fired Floor Furnaces''; (5) UL 730–2003, ''Standard for Safety for Oil-Fired Wall Furnaces''; and (6) UL 896–1993, ''Standard for Safety for Oil-Burning Stoves.'' DOE also proposes to establish a test method to determine the annual fuel utilization efficiency of vented home heating products that use condensing technology. Lastly, DOE proposes to reduce the test burden for floor furnaces by allowing a default assigned value for jacket loss in lieu of testing.

For pool heaters, DOE clarifies in today's NOPR the applicability of the test method for oil-fired products. DOE also proposes to adopt new provisions for testing electric pool heaters, including heat pump pool heaters. DOE proposes that electric pool heaters be tested in accordance with ASHRAE Standard 146–2011, and that heat pump pool heaters be tested using the test method prescribed in AHRI 1160–2009 with an accompanying conversion of the Coefficient of Performance metric used in that standard to thermal efficiency as required by EPCA. (42 U.S.C. 6291(22)(E))

In any rulemaking to amend a test procedure, DOE must determine to what extent, if any, the proposed test procedure would alter the measured energy efficiency of any covered product as determined under the

[3] For more information, please visit DOE's Web site at: *http://www1.eere.energy.gov/buildings/appliance_standards/residential/waterheaters.html.*

[4] The October 2011 RFI also requested information on the need to amend the test procedures for residential water heaters. However, because the American Energy Manufacturing and Technical Corrections Act amended EPCA to require that DOE develop a uniform efficiency descriptor for residential and commercial water heaters (42 U.S.C. 6295(e)(5)), DOE is addressing test procedure updates for that product in a separate rulemaking.

existing test procedure. (42 U.S.C. 6293(e)(1)) If DOE determines that the amended test procedure would alter the measured efficiency of a covered product, DOE must amend the applicable energy conservation standard accordingly. (42 U.S.C. 6293(e)(2)) For both direct heating equipment and pool heaters, DOE has tentatively determined that the proposed test procedure amendments would have a *de minimis* impact on the products' measured efficiency. A full discussion of the rationale for this tentative conclusion is provided in section III.C below.

III. Discussion

In response to the October 2011 RFI, DOE received eight written comments related to two covered products, direct heating equipment (DHE) and pool heaters, from the following interested parties: American Council for an Energy-Efficient Economy (ACEEE), American Gas Association (AGA), Air-Conditioning, Heating, and Refrigeration Institute (AHRI), Empire Stove, Hearth & Home Technologies (HHT), National Propane Gas Association (NPGA), Hearth, Patio & Barbecue Association (HPBA), and Miles Industries Ltd. (Miles Industries). These interested parties commented on a range of issues, including those DOE identified in the October 2011 RFI, as well as several other pertinent issues. The issues on which DOE received comment, DOE's responses to those comments, and the proposed changes to the test procedures for direct heating equipment and pool heaters resulting from those comments are discussed in the subsections immediately below.

DOE notes that, because of a recent decision of the U.S. Court of Appeals for the District of Columbia (DC Circuit), DOE is not addressing the comments relating to the application of the test procedure to vented hearth heaters. On February 8, 2013, the DC Circuit issued a decision vacating the DOE definition of ''Vented hearth heater'' at 10 CFR 430.2, and remanded the issue to DOE to interpret the challenged provisions consistent with the court's opinion. *Hearth, Patio & Barbecue Association* v. *U.S. Department of Energy,* 706 F.3d 499, 509 (D.C. Cir. 2013). DOE will address the comments received on the October 2011 RFI regarding the application of the DHE test procedures to vented hearth heaters in a separate rulemaking devoted to those products.

A. Test Procedure for Direct Heating Equipment

In response to the October 2011 RFI, DOE received comments from eight interested parties, all of which addressed the DOE test procedures for direct heating equipment. (AGA, AHRI, Miles Industries, HPBA, Empire Stove, HHT, ACEEE, and NPGA) Generally, the comments were supportive of DOE's efforts to update, improve, and clarify its test procedures for DHE. The comments focused on two key issues: (1) Clarification of the test procedures as applied to vented hearth heating products; and (2) the expansion of the test procedures to accommodate DHE with condensing technology. Regarding the first issue, as noted above, DOE will address comments related to vented hearth heaters in a later rulemaking. Regarding the second issue, as part of DOE's overall review of test procedures, these proposed DHE amendments include a complete updating of references to industry standards used in the DHE test procedures and modifications to the test procedures for jacket loss measurement.

1. Vented Home Heating Equipment Employing Condensing Technology

DOE received comments on the October 2011 RFI that encouraged DOE to develop and adopt new test procedure provisions to properly measure the efficiency of gas-fired direct heating equipment designed to operate using condensing technology. (Empire, No. 7 at p. 1; AHRI, No. 12 at p. 3; HPBA, No. 26 at p. 1)

Condensing technology is a design strategy that increases the efficiency of a heating appliance by extracting additional thermal energy from the flue gases, thereby reducing the flue gas temperatures and air flow such that the water vapor created in the combustion process becomes a liquid condensate. Normally, in non-condensing systems, the water vapor created in the combustion process remains as a vapor and is removed through the flue system along with the other products of combustion. However, in condensing systems, the condensing of the water vapor is a result of the reduction in the overall flue energy loss of the flue gas (*i.e.,* an energy efficiency improvement). The test procedures for furnaces and boilers have provisions to account for the increased efficiency of models that utilize condensing technology. However, no such provisions are included in the existing test procedures for vented heaters.

Today's proposed amendments would account for the increased efficiency of vented direct heating equipment utilizing condensing technology. The proposed amendments are similar to those found in DOE's furnace and boiler test procedures (10 CFR Part 430, Subpart B, Appendix N), with differences and clarifications appropriate for the vented direct heating equipment product type. More specifically, the additional provisions proposed for vented heaters are essentially the same as those contained in the latest version of the ANSI/ASHRAE Standard 103–2007, ''Method of Testing for Annual Fuel Utilization Efficiency of Residential Central Furnaces and Boilers.'' DOE is proposing that ANSI/ASHRAE 103–2007 be incorporated by reference into these test procedures by this NOPR for purposes of certain other AFUE test provisions. However, because of the numerous clarifications and modifications needed to apply the condensing technology provisions of the industry standard for furnaces and boilers to vented heaters, DOE proposes incorporating the condensing procedures as stand-alone amendments to DOE's vented heater test procedure, rather than incorporating by reference select provisions of ANSI/ASHRAE Standard 103–2007.

Basically, the proposed amendments for vented heaters with condensing technology would utilize a condensate collection methodology that requires a separate test to be run to quantify directly the extent of the efficiency credit appropriate for a given vented heater's particular design of condensing technology. This methodology requires direct collection of liquid condensate. For vented heaters employing condensing technology that are not designed to collect and dispose of liquid condensate, the amendments clarify that such means must be provided during testing. The duration of the condensate collection test time would be 30 minutes for steady-state testing and 1–2 hours for cyclic testing.

DOE is interested in receiving comment on the adequacy of the proposed provisions for determining the efficiency improvement associated with vented heaters that utilize condensing technology. DOE is also interested in any further clarifications or modifications that might be necessary. This is identified as issue 1 in section V.E, ''Issues on Which DOE Seeks Comment.''

2. Updating of Industry Reference Standards

The October 2011 RFI sought comment on other relevant issues that would affect the test procedures for direct heating equipment (both vented type and unvented type). 76 FR 63211, 63215 (Oct. 12, 2011). Interested parties were encouraged to provide comments on any aspect of the test procedure, including updates to referenced

standards, as part of this comprehensive 7-year-review rulemaking.

AGA commented that the existing test procedure for direct heating equipment cites installation requirements from ANSI standards for vented wall furnaces and vented floor furnaces but does not reference the applicable ANSI standard for vented room heaters. (AGA, No. 13 at pp. 2–3) Accordingly, AGA recommended that DOE revise section 2.1.3 of the DOE test procedure in order to provide complete installation requirements for testing of vented room heaters based on the applicable ANSI design certification standards, which AGA identified as ANSI Z21.11, ''Gas Fired Room Heaters.''

In addition to addressing this referencing concern pointed out by AGA, DOE is taking this opportunity to fully review all the referenced standards in the DHE test procedure as part of this 7-year review process. The following is a list of the shorthand titles and full titles of all the referenced standards currently used and proposed for use in the DHE test procedure.

Standards Currently Used in Existing Test Procedures for DHE:

''ANSI Standard Z21.11.1–1974'' means the American National Standard for Gas-Fired Room Heaters.

''ANSI Standard Z21.44–1973'' means the American National Standard for Gas-Fired Gravity and Fan Type Direct Vent Wall Furnaces.

''ANSI Standard Z21.48–1976'' means the American National Standard for Gas-Fired Gravity and Fan Type Floor Furnaces.

''ANSI Standard Z21.49–1975'' means the American National Standard for Gas-Fired Gravity and Fan Type Vented Wall Furnaces.

''ANSI Standard Z91.1–1972'' means the American National Standard for Performance Standards for Oil-Powered Central Furnaces.

''ANSI Standard Z11.182–1965 (R1971) (ASTM D 2156–65 (1970))'' means the standard published by the American Society of Testing and Materials titled, ''Standard Test Method for Smoke Density in Flue Gases from Burning Distillate Fuels.''

''UL 729–1976'' means the Underwriters Laboratories standard for Oil-Fired Floor Furnaces.

''UL 730–1974'' means the Underwriters Laboratories standard for Oil-Fired Wall Furnaces.

''UL 896–1973'' means the Underwriters Laboratories standard for Oil-Burning Stoves.

Standards Proposed for Use in the Test Procedures for DHE:

''ANSI/ASHRAE 103–2007'' means the test standard published by the American Society of Heating, Refrigerating, and Air-Conditioning Engineers titled, ''Method of Test for Annual Fuel Utilization Efficiency of Residential Central Furnaces and Boilers.''

''ANSI Z21.86–2008'' means the standard published by the American National Standards Institute titled, ''Vented Gas-Fired Space Heating Appliances.''

''ASTM D2156–09'' means the standard published by the American Society of Testing and Materials titled, ''Standard Test Method for Smoke Density in Flue Gases from Burning Distillate Fuels.''

''UL 729–2003'' means the test standard published by the Underwriters Laboratory, Inc. titled, ''Standard for Safety for Oil-Fired Floor Furnaces.''

''UL 730–2003'' means the test standard published by the Underwriters Laboratory, Inc. titled, ''Standard for Safety for Oil-Fired Wall Furnaces.''

''UL 896–1993'' means the test standard published by the Underwriters Laboratory, Inc. titled, ''Standard for Safety for Oil-Burning Stoves.''

As a result of the full review, DOE proposes a number of changes. In most cases, the proposed changes reflect the updating of the specific references to the most current version. This updating allows for new users of the test procedures to execute the DOE test procedures without depending on outdated standards which may be difficult to obtain. In some cases, the updated reference bundles several of the current references under a new title. This is the case where the current separate ANSI standards for wall furnaces, floor furnaces, and room heaters have been combined into a single standard for these three types of vented heaters. This new standard is titled, ''Vented Gas-Fired Space Heating Appliances'' referred to as ''ANSI Z21.86–2008'' in the proposed amendments. ANSI Z21.86–2008 is proposed for purposes of specifying the testing procedures related to circulation air, section 2.5, and location of temperature measuring instrumentation, section 2.6.1. In addition, DOE is proposing to use ANSI Z21.86–2008 to specify the installation instructions for direct vent (section 6.1.3 and figure 6) and non-direct vent (section 8.1.3 and figure 7 or figure 10) wall furnaces. However, since ANSI Z21.86–2008 does not include installation specifications for vented room heaters and vented floor furnaces, the installation specifications of the corresponding UL standard for that product type would be used. Although the UL standards typically are used for oil-fired equipment and the ANSI standards typically are used for gas-fired equipment, in the existing DOE test procedure, where there is no distinction between installation provisions, the UL standards are cited in application to both gas and oil vented heaters (*i.e.,* section 2.1.2). As there are no installation specifications available in ANSI Z21.86–2008 for vented room heaters and vented floor furnaces, DOE tentatively proposes to follow this approach and use the corresponding UL standards for installation provisions.

Finally, in three places (sections 2.3 Fuel supply, 2.4 Burner adjustments, and 3.2 Jacket loss), DOE proposes to use a new reference thought to be more appropriate for these test procedures. Specifically, ANSI/ASHRAE Standard 103–2007, ''Method of Testing for Annual Fuel Utilization Efficiency of Residential Furnaces and Boilers,'' is proposed for use in lieu of three older standards referenced in these three sections of the existing DOE test procedure. DOE believes this migration to ANSI/ASHRAE Standard 103 is appropriate because it is essentially the same test method used in the current DHE test procedure (*i.e.,* the AFUE test method) and incorporates the latest industry consensus on such testing without the need to depend on other references. DOE tentatively concludes that these changes and updates would neither result in any material differences in test results nor increase the test procedure burden.

DOE proposes to list all of the referenced industry standards in 10 CFR 430.3, *Materials incorporated by reference.* As explained above, DOE tentatively concludes that these incorporation by reference changes and updates would neither result in any material differences in the test results nor increase test procedure burden. DOE solicits comment on this tentative conclusion, as well as the adequacy of the proposed updating of referenced standards. DOE is also interested in any further clarification or modifications that may be necessary. This is identified as issue 2 in section V.E, ''Issues on Which DOE Seeks Comment.''

3. Other Issues

As part of its review of the existing test procedures, DOE identified three additional test procedure issues that it believes should be addressed in this rulemaking: (1) The jacket loss test for floor furnaces; (2) testing of manually controlled vented heaters; and (3) clarification of section 3.3 tracer gas procedures as applied to vented heaters without thermal stack dampers.

First, DOE noticed that the jacket loss measurement test, which is required for all vented floor furnaces by section 3.2 of the existing DOE test procedure, is inconsistent as compared to the similar procedures required for outdoor-installed (weatherized) furnaces and boilers. The current jacket loss test for DHE uses the procedures from outdated ANSI Standard Z21.48–1975. (As mentioned above in the discussion about updating references, the newly proposed industry reference for jacket loss testing is ANSI/ASHRAE Standard 103–2007). The jacket loss test in ANSI Standard Z21.48–1975, as well as the essentially identical provisions of ANSI/ASHRAE Standard 103–2007, represent a considerable test burden. In view of this burden, the DOE test procedures for furnaces and boilers, through the referencing of ANSI/ASHRAE Standard 103–1993, allow for an assignment of jacket loss in lieu of testing. The assigned jacket loss value of 1 percent for furnaces and boilers is thought to be a reasonably conservative value (*i.e.,* one that typically would be higher than the tested value). This allows for the manufacturer to weigh the burden of jacket loss testing against the likely conservative rating associated with a default value. This conservative default value approach is used throughout the DOE test procedures where appropriate (*e.g.,* cyclic degradation coefficient assignment for central air conditioners, jacket loss assignment for furnaces and boilers). In consideration of the test burden associated with the jacket loss test and the desire for consistency across the test procedures, DOE has tentatively concluded that manufacturers should be allowed the choice either to conduct actual jacket loss testing or to accept a reasonably conservative default value under the DHE test procedure. Accordingly, DOE is proposing that section 3.2, *Jacket loss measurement,* be amended to include the option of assigning the value of one percent for the jacket loss in lieu of testing.

DOE solicits comment on adding this allowance and the appropriateness of the assigned value of 1 percent. This is identified as issue 3 in section V.E, ''Issues on Which DOE Seeks Comment.''

A second issue that was identified during DOE's review is the lack of an equation in the calculation procedures for manually controlled vented heaters. Specifically, section 4.2.4 *Weighted-average steady-state efficiency,* does not have a defining equation, so DOE is proposing an amendment to remedy this oversight, a matter of particular importance in terms of capturing latent heat loss.

The final issue identified in DOE's review was the need to clarify the application of the tracer gas procedures in section 3.3 for units not employing a thermal stack damper. To explain, it is noted that section 3.3 and 4.3 outlines a testing and calculation procedure that must be used to evaluate the efficiency of vented heaters employing a thermal stack damper. In the calculation section 4.3 it is noted that all vented heaters may use this procedure as an option. Although this option is clearly stated in the calculation section and no modification to the calculations are necessary, some clarification is felt necessary in the actual testing provisions of section 3.3 to accommodate vented heaters not employing thermal stack dampers. For example the location of tracer gas introduction is not fully explained in the existing procedures for vented heaters not employing a thermal stack damper.

Finally, DOE proposes to correct typographical errors regarding the equation in section 4.3.6 of appendix O. Specifically, DOE is proposing to add a missing minus (''−'') sign and replace a plus (''+'') sign with a multiplication symbol (''×''). These errors are obviously typographical in nature because similar efficiency equations in other parts of the test procedures, as well as those used in industry standards, do not include these errors. The relevant industry groups have determined the correct format of this equation since its adoption and have been utilizing the correct format when testing and rating product efficiency. DOE is interested in receiving comment on any other corrections that might be needed in this review of the DHE test procedures.

B. Test Procedure for Pool Heaters

1. Electric Pool Heaters

DOE's test procedures for pool heaters are found at 10 CFR 430.23(p) and 10 CFR part 430, subpart B, appendix P. In its definition of ''efficiency descriptor,'' EPCA specifies that for pool heaters, the efficiency descriptor shall be ''thermal efficiency.'' (42 U.S.C. 6291(22)(E)) Further, EPCA defines the ''thermal efficiency of pool heaters'' as the ''measure of the heat in the water delivered at the heater outlet divided by the heat input of the pool heater as measured under test conditions specified in section 2.8.1 of the *American National Standard for Gas Fired Pool Heaters,* Z21.56–1986, or as may be prescribed by the Secretary.'' [5] (42 U.S.C. 6291(26)) Current energy conservation standards for pool heaters do not account for standby mode and off mode energy use.

As part of a recent test procedure rulemaking, DOE prescribed a new efficiency metric for pool heaters, titled ''integrated thermal efficiency.'' 77 FR 74559 (Dec. 17, 2012).[6] This prescribed integrated thermal efficiency metric builds on the existing thermal efficiency metric to include electrical energy consumption during standby mode and off mode operation, as required by EISA 2007. (42 U.S C. 6295(gg)(2)(A)) The amended test procedure was effective 30 days after publication of the final rule. Until such time as compliance is required with amended energy conservation standards that account for standby mode and off mode energy consumption, manufacturers must continue using the thermal efficiency metric for certification and compliance purposes. However, if manufacturers choose to make written statements regarding standby mode and off mode energy efficiency, those representations must be based on the amended test procedure as of June 17, 2013, 180 days after the date of publication of the test procedure final rule.

Because certain types of pool heaters are powered by energy sources other than gas, DOE requested comments in the October 2011 RFI regarding the appropriateness of the currently incorporated ANSI Z21.56 test method, titled ''Gas-Fired Pool Heaters,'' for testing pool heaters that operate with electricity (including heat pump pool heaters) or oil. 76 FR 63211, 63215–16 (Oct. 12, 2011). In the October 2011 RFI, DOE tentatively concluded that the test procedure for pool heaters at 10 CFR part 430, subpart B, appendix P already contains provisions to allow the ANSI Z21.56 test method to be applied to oil-fired pool heaters, and, therefore, no further action is necessary for those products. DOE received no comments that were contrary to this conclusion.

In a December 2009 NOPR for energy conservation standards for heating products, DOE concluded that, as currently drafted, the DOE test procedure for pool heaters is not suitable for measuring energy efficiency for electric pool heaters (including heat pump pool heaters). 74 FR 65852, 65866–67 (Dec. 11, 2009). In the October 2011 RFI, DOE noted that for electric pool heaters (including those units

[5] In an August 2010 NOPR, DOE proposed to use the most recent version of this standard, ANZI Z21.56–2006. 75 FR 52892, 52899–901 (August 30, 2010).

using heat pump technology), the fuel source is electricity (measured in watts) instead of gas (measured in Btu/h), but ''thermal efficiency,'' as required under EPCA and determined using ANSI Z21.56, is a measure of heat delivered to the water at the heater outlet (in Btu/h) divided by the heat input (in Btu/h) of the fuel. 76 FR 63211, 63215–16 (Oct. 12, 2011). It is technically feasible to develop an integrated thermal efficiency rating for a heat pump pool heater by converting the power input in watts to the input in Btu/h (which can be done for both the power used during active mode and during standby mode and off mode). However, if such an integrated thermal efficiency metric were applied to heat pump pool heaters, DOE noted that the numerical result would be efficiency ratings of over 100 percent, which may necessitate some reeducation among consumers because heat pumps are typically rated using industry standards for Coefficient of Performance (COP). In contrast, electric pool heaters that operate with resistance heating (as opposed to heat pump technology), are typically rated with a thermal efficiency metric. Consequently, DOE noted in the October 2011 RFI that the ratings for electric pool heaters using these two competing technologies are not always directly comparable. *Id.* at 63215. Another consideration for heat pump pool heaters is that performance depends upon the ambient temperature and humidity, so environmental conditions for testing are much more important for heat pump pool heaters than for gas-fired pool heaters.

Because of these factors, DOE's October 2011 RFI requested comment on the potential to update the pool heater test procedures by adding provisions to address electric heat pump pool heaters through use of a COP metric drawn from industry standards, coupled with a separate conversion to thermal efficiency (*i.e.,* the regulating metric specified in EPCA) and integrated thermal efficiency (*i.e.,* the new regulating metric incorporating standby mode and off mode energy consumption as required by EISA 2007). *Id.* at 63216.

On this topic, DOE received comments from AHRI and ACEEE that supported the expansion of the test method to include electric pool heaters. AHRI further commented that DOE should not integrate the standby mode and off mode energy consumption into an integrated thermal efficiency metric. (AHRI, No. 12 at p. 3; ACEEE, No. 24 at p. 4)

After carefully considering these public comments, DOE is proposing to add test methods that are applicable to heat pump pool heaters and electric resistance pool heaters. DOE proposes to amend its pool heater test procedure by adding a proposed test method for heat pump pool heaters that would reference ANSI/AHRI Standard 1160–2009, ''Performance Rating of Heat Pump Pool Heaters,'' and ANSI/ASHRAE Standard 146–2011, ''Method of Testing and Rating Pool Heaters.'' Additionally, DOE proposes to amend its pool heater test procedure by adding a proposed test method for electric resistance pool heaters that references ANSI/ASHRAE Standard 146–2011, ''Method of Testing and Rating Pool Heaters.'' DOE has tentatively concluded that incorporation of these industry test standards is appropriate, because they represent current best practices for these pool heater products.

Because the statute requires use of an integrated metric where technically feasible (as is the case here), DOE proposes to maintain the integrated thermal efficiency metric in the test procedure, as set forth in the final rule published on December 17, 2012. 77 FR 74559. Once DOE arrives at the thermal efficiency value for electric pool heaters, that value will feed into the integrated thermal efficiency calculation, which is applicable for all types of pool heaters.

Although DOE may prescribe amended test procedures in the final rule, manufacturers are not required to certify compliance for electric heat pump and electric resistance pool heaters until such time as DOE sets minimum energy conservation standards for those products (which will include energy consumption in active, standby, and off modes). Prior to DOE setting minimum energy conservation standards for electric heat pump and electric resistance pool heaters, any representations as to the energy efficiency or energy use of those products must be based on the amended test procedure within 180 days after the effective date of the test procedure final rule. Manufacturers of heat pump pool heaters would be able to use the COP metric, the integrated thermal efficiency metric, or both for making efficiency representations until an energy conservation standard is set.

EPCA requires the use of the integrated thermal efficiency metric for all pool heaters, including electric resistance and heat pump pool heaters, upon the compliance date for new energy conservation standards. Therefore, if DOE were to set energy conservation standards for heat pump pool heaters and electric resistance pool heaters, manufacturers would then be required to rate their products using the integrated thermal efficiency metric, although manufacturers of heat pump pool heaters would still have the option of making supplemental representations of efficiency using the COP metric. DOE is proposing to include an approach to determine the integrated thermal efficiency based on a COP value for heat pump pool heaters.

2. Other Issues

In addition to the changes for electric pool heaters described in the previous section, DOE is also clarifying that the DOE test procedure is applicable to oil-fired pool heaters, despite the incorporation of a test method titled ''Gas-Fired Pool Heaters.'' Section 4.1.1 of that test method contains a provision to compute the energy used when oil is the fuel, as opposed to natural gas.

DOE also seeks comments on other relevant issues that would affect the test procedures for pool heaters. Although DOE has attempted to identify those portions of the test procedure where it believes amendments may be warranted, interested parties are welcome to provide comments on any aspect of the test procedure as part of this comprehensive 7-year-review rulemaking.

C. Compliance With Other EPCA Requirements

As mentioned in the summary at section II above, in amending a test procedure, EPCA directs DOE to determine to what extent, if any, the test procedure would alter the measured energy efficiency or measured energy use of a covered product. (42 U.S.C. 6293(e)(1)) If the amended test procedure alters the measured energy efficiency or measured energy use, the Secretary must amend the applicable energy conservation standard accordingly. (42 U.S.C. 6293(e)(2)) The current energy conservation standards for direct heating equipment and pool heaters are based on existing test procedure efficiency metrics—AFUE and thermal efficiency (E_t), respectively.

The proposed test procedure amendments for DHE generally do not contain changes that would materially alter the measured energy efficiency of equipment. Rather, most of the proposed changes represent clarifications that would improve the uniform application of the test procedures for certain product types. Any change in the reported efficiency that might be associated with these clarifications is tentatively expected to be *de minimis.*

Consistent with 42 U.S.C. 6293(c), any representations of energy consumption of vented heaters must be based on any final amended test procedures 180 days

after the publication of the test procedure final rule. Until that time, manufacturers may make such representations based either on the final amended test procedures or on the previous test procedures, set forth at 10 CFR part 430, subpart B, appendix O 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), representations 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, Annual Fuel Utilization Efficiency (AFUE)), or other measure of energy consumption. DOE notes that manufacturers must use the same test procedure for both representations of energy efficiency and certifications of compliance.

Today's proposal does not include any changes to the current standby mode and off mode testing procedures and calculations as established in the December 2012 final rule. 77 FR 74559 (Dec. 17, 2012). Although fossil fuel standby mode and off mode energy consumption were already captured in the existing AFUE metric, the December 2012 final rule required manufacturers to use the new test procedures for determining electrical standby mode and off mode energy consumption in Appendix O beginning on June 17, 2013. Certifications of compliance with the electrical standby mode and off mode energy consumption standards are not required until the compliance date of DOE standards that include electrical standby mode and off mode energy consumption.

The proposed test procedure amendments for pool heaters would not alter the measured efficiency of equipment covered by the existing test procedure. However, it would provide a new method of test for electric resistance and heat pump pool heaters, which are not currently subject to energy conservation standards by DOE. Therefore, DOE has tentatively concluded that there is no need to address the impact of these amendments on current energy conservation standards for pool heaters.

Consistent with 42 U.S.C. 6293(c), any representations of energy consumption of pool heaters must be based on any final amended procedures and calculations in appendix P starting 180 days after the publication of any final amended test procedures. Until that time, manufacturers of gas-fired and oil-fired pool heaters may make such representations based either on the final amended test procedures or on the previous test procedures, set forth at 10 CFR part 430, subpart B, appendix P 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), representations 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, thermal efficiency (E_t), or integrated thermal efficiency (TE_I)), or other measure of energy consumption. Again, DOE notes that manufacturers must use the same test procedure for both representations of energy efficiency and certifications of compliance.

There are currently no energy conservation standards for electric resistance pool heaters, heat pump pool heaters, or oil-fired pool heaters. Upon the compliance date of any final energy conservation standards for these types of pool heaters, use of any final test procedures in appendix P will be required to demonstrate compliance. There are also currently no energy conservation standards for the standby mode and off mode energy use of gas-fired pool heaters. Upon the compliance date of any energy conservation standards that incorporate standby mode and off mode energy consumption for gas-fired pool heaters (*i.e.,* for this product, a standard expressed as integrated thermal efficiency (TE_I)), use of any final test procedures in appendix P will be required to demonstrate compliance.

IV. Procedural Issues and Regulatory Review

A. Administrative Procedure Act

DOE expects that any final rule in this proceeding would be effective 30 days after the date of publication of that final rule.

B. 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 regulatory 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).

C. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996) requires preparation of an initial regulatory flexibility analysis (IFRA) 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 at: *www.gc.doe.gov/gc/office-general-counsel.*

Today's proposed rule would prescribe test procedure amendments that would be used to determine compliance with energy conservation standards for direct heating equipment and pool heaters. For direct heating equipment, the proposed amendments would add provisions for testing vented home heating equipment that utilizes condensing technology, and incorporate by reference the most appropriate or recent versions of several industry standards referenced in the DOE test procedure for the purposes of test set-up and installation specifications. For pool heaters, the proposed amendments would incorporate by reference ANSI/AHRI Standard 1160–2009 and ANSI/ASHRAE Standard 146–2011 to establish testing procedures for electric (including heat pump) pool heaters. The proposed amendments for pool heaters would also clarify the test procedure's applicability to oil-fired pool heaters. DOE reviewed today's proposed rule under the provisions of the Regulatory Flexibility Act and the policies and procedures published on February 19, 2003. 68 FR 7990.

1. Reasons for, Objectives of, and Legal Basis for the Proposed Rule

The reasons for, objectives of, and legal basis for the proposed rule are stated elsewhere in the preamble and are not repeated here.

2. Description and Estimated Number of Small Entities Regulated

For the manufacturers of the covered products, the Small Business

Administration (SBA) has set a size threshold, which defines those entities classified as ''small businesses'' for the purposes of the statute. DOE used the SBA's small business size standards to determine whether any small entities would be subject to the requirements of the rule. 65 FR 30836, 30848–49 (May 15, 2000), as amended at 65 FR 53533, 53544–45 (Sept. 5, 2000) and codified at 13 CFR part 121. The size standards are listed by North American Industry Classification System (NAICS) code and industry description and are available at *http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf.* DHE and pool heater manufacturing are classified under NAICS 333414—''Heating Equipment (except Warm Air Furnaces) Manufacturing.'' The SBA sets a threshold of 500 employees or less for an entity to be considered as a small business for both of these categories.[7]

To estimate the number of companies that could be small business manufacturers of products covered by this rulemaking, DOE conducted a market survey using available public information to identify potential small manufacturers. DOE's research involved reviewing several industry trade association membership directories (*e.g.,* AHRI [8]), product databases (*e.g.,* AHRI [9] and CEC [10] databases), individual company Web sites, and marketing research tools (*e.g.,* Hoovers [11] reports) to create a list of all domestic small business manufacturers of heating products covered by this rulemaking. DOE has identified 2 manufacturers of vented DHE and 5 manufacturers of pool heaters (including heat pump pool heater manufacturers) that can be considered small businesses. DOE did not count manufacturers of vented hearth heaters because, as noted previously, the definition of ''vented hearth heater'' was remanded to DOE for further consideration by the D.C. Circuit Court. DOE plans to conduct a separate rulemaking that would clarify the standards and test procedures for vented hearth products, and as a result, DOE will assess impacts on small business vented hearth product manufacturers as part of that proceeding.

3. Description and Estimate of Compliance Requirements

For direct heating equipment, the proposed amendments would incorporate by reference the most recent version of various industry standards already referenced in the DHE test procedures for the purposes of specifying the test set-up provisions. In addition, the proposed test procedure would include provisions for determining the AFUE of products that use condensing technology. The updates to the most recent versions of the various industry standards would result in no material change to DOE's test procedure for direct heating equipment. The additional provisions for measuring energy efficiency of products with condensing technology may add a modest cost to testing for manufacturers of such products. The test could be conducted in the same test facility, but some additional testing and calculation would be required to determine AFUE. Specifically, the proposed provisions would require a condensate collection test to be conducted on vented heaters utilizing condensing technologies. The duration of the condensate collection test time would be 30 minutes for steady-state testing and 1–2 hours for cyclic testing. In some cases only steady-state testing would be required (*i.e.,* all manually-controlled vented heaters and those vented heaters not utilizing the optional tracer gas procedures). Vented heaters tested utilizing the optional tracer gas procedures would be required to conduct both steady-state and cyclic condensate collection procedures. Therefore, DOE estimates that the additional testing for condensing units would add, in the worst case, 3 hours to the overall length of time it takes to conduct the AFUE test, as compared to DHE not utilizing condensing technology. At a rate of $30 an hour for a test lab technician, DOE estimates that the added cost will be $90 per test unit, which is modest in comparison to the overall cost of product development and certification.

For pool heaters, the proposed updates to the test procedure would add provisions to determine the energy efficiency of electric pool heaters, including heat pump pool heaters, and would incorporate by reference ANSI/AHRI 1160–2009 and ANSI/ASHRAE 146–2011. These products are not currently regulated by DOE, but DOE's research showed that all domestic small business manufacturers of heat pump pool heaters that were identified already rate COP and capacity according to the rating conditions in ANSI/AHRI 1160 and typically at an additional rating point outside of the ANSI/AHRI 1160 test conditions. In addition, DOE notes that ASHRAE Standard 90.1–2010 contains efficiency levels for heat pump pool heaters and specifies ANSI/AHRI 1160–2009 as the test method. Several States (*e.g.,* Florida, California) also have minimum efficiency requirements for heat pump pool heaters, which is another factor that may drive manufacturers to rate their products for efficiency. Because manufacturers of heat pump pool heaters are already rating their products using AHRI 1160–2009 due to the ASHRAE Standard 90.1–2010 requirements and State efficiency requirements, DOE does not believe there will be much, if any, additional burden from today's proposal for including a heat pump pool heater test method that references the industry standard. For electric resistance pool heaters, the proposed test method in ANSI/ASHRAE 146–2011 is comparable to that for gas-fired and oil-fired pool heaters in the existing test method. For these manufacturers to make any representation regarding the efficiency of their products, they must have been using a similar test, so it is not expected that the current proposal would add to the burden of manufacturers of electric resistance pool heaters. DOE requests comment on these tentative conclusions and on the potential impacts of this proposed rule on small business manufacturers of pool heaters, particularly of heat pump pool heaters and electric resistance pool heaters. This is identified as issue 5 in section V.E, ''Issues on Which DOE Seeks Comment.''

4. Duplication, Overlap, and Conflict With Other Rules and Regulations

DOE is not aware of any rules or regulations that duplicate, overlap, or conflict with the rule being proposed today.

5. Significant Alternatives to the Rule

As noted earlier in the preamble, the proposed rule is largely based upon the industry testing procedures already in place for direct heating equipment and pool heaters. DOE believes the proposed amendments would be useful for both consumers and industry, and are consistent with the Department's goals and statutory requirements, while also minimizing the economic burden on manufacturers. DOE seeks comment and information on the need, if any, for alternative test methods that, consistent with the statutory requirements, would reduce the economic impact of this rule

[7] In the December 2009 NOPR, DOE mistakenly listed gas-fired pool heater manufacturing under NAICS code 335228. 74 FR 65852, 65984 (Dec. 11, 2009). The correct classification for pool heater manufacturing is NAICS 333414. Both NAICS categories have the same 500 employee limit.

[8] See: *http://www.ahrinet.org/ahri+members.aspx.*

[9] See: *http://www.ahridirectory.org/ahriDirectory/pages/home.aspx.*

[10] See: *http://www.appliances.energy.ca.gov/.*

[11] See: *http://www.hoovers.com/.*

on small entities. DOE will consider any comments received regarding alternative methods of testing that would reduce economic impact of the rule on small entities. DOE will consider the feasibility of such alternatives and determine whether they should be incorporated into the final rule.

D. Review Under the Paperwork Reduction Act of 1995

Manufacturers of direct heating equipment and pool heaters must certify to DOE that their products comply with all applicable energy conservation standards. In certifying compliance, manufacturers must test their products according to the DOE test procedures for direct heating equipment and pool heaters, 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 direct heating equipment and pool heaters. 76 FR 12422 (March 7, 2011). The collection-of-information requirement for 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.

E. Review Under the National Environmental Policy Act of 1969

In this proposed rule, DOE proposes test procedure amendments that it expects will be used to develop and implement future energy conservation standards for direct heating equipment and pool heaters. 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 proposed rule would amend the existing test procedures without affecting the amount, quality, or distribution of energy usage, and, therefore, would 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.

F. Review Under Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 10, 1999), imposes certain requirements on Federal 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 has examined this proposed rule and has tentatively determined that it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. 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(d)) No further action is required by Executive Order 13132.

G. 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 tentatively determined that, to the extent permitted by law, the proposed rule meets the relevant standards of Executive Order 12988.

H. 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 regulatory actions likely to result 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 *www.gc.doe.gov/gc/office-general-counsel.*) DOE examined

today's proposed rule according to UMRA and its statement of policy and has tentatively determined that the rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more in any year. Accordingly, no further assessment or analysis is required under UMRA.

I. 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. This 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.

J. 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 proposed rule would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

K. 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 Federal 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 proposed rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

L. 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 at 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 proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

Today's regulatory action to amend the test procedure for measuring the energy efficiency of direct heating equipment and pool heaters 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.

M. 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.

Today's proposed rule incorporates testing methods contained in the following commercial standards: ANSI/ASHRAE 103–2007, ''Method of Test for Annual Fuel Utilization Efficiency of Residential Central Furnaces and Boilers''; ANSI Z21.86–2008, ''Vented Gas-Fired Space Heating Appliances''; ASTM D2156–09, ''Standard Test Method for Smoke Density in Flue Gases from Burning Distillate Fuels''; UL 729–2003, ''Standard for Safety for Oil-Fired Floor Furnaces''; UL 730–2003, ''Standard for Safety for Oil-Fired Wall Furnaces''; UL 896–1993, ''Standard for Safety for Oil-Burning Stoves''; AHRI 1160–2009, ''Performance Rating of Heat Pump Pool Heaters''; and ASHRAE 146–2011, ''Method of Testing Pool Heaters.'' While today's proposed test procedures are not exclusively based on these standards, components of the test procedures are adopted directly from these standards without amendment. The Department has evaluated these standards and is unable to conclude whether they fully comply with the requirements of section 32(b) of the FEAA, (*i.e.,* that they were developed in a manner that fully provides for public participation, comment, and review). DOE will consult with the Attorney General and the Chairman of the FTC concerning the impact on competition of requiring manufacturers to use the test methods contained in these standards prior to prescribing 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*. 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 of this fact as soon as possible by contacting Ms. Brenda Edwards to initiate the necessary procedures.

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 at: *http://www1.eere.energy.gov/buildings/appliance_standards/product.aspx/productid/68.* Please also note that any person wishing to bring a laptop computer or tablet into the Forrestal Building will be required to obtain a property pass. Visitors should avoid bringing such devices, or allow an extra 45 minutes. Persons may also attend the public meeting via webinar. Participants are responsible for ensuring their systems are compatible with the webinar software.

B. Procedure for Submitting Requests To Speak and Prepared General Statements for Distribution

Any person who has an interest in the topics addressed in this notice of proposed rulemaking, or who is representative of a group or class of persons that has an interest in these issues, may request an opportunity to make an oral presentation at the public meeting. Such persons may hand-deliver requests to speak to the address show in the **ADDRESSES** section at the beginning of this notice of proposed rulemaking between 9:00 a.m. and 4:00 p.m., Monday through Friday, except Federal holidays. Requests may also be sent by mail or email to Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, 1000 Independence Avenue SW, Washington, DC 20585–0121, or *Brenda.Edwards@ee.doe.gov.* Persons who wish to speak should include in their request a computer diskette or CD–ROM in WordPerfect, Microsoft Word, PDF, or text (ASCII) file format that briefly describes the nature of their interest in this rulemaking and the topics they wish to discuss. Such persons should also provide a daytime telephone number where they can be reached.

DOE requests persons selected to make an oral presentation to submit an advance copy of their statements at least one week before the public meeting. DOE may permit persons who cannot supply an advance copy of their statement to participate, if those persons have made advance alternative arrangements with the Building Technologies Program. As necessary, request to give an oral presentation should ask for such alternative arrangements.

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 electronic copy of their statement in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format, to the appropriate address shown in the **ADDRESSES** section at the beginning of this notice of proposed rulemaking. 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 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. There shall not be discussion of proprietary information, costs or prices, market share, or other commercial matters regulated by U.S. anti-trust laws. 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 prepared 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 allow, 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 of proposed rulemaking, and will be accessible on the DOE Web site. 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 this proposed rule before or after the public meeting, but no later than the date provided in the **DATES** section at the beginning of this proposed rule. Interested parties may submit comments using any of the methods described in the **ADDRESSES** section at the beginning of this notice of proposed rulemaking.

All submissions received must include the agency name and docket number and/or RIN for this rulemaking. No telefacsimilies (faxes) will be accepted.

Submitting comments via regulations.gov. The *www.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 itself 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. Otherwise, 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 *www.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 *www.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 *www.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 *www.regulations.gov* provides after you have successfully uploaded your comment.

Submitting comments via email, hand delivery/courier, or mail. Comments and documents submitted via email, hand delivery/courier, or mail also will be posted to *www.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 in 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/courier, please provide all items on a CD, if feasible, in which case it is not necessary to submit printed copies. No telefacsimiles (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. Pursuant 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/courier two well-marked copies: one copy of the document marked ''confidential'' including all 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: (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 has previously been made available to others without obligation concerning its confidentiality; (5) an explanation of the competitive injury to the submitting person which 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.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

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. Are the proposed provisions for testing vented heaters that are capable of condensing operation appropriate and sufficient?

2. Are the updates to the material incorporated by reference into the direct heating equipment test procedure appropriate and sufficient?

3. Is the assignment of a 1-percent default jacket loss in lieu of testing for vented floor furnaces appropriate?

4. Are the proposed provisions to allow testing of electric resistance and heat pump pool heaters appropriate and sufficient?

5. What are the impacts of this proposed rule on small business entities?

VI. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of today's notice of proposed rulemaking.

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 September 30, 2013.

Kathleen B. Hogan,

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

For the reasons stated in the preamble, DOE is proposing to amend 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. Section 430.3 is amended by:
■ a. Redesignating paragraph (d)(18) as (d)(19) and adding ''and Appendix O of this part'' after ''for § 430.2'' in redesignated paragraph (d)(19);
■ b. Redesignating paragraphs (f)(10) as (f)(11) and (i) through (p) as (j) through (q) respectively; and
■ c. Adding paragraphs (b)(2), (d)(18), (f)(10), (f)(12), (i), and (r).

The additions read as follows:

§ 430.3 Materials incorporated by reference.

* * * * *

(b) * * *

(2) ANSI/AHRI Standard 1160–2009 (''ANSI/AHRI 1160''), Performance Rating of Heat Pump Pool Heaters, ANSI approved November 4, 2011, IBR approved for appendix P to subpart B.

* * * * *

(d) * * *

(18) ANSI Z21.86–2008 (CSA 2.32–2008), (''ANSI Z21.86''), Vented Gas-Fired Space Heating Appliances, Fifth Edition, ANSI approved March 28, 2008, IBR approved for appendix O to subpart B.

* * * * *

(f) * * *

(10) ANSI/ASHRAE 103–2007, Method of Test for Annual Fuel Utilization Efficiency of Residential Central Furnaces and Boilers, ASHRAE approved June 27, 2007, ANSI approved March 25, 2008, IBR approved for appendix O to subpart B.

* * * * *

(12) ANSI/ASHRAE 146–2011 (''ANSI/ASHRAE 146''), Method of Testing and Rating Pool Heaters, ASHRAE approved February 2, 2011, ANSI approved February 3, 2011, IBR approved for appendix P to subpart B.

* * * * *

(i) *ASTM.* American Society for Testing and Materials International, 100

Barr Harbor Drive, P.O. Box C700, West Conshohocken, PA 19428–2959 (*www.astm.org*).

(1) ASTM D2156–09, (''ASTM D2156''), Standard Test Method for Smoke Density in Flue Gases from Burning Distillate Fuels, Edition 09, ASTM approved December 1, 2009, IBR approved for and appendix O to subpart B.

(2) [Reserved]

* * * * *

(r) *UL.* Underwriters Laboratories, Inc., 2600 NW. Lake Rd., Camas WA 98607–8542 (*www.UL.com*).

(1) UL 729–2003 (''UL 729''), Standard for Safety for Oil-Fired Floor Furnaces, dated August 29, 2003, Sixth Edition including revisions through April 22, 2010, IBR approved for appendix O to subpart B.

(2) UL 730–2003 (''UL 730''), Standard for Safety for Oil-Fired Wall Furnaces, dated August 29, 2003, 5th edition including revisions through April 22, 2010, IBR approved for appendix O to subpart B.

(3) UL 896–1993 (''UL 896''), Standard for Safety for Oil-Burning Stoves, dated July 29, 1993, 5th edition including revisions through May 7, 2010, IBR approved for appendix O to subpart B.

■ 3. Section 430.23 is amended by revising paragraphs (o) and (p) to read as follows:

§ 430.23 Test procedures for the measurement of energy and water consumption.

* * * * *

(o) *Vented home heating equipment.* (1) When determining the annual fuel utilization efficiency (AFUE) of vented home heating equipment (see the note at the beginning of appendix O), expressed in percent (%), AFUE shall be calculated in accordance with section 4.1.17 or 4.3.7 of appendix O of this subpart for vented heaters without either manual controls or thermal stack dampers; according to section 4.2.6 or 4.3.7 of appendix O of this subpart for vented heaters equipped with manual controls; or according to section 4.3.7 of appendix O of this subpart for vented heaters equipped with thermal stack dampers.

(2) When estimating the annual operating cost for vented home heating equipment, calculate the sum of:

(i) The product of the average annual fuel energy consumption, in Btu's per year for natural gas, propane, or oil-fueled vented home heating equipment, determined according to section 4.6.2 of appendix O of this subpart, and the representative average unit cost in dollars per Btu for natural gas, propane, or oil, as appropriate, as provided pursuant to section 323(b)(2) of the Act; plus

(ii) The product of the average annual auxiliary electric energy consumption in kilowatt-hours per year determined according to section 4.6.3 of appendix O of this subpart, and the representative average unit cost in dollars per kilowatt-hours as provided pursuant to section 323(b)(2) of the Act, the resulting sum then being rounded off to the nearest dollar per year.

(3) When estimating the estimated operating cost per million Btu output for gas or oil vented home heating equipment with an auxiliary electric system, calculate the product of:

(i) The quotient of one million Btu divided by the sum of:

(A) The product of the maximum fuel input in Btu's per hour as determined in 3.1.1 or 3.1.2 of appendix O of this subpart times the annual fuel utilization efficiency in percent as determined in 4.1.17, 4.2.6, or 4.3.7 of this appendix as appropriate divided by 100; plus

(B) The product of the maximum electric power in watts as determined in 3.1.3 of appendix O of this subpart times the quantity 3.412; and

(ii) Of the sum of:

(A) The product of the maximum fuel input in Btu's per hour as determined in 3.1.1 or 3.1.2 of this appendix times the representative unit cost in dollars per Btu for natural gas, propane, or oil, as appropriate, as provided pursuant to section 323(b)(2) of the Act; plus

(B) The product of the maximum auxiliary electric power in kilowatts as determined in 3.1.3 of appendix O of this subpart times the representative unit cost in dollars per kilowatt-hour as provided pursuant to section 323(b)(2) of the Act, the resulting quantity shall be rounded off to the nearest 0.01 dollar per million Btu output.

(p) *Pool heaters.* (1) Prior to the compliance date of any energy conservation standards that incorporate standby mode and off mode energy consumption for pool heaters, when determining the thermal efficiency of pool heaters (see the note at the beginning of appendix P of this subpart) expressed as a percent (%), thermal efficiency shall be calculated in accordance with section 5.1 of appendix P to this subpart.

(2) After the compliance date of any energy conservation standards that incorporate standby mode and off mode energy consumption for pool heaters, when determining the integrated thermal efficiency of pool heaters (see the note at the beginning of appendix P of this subpart) expressed as a percent (%), integrated thermal efficiency shall be calculated in accordance with section 5.4 of appendix P to this subpart.

(3) When estimating the annual operating cost of pool heaters, calculate the sum of:

(i) The product of the average annual fuel energy consumption, in Btu's per year, of natural gas or oil-fueled pool heaters, determined according to section 5.2 of appendix P to this subpart, and the representative average unit cost in dollars per Btu for natural gas or oil, as appropriate, as provided pursuant to section 323(b)(2) of the Act; plus

(ii) The product of the average annual electrical energy consumption in kilowatt-hours per year determined according to section 5.3 of appendix P to this subpart and converted to kilowatt-hours using a conversion factor of 3412 Btu = 1 kilowatt-hour, and the representative average unit cost in dollars per kilowatt-hours as provided pursuant to section 323(b)(2) of the Act, the resulting sum then being rounded off to the nearest dollar per year.

* * * * *

■ 4. Appendix O to subpart B of part 430 is amended by:

■ a. Revising the note after the appendix heading;

■ b. Redesignating the second section 1.33 (following section 1.37) as section 1.39.

■ c. Redesignating sections 1.5 through 1.37 as 1.6 through 1.38;

■ d. Adding sections 1.5, 2.2.4, 3.8, 3.8.1, 3.8.2, 4.1.6.1, 4.1.6.2, 4.1.6.3, and 4.1.6.4;

■ e. Amending section 2.6.1 by removing the words ''ANSI Z21.49–1975, section 2.14.'' and adding in their place ''Part VIII section 8.7 of ANSI Z21.86.''

■ f. Amending section 2.6.2 by removing the words ''Figure 34.4 of UL 730–1974, or Figures 35.1 and 35.2 of UL 729–1976'' and adding in their place ''Figure 36.4 of UL 730, or Figure 38.1 and 38.2 of UL 729.'' and by removing the words ''sections 35.12 through 35.17 of UL 730–1974.'' and adding in their place ''sections 37.5.8 through 37.5.18 of UL 730.''

■ g. Revising sections 2.1.1, 2.1.2, 2.1.3, 2.2.2, 2.3.3, 2.3.4, 2.4.2, 2.5.1, 3.1.2, 3.2, 3.3, 4.1.6, 4.1.10, 4.2.4.1, 4.3.3, and 4.3.6.

These additions and revisions read as follows:

Appendix O to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Vented Home Heating Equipment

Note: After [date 180 days after publication of the final rule in the **Federal Register**], any representations made with respect to the energy use or efficiency of vented home

heating equipment must be made in accordance with the results of testing pursuant to this appendix. After this date, if a manufacturer elects to make representations with regard to standby mode and off mode energy consumption, then testing must also include the provisions of this appendix related to standby mode and off mode energy consumption.

Manufacturers conducting tests of vented home heating equipment after [date 30 days after publication of the final rule in the **Federal Register**] and prior to [date 180 days after publication of the final rule in the **Federal Register**], must conduct such test in accordance with either this appendix or appendix O as it appeared at 10 CFR part 430, subpart B, appendix X, in the 10 CFR parts 200 to 499 edition revised as of January 1, 2013. Any representations made with respect to the energy use or efficiency of such vented home heating equipment must be in accordance with whichever version is selected. Given that after [date 180 days after publication of the final rule in the **Federal Register**] representations with respect to the energy use or efficiency of vented home heating equipment must be made in accordance with tests conducted pursuant to this appendix, manufacturers may wish to begin using this test procedure as soon as possible.

On or after the compliance date for any amended energy conservation standards that incorporate standby mode and off mode energy consumption, all representations must be based on testing performed in accordance with this appendix in its entirety.

* * * * *

1.5 ''*Condensing vented heater*'' means a vented heater that will, during the laboratory tests prescribed in this appendix, condense part of the water vapor in the flue gases.

* * * * *

2.1.1 *Vented wall furnaces (including direct vent systems).* Install non-direct vent gas-fueled vented wall furnaces as specified in section 8.1.3 and figure 7 or figure 10 of ANSI Z21.86 (incorporated by reference; see § 430.3). Install direct vent gas-fueled vented wall furnaces as specified in section 6.1.3 and figure 6 of ANSI Z21.86. Install oil-fueled vented wall furnaces as specified in section 36.1 of UL 730.

2.1.2 *Vented floor furnaces.* Install vented floor furnaces for test as specified in section 38.1 of UL 729.

2.1.3 *Vented room heaters.* Install vented room heaters for test as specified in section 37.1.1 of UL 896.

* * * * *

2.2.2 *Oil-fueled vented home heating equipment (excluding direct vent systems).* Use flue connections for oil-fueled vented floor furnaces as specified in section 38.2 of UL 729, sections 36.2 of UL 730 for oil-fueled vented wall furnaces, and sections 37.1.2 and 37.1.3 of UL 896 for oil-fueled vented room heaters (incorporated by reference; see § 430.3).

* * * * *

2.2.4 *Condensing vented heater, additional flue requirements.* The flue pipe installation must not allow condensate formed in the flue pipe to flow back into the unit. An initial downward slope from the unit's exit, an offset with a drip leg, annular collection rings, or drain holes must be included in the flue pipe installation without disturbing normal flue gas flow. Flue gases should not flow out of the drain with the condensate. For condensing vented heaters not designed for collection and draining of condensate, a means to collect condensate must be provided for the purposes of testing.

* * * * *

2.3.3 *Other test gas.* Use other test gases with characteristics as described in table 1 of ANSI/ASHRAE 103–2007 (incorporated by reference; see § 430.3). Use gases with a measured higher heating value within ±5 percent of the values specified in the above ANSI/ASHRAE standard. Determine the actual higher heating value of the gas used in the test with an error no greater than one percent.

2.3.4 *Oil supply.* For a vented heater utilizing fuel oil, use No. 1, fuel oil (kerosene) for vaporizing-type burners and either No. 1 or No. 2 fuel oil, as specified by the manufacturer, for mechanical atomizing type burners. Use test fuel conforming to the specifications given in tables 2 and 3 of ANSI/ASHRAE 103–2007 (incorporated by reference; see § 430.3). Measure the higher heating value of the test fuel with an error no greater than one percent.

* * * * *

2.4.2 *Oil burner adjustments.* Adjust the burners of oil-fueled vented heaters to give the CO_2 reading recommended by the manufacturer and an hourly Btu input, during the steady-state performance test described below, which is within ±2 percent of the heater manufacturer's specified normal hourly Btu input rating. On units employing a power burner, do not allow smoke in the flue to exceed a No. 1 smoke during the steady-state performance test as measured by the procedure in ASTM D2156 (incorporated by reference; see § 430.3). If, on units employing a power burner, the smoke in the flue exceeds a No. 1 smoke during the steady-state test, readjust the burner to give a lower smoke reading, and, if necessary a lower CO_2 reading, and start all tests over. Maintain the average draft over the fire and in the flue during the steady-state performance test at that recommended by the manufacturer within ±0.005 inches of water gauge. Do not make additional adjustments to the burner during the required series of performance tests. The instruments and measuring apparatus for this test are described in section 6 and shown in Figure 8 of ANSI/ASHRAE 103–2007 (incorporated by reference; see § 430.3).

* * * * *

2.5.1 *Forced air vented wall furnaces (including direct vent systems).* During testing, maintain the air flow through the heater as specified by the manufacturer and operate the vented heater with the outlet air temperature between 80 °F and 130 °F above room temperature. If adjustable air discharge registers are provided, adjust them so as to provide the maximum possible air restriction. Measure air discharge temperature as specified in section 8.7 of ANSI Z21.86 (incorporated by reference; see § 430.3).

* * * * *

3.1.2 *Oil-fueled vented home heating equipment (including direct vent systems).* Set up and adjust the vented heater as specified in sections 2.1, 2.2, and 2.3.4 of this appendix. Begin the steady-state performance test by operating the burner and the circulating air blower, on units so equipped, with the adjustments specified by sections 2.4.2 and 2.5 of this appendix until steady-state conditions are attained as indicated by a temperature variation of not more than 5 °F (2.8 C) in the flue gas temperature in three successive readings taken 15 minutes apart.

For units equipped with power burners, do not allow smoke in the flue to exceed a No. 1 smoke during the steady-state performance test as measured by the procedure described in ASTM D 2156 (incorporated by reference; see § 430.3). Maintain the average draft over the fire and in the breeching during the steady-state performance test at that recommended by the manufacturer ±0.005 inches of water gauge.

Measure the room temperature (T_{RA}) as described in section 2.9 of this appendix and measure the steady-state flue gas temperature ($T_{F,SS}$) using nine thermocouples located in the flue pipe as described in section 2.6.2 of this appendix. Secure a sample of the flue gas in the plane of temperature measurement and determine the concentration by volume of CO_2 (X_{CO2F}) present in dry flue gas. Measure and record the steady-state heat input rate (Q_{in}).

For manually controlled oil-fueled vented heaters, determine the steady-state efficiency at a fuel input rate that is within ±5 percent of 50 percent of the maximum fuel input rate or at the minimum fuel input rate as measured in section 3.1.2 to this appendix for manually controlled oil-fueled vented heaters if the design of the heater is such that the ±5 percent of 50 percent of the maximum fuel input rate cannot be set.

* * * * *

3.2 *Jacket loss measurement.* Conduct a jacket loss test for vented floor furnaces. Measure the jacket loss (L_j) in accordance with the ANSI/ASHRAE 103–2007 section 8.6 (incorporated by reference; see § 430.3), applying the provisions for furnaces and not the provisions for boilers. In lieu of testing, the jacket loss can be assigned a value of 1%.

3.3 *Measurement of the off-cycle losses for vented heaters equipped with thermal stack dampers.* As noted in section 4.3, this procedure may be optionally used for all vented heaters. Install the thermal stack damper, if required, according to the manufacturer's instructions. Unless specified otherwise, the thermal stack damper should be at the draft diverter exit collar. Attach a five foot length of bare stack to the outlet of the damper. Install thermocouples as specified in section 2.6.1 of this appendix.

For vented heaters equipped with single-stage thermostats, measure the off-cycle losses at the maximum fuel input rate. For vented heaters equipped with two-stage thermostats, measure the off-cycle losses at the maximum fuel input rate and at the reduced fuel input rate. For vented heaters equipped with step-modulating thermostats,

measure the off-cycle losses at the reduced fuel input rate.

Let the vented heater heat up to a steady-state condition. Feed a tracer gas at a constant metered rate into the stack directly above and within one foot above the stack damper. For units not employing a thermal stack damper, introduce the tracer gas within the first foot of the test stack. Record tracer gas flow rate and temperature. Measure the tracer gas concentration in the stack at several locations in a horizontal plane through a cross-section of the stack at a point sufficiently above the stack damper to ensure that the tracer gas is well mixed in the stack.

Continuously measure the tracer gas concentration and temperature during a 10-minute cool-down period. Shut the burner off and immediately begin measuring tracer gas concentration in the stack, stack temperature, Room temperature, and barometric pressure. Record these values as the midpoint of each one-minute interval between burner shut-down and ten minutes after burner shut-down. Meter response time and sampling delay time shall be considered in timing these measurements.

* * * * *

3.8 *Condensing vented heaters measurement of condensate under steady-state and cyclic conditions.* Condensate drain lines shall be attached to the vented heater as specified in the manufacturer's installation instructions. The test unit shall be level prior to all testing. A continuous downward slope of drain lines from the unit shall be maintained. Additional precautions shall be taken to facilitate uninterrupted flow of condensate during the test. Collection container must be glass or polished stainless steel to facilitate removal of interior deposits. The collection container shall have a vent opening to the atmosphere, be dried prior to each use, and be at room ambient temperature. The humidity of the room air shall at no time exceed 80% relative humidity. For condensing units not designed for collecting and draining condensate, drain lines need to be provided during testing that meet the criteria set forth in this section 3.8. Units employing manual controls and units not tested under the optional tracer gas procedures of section 3.3 and 3.6 shall only conduct the steady-state condensate collection test.

3.8.1 *Steady-state condensate collection test.* Begin a steady-state condensate collection immediately after the steady-state testing of section 3.1 has been completed. The steady-state condensate collection period shall be an additional 30 minutes. Condensate mass shall be measured immediately at the end of the collection period to minimize evaporation loss from the sample. Fuel input shall be recorded for the 30-minute condensate collection steady-state test period. Fuel higher heating value (HHV), temperature, and pressures necessary for determining fuel energy input ($Q_{c,ss}$) will be measured and recorded. The fuel quantity and HHV shall be measured with errors no greater than 1%. Determine the mass of condensate for the steady-state test ($M_{c,ss}$) in pounds by subtracting the tare container weight from the total container and condensate weight measured at the end of the 30-minute condensate collection test period.

For units with step modulating or two-stage controls, the steady-state condensate collection test shall be conducted at both the maximum and reduced input rates.

3.8.2 *Cyclic condensate collection tests.* (only for vented heaters tested under the optional tracer gas procedures of section 3.3 or 3.6) Control devices shall be installed to allow cyclical operation of the vented heater. The unit shall be operated in a cyclical manner until flue gas temperatures at the end of each on-cycle are within 5° F of each other for two consecutive cycles. On-cycle and off-cycle times are 4 minutes and 13 minutes respectively. Control of ON and OFF operation actions shall be within +/− 6 seconds of the scheduled time. Begin three test cycles. For fan-type vented heaters, maintain circulating air adjustments as specified in section 2.5 of this appendix. Begin condensate collection at one minute before the on-cycle period of the first test cycle. The container shall be removed one minute before the end of each off-cycle period. Condensate mass shall be measured for each test-cycle.

Fuel input shall be recorded during the entire test period starting at the beginning of the on-time period of the first cycle to the beginning of the on-time period of the second cycle, etc., for each of the test cycles. Fuel higher heating value (HHV), temperature, and pressure necessary for determining fuel energy input, Q_c, shall be recorded. Determine the mass of condensate for each cycle, M_c, in pounds. If at the end of three-cycles, the sample standard deviation is within 20% of the mean value for three cycles, use total condensate collected in the three cycles as M_c; if not, continue collection for an additional three cycles and use the total condensate collected for the six cycles as M_c. Determine the fuel energy input, Q_c, during the three or six test cycles, expressed in Btu.

* * * * *

4.1.6 *Latent heat loss.* For non-condensing vented heaters, obtain the latent heat loss ($L_{L,A}$) from Table 2 of this appendix. For condensing vented heaters, a modified latent heat loss ($L_{L,A}$*) is obtained as follows:

For steady-state conditions:

$L_{L,A}^* = L_{L,A} - L_{G,SS} + L_{C,SS}$

where:

$L_{L,A}$ = Latent heat loss, based on fuel type, from table 2 of this appendix

$L_{G,SS}$ = Steady-state latent heat gain due to condensation as determined in 4.1.6.1 of this appendix

$L_{C,SS}$ = Steady-state heat loss due to hot condensate going down the drain as determined in 4.1.6.2 of this appendix

For cyclic conditions: (only for vented heaters tested under the optional tracer gas procedures of section 3.3 or 3.6)

$L_{L,A}^* = L_{L,A} - L_G + L_C$

where:

$L_{L,A}$ = Latent heat loss, based on fuel type, from table 2 of this appendix

L_G = Latent heat gain due to condensation under cyclic conditions as determined in 4.1.6.3 of this appendix

L_C = Heat loss due to hot condensate going down the drain under cyclic conditions as determined in 4.1.6.4 of this appendix

4.1.6.1 Latent heat gain due to condensation under steady-state conditions. Calculate the latent heat gain ($L_{G,SS}$) expressed as a percent and defined as:

$$L_{G,SS} = 100\frac{(1053.3)M_{CSS}}{Q_{C,SS}}$$

where:

100 = conversion factor to express a decimal as a percent

1053.3 = latent heat of vaporization of water, Btu per pound

$M_{c,ss}$ = mass of condensate for the steady-state test as determined in 3.8.1 of this appendix, pounds

$Q_{c,ss}$ = fuel energy input for steady-state test as determined in 3.8.1 of this appendix, Btu

4.1.6.2 Heat loss due to hot condensate going down the drain under steady-state conditions. Calculate the steady-state heat loss due to hot condensate going down the drain ($L_{C,SS}$) expressed as a percent and defined as:

$$L_{CSS} = L_{G,SS}\frac{1.0\left(T_{F,SS} - 70\right) - 0.45\left(T_{F,SS} - 45\right)}{1053}.3$$

where:

$L_{G,SS}$ = Latent heat gain due to condensation under steady-state conditions as defined in 4.1.6.1 of this appendix

1.0 = specific heat of water, Btu/lb–°F

$T_{F,SS}$ = Flue (or stack) gas temperature as defined in 3.1 of this appendix, °F.

70 = assumed indoor temperature, °F

0.45 = specific heat of water vapor, Btu/lb–°F

45 = average outdoor temperature for vented heaters, °F

4.1.6.3 Latent heat gain due to condensation under cyclic conditions. (only for vented heaters tested under the optional tracer gas procedures of section 3.3 or 3.6) Calculate the latent heat gain (L_G) expressed as a percent and defined as:

$$L_G = 100\frac{(1053.3)M_C}{Q_C}$$

where:

100 = conversion factor to express a decimal as a percent

1053.3 = latent heat of vaporization of water, Btu per pound

M_c = mass of condensate for the cyclic test as determined in 3.8.2 of this appendix, pounds

Q_c = fuel energy input for cyclic test as determined in 3.8.2 of this appendix, Btu

4.1.6.4 Heat loss due to hot condensate going down the drain under cyclic conditions. (only for vented heaters tested under the optional tracer gas procedures of section 3.3 or 3.6) Calculate the cyclic heat loss due to hot condensate going down the drain (L_C) expressed as a percent and defined as:

$$L_C = L_G \frac{1.0\left(T_{F,SS} - 70\right) - 0.45\left(T_{F,SS} - 45\right)}{1053}.3$$

where:

L_G = Latent heat gain due to condensation under cyclic conditions as defined in 4.1.6.3 of this appendix

1.0 = specific heat of water, Btu/lb–°F

$T_{F,SS}$ = Flue (or stack) gas temperature as defined in 3.1 of this appendix.

70 = assumed indoor temperature, °F

0.45 = specific heat of water vapor, Btu/lb–°F

45 = average outdoor temperature for vented heaters, °F

* * * * *

4.1.10 *Steady-state efficiency.* For vented heaters equipped with single-stage thermostats, calculate the steady-state efficiency (excluding jacket loss, $\eta_{SS,}$ expressed in percent and defined as:

$\eta_{SS} = 100 - L_{L,A} - L_{S,SS,A}$

where:

$L_{L,A}$ = latent heat loss, as defined in 4.1.6 of this appendix (for condensing vented heaters $L_{L,A}$* for steady-state conditions)

$L_{S,SS,A}$ = sensible heat loss at steady-state operation, as defined in 4.1.9 of this appendix

For vented heaters equipped with either two-stage thermostats or with step-modulating thermostats, calculate the steady-state efficiency at the reduced fuel input rate, η_{SS-L}, expressed in percent and defined as:

$\eta_{SS-L} = 100 - L_{L,A} - L_{S,SS,A}$

where:

$L_{L,A}$ = latent heat loss, as defined in 4.1.6 of this appendix (for condensing vented heaters $L_{L,A}$* for steady-state conditions at the reduced firing rate)

$L_{S,SS,A}$ = sensible heat loss at steady-state operation, as defined in 4.1.9 of this appendix in which $L_{S,SS,A}$is determined at the reduced fuel input rate

For vented heaters equipped with two-stage thermostats, calculate the steady-state efficiency at the maximum fuel input rate, η_{SS-H}, expressed in percent and defined as:

$\eta_{SS-H} = 100 - L_{L,A} - L_{S,SS,A}$

where:

$L_{L,A}$ = latent heat loss, as defined in 4.1.6 of this appendix (for condensing vented heaters $L_{L,A}$* for steady-state conditions at the maximum fuel input rate)

$L_{S,SS,A}$ = sensible heat loss at steady-state operation, as defined in 4.1.9 of this appendix in which $L_{S,SS,A}$is measured at the maximum fuel input rate

For vented heaters equipped with step-modulating thermostats, calculate the weighted-average steady-state efficiency in the modulating mode, η_{SS-MOD}, expressed in percent and defined as:

$$\eta_{SS-MOD} = \left[\eta_{SS-H} - \eta_{SS-L}\right]\left[\frac{T_C - T_{OA}*}{T_C - 15}\right] + \eta_{SS-L}$$

where:

η_{SS-H} = steady-state efficiency at the maximum fuel input rate, as defined in 4.1.10 of this appendix

η_{SS-L} = steady-state efficiency at the reduced fuel input rate, as defined in 4.1.10 of this appendix

T_{OA}* = average outdoor temperature for vented heaters with step-modulating thermostats operating in the modulating mode and is obtained from Table 3 or Figure 1 of this appendix

T_C = balance point temperature which represents a temperature used to apportion the annual heating load between the reduced input cycling mode and either the modulating mode or maximum input cycling mode and is obtained either from Table 3 of this appendix or calculated by the following equation:

$T_C = 65 - [(65 - 15)R]$

where:

65 = average outdoor temperature at which a vented heater starts operating

15 = national average outdoor design temperature for vented heaters

R = ratio of reduced to maximum heat output rates, as defined in 4.1.13 of this appendix

* * * * *

4.2.4.1 For manually-controlled heaters with various input rates the weighted average steady-state efficiency (η_{SS-WT}), is determined as follows:

$\eta_{SS-WT} = 100 - L_{L,A} - L_{S,SS,A}$

where:

$L_{L,A}$ = latent heat loss, as defined in 4.1.6 of this appendix (for condensing vented heaters, $L_{L,A}$* for steady-state conditions)

$L_{S,SS,A}$ = steady-state efficiency at the reduced fuel input rate, as defined in 4.1.9 of this appendix

and where $L_{L,A}$ and $L_{S,SS,A}$ are determined:

(1) at 50 percent of the maximum fuel input rate as measured in either section 3.1.1 of this appendix for manually-controlled gas vented heaters or section 3.1.2 of this appendix for manually-controlled oil vented heaters, or

(2) at the minimum fuel input rate as measured in either section 3.1.1 to this appendix for manually-controlled gas vented heaters or section 3.1.2 to this appendix for manually-controlled oil vented heaters if the design of the heater is such that the ±5 percent of 50 percent of the maximum fuel input rate cannot be set, provided this minimum rate is no greater than 2/3 of the maximum input rate of the heater.

* * * * *

4.3.3 *Off-cycle sensible heat loss.* For vented heaters equipped with single-stage thermostats, calculate the off-cycle sensible heat loss ($L_{S,OFF}$) at the maximum fuel input rate. For vented heaters equipped with step-modulating thermostats, calculate $L_{S,OFF}$ defined as:

$L_{S,OFF} = X_1\ L_{S,OFF,red}$

where:

X_1 = as defined in 4.1.14 of this appendix

$L_{S,OFF,red}$ = as defined as $L_{S,OFF}$ in 4.3.3 of this appendix at the reduced fuel input rate

For vented heaters equipped with two-stage thermostats, calculate $L_{S,OFF}$ defined as:

$L_{S,OFF} = X_1\ L_{S,OFF,red} + X_2\ L_{S,OFF,Max}$

where:

X_1 = as defined in 4.1.14 of this appendix

$L_{S,OFF,red}$ =as defined as $L_{S,OFF}$ in 4.3.3 of this appendix at the reduced fuel input rate

X_2 = as defined in 4.1.15 of this appendix

$L_{S,OFF,Max}$ = as defined as $L_{S,OFF}$ in 4.3.3 of this appendix at the maximum fuel input rate

Calculate the off-cycle sensible heat loss ($L_{S,OFF}$) expressed as a percent and defined as:

$$L_{s,OFF} = \frac{100\,(0.24)}{Q_{in}\,t_{on}} \sum m_{s,OFF}\left(T_{s,OFF} - T_{RA}\right)$$

where:

100 = conversion factor for percent

0.24 = specific heat of air in Btu per pound − °F

Q_{in} = fuel input rate, as defined in 3.1 of this appendix in Btu per minute (as appropriate for the firing rate)

t_{on} = average burner on-time per cycle and is 20 minutes

$\Sigma\, m_{S,OFF}\,(T_{S,OFF} - T_{RA})$ = summation of the ten values (for single-stage or step-modulating models) or twenty values (for two-stage models) of the quantity, $m_{S,OFF}\,(T_{S,OFF} - T_{RA})$, measured in accordance with 3.3 of this appendix

$m_{S,OFF}$ = stack gas mass flow rate pounds per minute

$$m_{s,OFF} = \frac{1.325 P_B V_T (100 - C_T)}{C_T (T_T + 460)}$$

$T_{S,OFF}$ = stack gas temperature measured in accordance with 3.3 of this appendix

T_{RA} = average room temperature measured in accordance with 3.3 of this appendix

P_B = barometric pressure in inches of mercury

V_T = flow rate of the tracer gas through the stack in cubic feet per minute

C_T * = concentration by volume of the active tracer gas in the mixture in percent and is 100 when the tracer gas is a single component gas

C_T = concentration by volume of the active tracer gas in the diluted stack gas in percent

T_T = temperature of the tracer gas entering the flow meter in degrees Fahrenheit

$(T_T + 460)$ = absolute temperature of the tracer gas entering the flow meter in degrees Rankine

* * * * *

4.3.6 *Part-load fuel utilization efficiency.* Calculate the part-load fuel utilization efficiency (η_u) expressed as a percent and defined as:

$$\eta_u = 100 - L_{L,A} - C_j L_j - \left[\frac{t_{on}}{t_{on} + P_F\, t_{off}}\right] \times \left[L_{S,ON} + L_{S,OFF} + L_{I,ON} + L_{I,OFF}\right]$$

where:

C_j = 2.8, adjustment factor

L_j = jacket loss as defined in 4.1.5

$L_{L,A}$ = Latent heat loss, as defined in 4.1.6 of this appendix (for condensing vented heaters $L_{L,A}$* for cyclic conditions)

t_{on} = Average burner on time which is 20 mins.

$L_{S,ON}$ = On-cycle sensible heat loss, as defined in 4.3.1 of this appendix

$L_{S,OFF}$ = Off-cycle sensible heat loss, as defined in 4.3.3 of this appendix

$L_{I,ON}$ = On-cycle infiltration heat loss, as defined in 4.3.2 of this appendix

$L_{I,OFF}$ = Off-cycle infiltration heat loss, as defined in 4.3.5 of this appendix

P_F = Pilot fraction, as defined in 4.1.4 of this appendix

t_{OFF} = average burner off-time per cycle, which is 20 minutes

* * * * *

■ 5. Appendix P to subpart B of part 430 is revised to read as follows:

Appendix P to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Pool Heaters

Note: After [date 180 days after publication of the final rule in the **Federal Register**], any representations made with respect to the energy use or efficiency of pool heaters must be made in accordance with the results of testing pursuant to this appendix. After this date, if a manufacturer elects to make representations with regard to standby mode and off mode energy consumption, then testing must also include the provisions of this appendix related to standby mode and off mode energy consumption.

Manufacturers conducting tests of gas-fired pool heaters after [date 30 days after publication of the final rule in the **Federal Register**] and prior to [date 180 days after publication of the final rule in the **Federal Register**], must conduct such test in accordance with either this appendix or appendix X as it appeared at 10 CFR Part 430, subpart B, appendix P, in the 10 CFR Parts 200 to 499 edition revised as of January 1, 2013. Any representations made with respect to the energy use or efficiency of such gas-fired pool heaters must be in accordance with whichever version is selected. Given that after [date 180 days after publication of the final rule in the **Federal Register**] representations with respect to the energy use or efficiency of pool heaters must be made in accordance with tests conducted pursuant to this appendix, manufacturers may wish to begin using this test procedure as soon as possible.

On or after the compliance date for any amended energy conservation standards that incorporate standby mode and off mode energy consumption, all representations must be based on testing performed in accordance with this appendix in its entirety.

1. *Definitions.*

1.1 *Active mode* means the condition during the pool heating season in which the pool heater is connected to the power source, and the main burner, electric resistance element, or heat pump is activated to heat pool water.

1.2 *Coefficient of Performance (COP),* as applied to heat pump pool heaters, means the ratio of heat output in kW to the total power input in kW

1.3 *Electric heat pump pool heater* means an appliance designed for heating nonpotable water employing a compressor, water-cooled condenser, and outdoor air coil.

1.4 *Electric resistance pool heater* means an appliance designed for heating nonpotable water employing electric resistance heating elements.

1.5 *Fossil fuel-fired pool heater* means an appliance designed for heating nonpotable water employing natural gas or oil burners.

1.6 *Hybrid pool heater* means an appliance designed for heating nonpotable water employing both a heat pump (compressor, water-cooled condenser, and outdoor air coil) and a fossil fueled burner as heating sources.

1.7 *Off mode* means the condition during the pool non-heating season in which the pool heater is connected to the power source, and neither the main burner, nor the electric resistance elements, nor the heat pump is activated, and the seasonal off switch, if present, is in the ''off'' position.

1.8 *Seasonal off switch* means a switch that effects a difference in off mode energy consumption as compared to standby mode energy consumption.

1.9 *Standby mode* means the condition during the pool heating season in which the pool heater is connected to the power source, and neither the main burner, nor the electric resistance elements, nor the heat pump is activated.

2. *Test method.*

2.1 *Active mode.*

2.1.1 *Fossil fuel-fired pool heaters.* The test method for testing fossil fuel-fired pool heaters in active mode is as specified in ANSI Z21.56 (incorporated by reference; see § 430.3).

2.1.2 *Electric resistance pool heaters.* The test method for testing electric resistance pool heaters in active mode is as specified in ANSI/ASHRAE 146 (incorporated by reference; see § 430.3).

2.1.3 *Electric heat pump pool heaters.* The test method for testing electric heat pump pool heaters in active mode is as specified in ANSI/AHRI 1160 (incorporated by reference; see § 430.3), which references ANSI/ASHRAE 146 (incorporated by reference; see § 430.3).

2.1.4 *Hybrid pool heaters.* [Reserved]

2.2 *Standby mode.* The test method for testing the energy consumption of pool heaters in standby mode is as described in sections 3 through 5 of this appendix.

2.3 *Off mode.*

2.3.1 *Pool heaters with a seasonal off switch.* For pool heaters with a seasonal off switch, no off mode test is required.

2.3.2 *Pool heaters without a seasonal off switch.* For pool heaters without a seasonal off switch, the test method for testing the energy consumption of the pool heater is as described in sections 3 through 5 of this appendix.

3. *Test conditions.*

3.1 *Active mode.*

3.1.1 *Fossil fuel-fired pool heaters.* Establish the test conditions specified in section 2.10 of ANSI Z21.56 (incorporated by reference; see § 430.3).

3.1.2 *Electric resistance pool heaters.* Establish the test conditions specified in section 9.1.4 of ANSI/ASHRAE 146 (incorporated by reference; see § 430.3).

3.1.3 *Electric heat pump pool heaters.* Establish the test conditions specified in section 5 of ANSI/AHRI 1160. The air temperature surrounding the unit shall be at the ''High Air Temperature—Mid Humidity (63% RH)'' level specified in section 6 of ANSI/AHRI 1160 (80.6 °F [27.0 °C] Dry-Bulb, 71.2 °F [21.8 °C]).

3.1.4 *Hybrid pool heaters.* [Reserved]

3.2 *Standby mode and off mode.* After completing the active mode tests described in section 3.1, reduce the thermostat setting to a low enough temperature to put the pool heater into standby mode. Reapply the energy sources and operate the pool heater in standby mode for 60 minutes.

4. *Measurements*

4.1 *Active mode*

4.1.1 *Fossil fuel-fired pool heaters.* Measure the quantities delineated in section 2.10 of ANSI Z21.56 (incorporated by reference; see § 430.3). The measurement of energy consumption for oil-fired pool heaters in Btu is to be carried out in appropriate units (*e.g.,* gallons).

4.1.2 *Electric resistance pool heaters.* Measure the quantities delineated in section 9.1.4 of ANSI/ASHRAE 146 (incorporated by reference; see § 430.3) during and at the end of the 30-minute period when water is flowing through the pool heater.

4.1.3 *Electric heat pump pool heaters.* Measure the quantities delineated in section 9.1.1 and Table 2 of ANSI/ASHRAE 146 (incorporated by reference; see § 430.3). The elapsed time, $t_{HP,}$ from the start of electric power metering to the end shall be recorded, in minutes.

4.1.4 *Hybrid pool heaters.* [Reserved]

4.2 *Standby mode.* For all pool heaters, record the average electric power consumption during the standby mode test, $P_{W,SB}$, in W, in accordance with section 5 of IEC 62301 (Second Edition) (incorporated by reference; see § 430.3). For fossil fuel-fired pool heaters, record the fossil fuel energy consumption during the standby test, Q_p, in Btu. (Milli-volt electrical consumption need not be considered in units so equipped.) Ambient temperature and voltage specifications in section 4.1 of this appendix shall apply to this standby mode testing. The recorded standby power ($P_{W,SB}$) shall be rounded to the second decimal place, and for loads greater than or equal to 10W, at least three significant figures shall be reported.

4.3 *Off mode.*

4.3.1 *Pool heaters with a seasonal off switch.* For pool heaters with a seasonal off switch, the average electric power consumption during the off mode, $P_{W,OFF}$ = 0, and the fossil fuel energy consumed during the off mode, Q_{off} = 0.

4.3.2 *Pool heaters without a seasonal off switch.* For all pool heaters without a seasonal off switch, record the average electric power consumption during the standby/off mode test, $P_{W,OFF}$ (= $P_{W,SB}$), in W, in accordance with section 5 of IEC 62301 (Second Edition) (incorporated by reference; see § 430.3). For fossil fuel-fired pool heaters without a seasonal off switch, record the fossil fuel energy consumption during the off mode test, Q_{off} (= Q_p), in Btu. (Milli-volt electrical consumption need not be considered in units so equipped.) Ambient temperature and voltage specifications in section 4.1 of this appendix shall apply to this off mode testing. The recorded off mode power ($P_{W,OFF}$) shall be rounded to the second decimal place, and for loads greater than or equal to 10W, at least three significant figures shall be reported.

5. *Calculations.*

5.1 *Thermal efficiency.*

5.1.1 *Fossil fuel-fired pool heaters.* Calculate the thermal efficiency, E_t (expressed as a percent), as specified in section 2.10 of ANSI Z21.56 (incorporated by reference; see § 430.3). The expression of fuel consumption for oil-fired pool heaters shall be in Btu.

5.1.2 *Electric resistance pool heaters.* Calculate the thermal efficiency, E_t (expressed as a percent), as specified in section 11.1 of ANSI/ASHRAE 146 (incorporated by reference; see § 430.3).

5.1.3 *Electric heat pump pool heaters.* Calculate the COP according to section 11.1 of ANSI/ASHRAE 146. Calculate the thermal efficiency, E_t (expressed as a percent): E_t = 100 * COP.

5.1.4 *Hybrid pool heaters.* [Reserved]

5.2 *Average annual fossil fuel energy for pool heaters.* For electric resistance and electric heat pump pool heaters, the average annual fuel energy for pool heaters, E_F =0.

For fossil fuel-fired pool heaters, the average annual fuel energy for pool heaters, E_F, is defined as:

E_F = BOH Q_{IN} + (POH—BOH)Q_{PR} + (8760—POH) $Q_{off,R}$

where:

BOH = average number of burner operating hours = 104 h

POH = average number of pool operating hours = 4464 h

Q_{IN} = rated fuel energy input as defined according to section 2.10.1 or section 2.10.2 of ANSI Z21.56 (incorporated by reference; see § 430.3), as appropriate. (For electric resistance and heat pump pool heaters, Q_{IN} = 0.)

Q_{PR} = average energy consumption rate of continuously operating pilot light, if employed, = (Q_P/1 h)

Q_P = energy consumption of continuously operating pilot light, if employed, as measured in section 4.2 of this appendix, in Btu

8760 = number of hours in one year

$Q_{off,R}$ = average off mode fossil fuel energy consumption rate = Q_{off}/(1 h)

Q_{off} = off mode energy consumption as defined in section 4.3 of this appendix

5.3 *Average annual electrical energy consumption for pool heaters.* The average annual electrical energy consumption for pool heaters, E_{AE}, is expressed in Btu and defined as:

(1) E_{AE} = $E_{AE,active}$ + $E_{AE,standby,off}$

(2) $E_{AE,active}$ = BOH * PE

(3) $E_{AE,standby,off}$ = (POH—BOH) $P_{W,SB}$(Btu/h) + (8760—POH) $P_{W,OFF}$(Btu/h)

where:

$E_{AE,active}$ = electrical consumption in the active mode

$E_{AE,standby,off}$ = auxiliary electrical consumption in the standby mode and off mode

PE = 2E_c, for fossil fuel-fired heaters tested according to section 2.10.1 of ANSI Z21.56 (incorporated by reference; see § 430.3) and for electric resistance pool heaters, in Btu/h

= 3.412 PE_{rated}, for fossil fuel-fired heaters tested according to section 2.10.2 of ANSI Z21.56, in Btu/h

= $E_{c,HP}$ * (60/t_{HP}), for heat pump pool heaters, in Btu/h.

E_c = electrical consumption of the heater (converted to equivalent unit of Btu), including the electrical energy to the recirculating pump if used, during the 30-minute thermal efficiency test, as defined in section 2.10.1 of ANSI Z21.56 for fossil fuel-fired pool heaters and section 9.1.4 of ANSI/ASHRAE 146 (incorporated by reference; see § 430.3) for electric resistance pool heaters, in Btu per 30 min.

2 = conversion factor to convert unit from per 30 min. to per h.

PE_{rated} = nameplate rating of auxiliary electrical equipment of heater, in Watts

$E_{c,HP}$ = electrical consumption of the heat pump pool heater (converted to equivalent unit of Btu), including the electrical energy to the recirculating pump if used, during the thermal efficiency test, as defined in section 9.1 of ANSI/ASHRAE 146, in Btu.

t_{HP} = elapsed time of data recording during the thermal efficiency test on heat pump pool heater, as defined in section 9.1 of ANSI/ASHRAE 146, in minutes.

BOH = as defined in 5.2 of this appendix

POH = as defined in 5.2 of this appendix

$P_{W,SB}$ (Btu/h) = electrical energy consumption rate during standby mode expressed in Btu/h = 3.412 $P_{W,SB}$, Btu/h

$P_{W,SB}$ = as defined in 4.2 of this appendix

$P_{W,OFF}$ (Btu/h) = electrical energy consumption rate during off mode expressed in Btu/h = 3.412 $P_{W,OFF}$, Btu/h

$P_{W,OFF}$ = as defined in 4.3 of this appendix

5.4 *Integrated thermal efficiency.*

5.4.1 *Calculate the seasonal useful output of the pool heater as:*

E_{OUT} = BOH[(E_t/100)(Q_{IN} + PE)]

where:

BOH = as defined in 5.2 of this appendix

E_t = thermal efficiency as defined in 5.1 of this appendix

Q_{IN} = as defined in 5.2 of this appendix

PE = as defined in 5.3 of this appendix

100 = conversion factor, from percent to fraction

5.4.2 *Calculate the annual input to the pool heater as:*

$E_{IN} = E_F + E_{AE}$

where:

E_F = as defined in 5.2 of this appendix

E_{AE} = as defined in 5.3 of this appendix

5.4.3 *Calculate the pool heater integrated thermal efficiency (TE_I) (in percent).*

$TE_I = 100(E_{OUT}/E_{IN})$

where:

E_{OUT} = as defined in 5.4.1 of this appendix

E_{IN} = as defined in 5.4.2 of this appendix

100 = conversion factor, from fraction to percent

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BILLING CODE 6450–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2013–0872; Directorate Identifier 2013–SW–012–AD]

RIN 2120–AA64

Airworthiness Directives; Eurocopter France Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for Eurocopter France Model AS332C, AS332L, AS332L1, AS332L2, EC225LP, and SA330J helicopters with a certain tail rotor control turnbuckle (turnbuckle) installed. This proposed AD would require inspecting the turnbuckles for corrosion or a crack, and depending on the results, either replacing the turnbuckle or treating the turnbuckle for corrosion. This proposed AD is prompted by a report that a turnbuckle had failed because of corrosion. The proposed actions are intended to detect corrosion or a crack on a turnbuckle and prevent the failure of a turnbuckle, loss of control of the tail rotor and subsequent loss of control of the helicopter.

DATES: We must receive comments on this proposed AD by December 23, 2013.

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

- *Federal eRulemaking Docket:* Go to *http://www.regulations.gov.* Follow the online instructions for sending your comments electronically.
- *Fax:* 202–493–2251.
- *Mail:* Send comments to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.
- *Hand Delivery:* Deliver to the ''Mail'' address between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket

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

For service information identified in this proposed AD, contact American Eurocopter Corporation, 2701 N. Forum Drive, Grand Prairie, TX 75052; telephone (972) 641–0000 or (800) 232–0323; fax (972) 641–3775; or at *http://www.eurocopter.com/techpub.* You may review the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

FOR FURTHER INFORMATION CONTACT: Robert Grant, Aviation Safety Engineer, Safety Management Group, FAA, 2601 Meacham Blvd., Fort Worth, Texas 76137; telephone (817) 222–5110; email *robert.grant@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

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

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

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA AD No. 2013–0081, dated March 26, 2013, to correct an unsafe condition for the Eurocopter Model SA330J, AS332C, AS332C1, AS332L, AS332L1, AS332L2, EC225LP helicopters equipped with tail rotor control turnbuckles, part number 330A27–5031–20. EASA advises that one of the two turnbuckles installed on the tail rotor's yaw flight control cables failed on a helicopter because of corrosion. The subsequent investigation revealed a lack of Mastinox sealant coating between both sides of the turnbuckle's internal tappings and the interface screws of the end-fitting components of the yaw flight control cables. EASA advises that this likely caused the corrosion. This condition, if not detected and corrected, could lead to failure of a tail rotor control turnbuckle, resulting in loss of control of the tail rotor and subsequent loss of control of the helicopter.

To address this condition, EASA issued AD No. 2013–0081, which requires repetitive inspections of each turnbuckle and, depending on the results, either replacing the turnbuckle or treating the turnbuckle for corrosion. EASA revised its AD and issued AD No. 2013–0081R1, dated June 20, 2013, to clarify some of the requirements.

FAA's Determination

These helicopters have been approved by the aviation authority of France and are approved for operation in the United States. Pursuant to our bilateral agreement with France, EASA, its technical representative, has notified us of the unsafe condition described in its AD. We are proposing this AD because we evaluated all known relevant information and determined that an unsafe condition is likely to exist or develop on other products of the same type design.

Related Service Information

On March 14, 2013, Eurocopter issued Alert Service Bulletin (ASB) No. EC225–05A031 for Model No. EC225LP helicopters; ASB No. AS332–05.00.95 for Model AS332C, AS332C1, AS332L, AS332L1 and AS332L2 and for military Model AS332B, AS332B1, AS332F1,

AS332M and AS332M1 helicopters; and ASB No. SA330–05.98 for Model SA330J and military Model SA330Ba, SA330Ca, SA330Ea, SA330H, SA330L, SA330Jm, SA330S1 and SA330Sm helicopters. Eurocopter reports that a tail rotor control turnbuckle ruptured because of corrosion. The damage was discovered during a flight-control check after the main gearbox was replaced. An investigation revealed that Mastinox sealant was missing between the turnbuckle tappings and end-fittings and led to the formation of galvanic corrosion. To prevent a turnbuckle from splitting, Eurocopter called for checking all tail rotor control turnbuckles for cracks and corrosion every 12 months. On June 5, 2013, Eurocopter revised all of the ASBs with Revision 1 to clarify a requirement.

Proposed AD Requirements

This proposed AD would require:

For helicopters delivered before March 1, 2013, within 110 hours time-in-service (TIS) or 3 months, whichever occurs first, and at intervals not to exceed 12 months thereafter, inspecting the turnbuckles for corrosion or a crack. The delivery date is the date the helicopter left Eurocopter's manufacturing plant in France and is the date on the helicopter's identification plate.

For helicopters delivered on or after March 1, 2013, within 12 months, and at intervals not to exceed 12 months thereafter, inspecting the turnbuckles for corrosion or a crack.

If there is corrosion or a crack on the tappings or middle hole of the internal surface of the turnbuckle, or if there is corrosion with a depth of more than 0.3 mm or a crack on the external surface of a turnbuckle, removing the turnbuckle from service before the next flight.

If corrosion is present at or less than a depth of 0.3 mm on the turnbuckle's external surface, before the next flight, treating the affected turnbuckle to prevent corrosion and then removing the treated turnbuckle from service within 6 months from the date the part is treated for corrosion.

Differences Between This Proposed AD and the EASA AD

The EASA AD applies to Eurocopter Model AS332C1 helicopters. This proposed AD does not because Model AS332C1 helicopters are not type certificated in the United States.

Costs of Compliance

We estimate that this proposed AD would affect 46 helicopters of U.S. Registry and that labor costs average $85 a work-hour. Based on these estimates, we would expect the following costs:

- Inspecting the tail rotor control turnbuckles for corrosion or a crack would require 4 work-hours for a labor cost of $340. Parts would cost $148 for a total cost of $488 per helicopter, $22,448 for the U.S. fleet.
- Treating the turnbuckle to prevent corrosion would require 1 work-hour for a labor cost of $85. The cost of parts is minimal for a total cost of $85 per helicopter.
- Replacing the turnbuckle would not require additional labor costs because it can be done as part of the inspection. Parts would cost $173 for a total cost of $173 per helicopter.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed, I certify this proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

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

3. Will not affect intrastate aviation in Alaska to the extent that it justifies making a regulatory distinction; and

4. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared an economic evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Eurocopter France: Docket No. FAA–2013–0872; Directorate Identifier 2013–SW–012–AD.

(a) Applicability

This AD applies to Eurocopter France (Eurocopter) Model AS332C, AS332L, AS332L1, AS332L2, EC225LP, and SA330J helicopters with a tail rotor control turnbuckle (turnbuckle), part number (P/N) 330A27–5031–20, installed, certificated in any category.

(b) Unsafe Condition

This AD defines the unsafe condition as failure of a turnbuckle. This condition could result in loss of the tail rotor control and subsequent loss of helicopter control.

(c) Comments Due Date

We must receive comments by December 23, 2013.

(d) Compliance

You are responsible for performing each action required by this AD within the specified compliance time unless it has already been accomplished prior to that time.

(e) Required Actions

(1) For helicopters delivered before March 1, 2013, within 110 hours time-in-service (TIS) or 3 months, whichever occurs first, and for helicopters delivered on or after March 1, 2013, within 12 months, and thereafter for all helicopters at intervals not to exceed 12 months, using a light source visually inspect the tappings, middle hole, and external surface of each turnbuckle for corrosion or a crack. Indications of corrosion include dirt, a bulge, faded paint, a powdery deposit, or a pit that is white or red in color.

(i) If there is corrosion or a crack on the tappings or middle hole of the internal

surface of a turnbuckle, replace the turnbuckle before further flight.

(ii) If there is a crack on the external surface of a turnbuckle, replace the turnbuckle before further flight.

(iii) If there is corrosion on the external surface of the turnbuckle, remove the corrosion, recondition the surface, and measure the corrosion depth in accordance with paragraph 3.B.2.b.2 of Eurocopter Alert Service Bulletin (ASB) No. EC225–05A031, ASB No. AS332–05.00.95, or ASB No. SA330–05.98, all Revision 1 and all dated June 5, 2013, as applicable to your model helicopter, except that you are not required to interpret the results per ASB paragraph 1.E.2.

(A) If the measured corrosion depth is greater than 0.3 mm, replace the turnbuckle before further flight.

(B) If the measured corrosion depth is 0.3 mm or less, do the following:

(1) Before further flight, treat the turnbuckle for corrosion in accordance with paragraph 3.B.2.c of ASB No. EC225–05A031, ASB No. AS332–05.00.95, or ASB No. SA330–05.98, as applicable to your model helicopter.

(2) Within 6 months from when the turnbuckle is treated for corrosion, replace the turnbuckle.

(2) After installation of a turnbuckle, P/N 330A27–5031–20, with greater than 0 hours TIS, before next flight accomplish the actions of paragraph (e)(1) of this AD.

(f) Special Flight Permit

Special flight permits are prohibited.

(g) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Safety Management Group, FAA, may approve AMOCs for this AD. Send your proposal to: Robert Grant, Aviation Safety Engineer, Safety Management Group, FAA, 2601 Meacham Blvd., Fort Worth, Texas 76137; telephone (817) 222–5110; email *robert.grant@faa.gov.*

(2) For operations conducted under a 14 CFR part 119 operating certificate or under 14 CFR part 91, subpart K, we suggest that you notify your principal inspector, or lacking a principal inspector, the manager of the local flight standards district office or certificate holding district office before operating any aircraft complying with this AD through an AMOC.

(h) Additional Information

The subject of this AD is addressed in European Aviation Safety Agency (EASA) AD No. 2013–0081, dated March 26, 2013. You may view the EASA AD in the AD docket on the Internet at *http://www.regulations.gov.*

(i) Subject

Joint Aircraft Service Component (JASC) Code: 6700, Rotorcraft Flight Control.

Issued in Fort Worth, Texas on September 27, 2013.

Lance T. Gant,

Acting Directorate Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 2013–24942 Filed 10–23–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2013–0866; Directorate Identifier 2013–NM–131–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for all The Boeing Company Model 737–100, –200, –200C, –300, –400, and –500 series airplanes. This proposed AD was prompted by reports of cracks found in the aft support fitting, the rear spar upper chord, and the rear spar web. This proposed AD would require repetitive inspections for cracking of the aft support fitting for the main landing gear (MLG) beam, and the rear spar upper chord and rear spar web in the area of rear spar station (RSS) 224.14; and repair if necessary. We are proposing this AD to detect and correct such cracks, which could grow and result in a fuel leak and possible fire.

DATES: We must receive comments on this proposed AD by December 9, 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:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

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

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

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2013–0866; Directorate Identifier 2013–NM–131–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

We have received five reports of cracks found in the aft support fitting for the MLG beam, and the rear spar upper chord and rear spar web in the area of rear spar station (RSS) 224.14. One report was of a vertical crack found in the rear spar web, along with cracks in the aft support fitting and rear spar upper chord. A second report indicated cracks found in two holes in the rear spar upper chord and rear spar web. A third report was of a crack in the rear spar upper chord that extended downward to the edge of the vertical flange and upward to the horizontal flange. The affected airplanes had accumulated between 42,988 and 66,572 total flight hours, and between 29,015

and 60,238 total flight cycles. Analysis shows that cracks in the aft support fitting, rear spar web, and rear spar upper chord are caused by operating load fatigue. Such cracks, if not corrected, could grow and result in a fuel leak and possible fire.

Related Rulemaking

AD 2005–18–08, Amendment 39–14248 (70 FR 52899, September 6, 2005) (''AD 2005–18–08''), affects certain Model 737–100, –200, –200C, and –300 series airplanes. AD 2005–18–08 requires—as one of two options for corrective action—replacement of the support fitting of the MLG beam in accordance with Boeing Special Attention Service Bulletin 737–57–1216. This replacement also terminates the inspections required by AD 2005–18–08. The compliance times for certain inspections specified in this proposed AD depend on accomplishment of that optional action in AD 2005–18–08.

Relevant Service Information

We reviewed Boeing Special Attention Service Bulletin 737–57–1318, dated May 15, 2013. For information on the procedures and compliance times, see this service information at *http://www.regulations.gov* by searching for Docket No. FAA–2013–0866.

FAA's Determination

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in the service information identified previously, except as discussed below.

Differences Between the Proposed AD and the Service Information

Boeing Special Attention Service Bulletin 737–57–1318, dated May 15, 2013, specifies to contact the manufacturer for instructions on how to inspect certain airplanes, and how to repair cracks detected on all airplanes, but this proposed AD would require that those actions be done in one of the following ways:

- In accordance with a method that we approve; or
- Using data that meet the certification basis of the airplane, and that have been approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) whom we have authorized to make those findings.

Costs of Compliance

We estimate that this proposed AD affects 353 airplanes of U.S. registry. We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection	Up to 86 work-hours × $85 per hour = $7,310 per inspection cycle.	$0	Up to $7,310 per inspection cycle.	Up to $2,580,430 per inspection cycle.

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

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

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

(4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

The Boeing Company: Docket No. FAA–2013–0866; Directorate Identifier 2013–NM–131–AD.

(a) Comments Due Date

We must receive comments by December 9, 2013.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all The Boeing Company Model 737–100, –200, –200C, –300, –400, and –500 series airplanes, certificated in any category.

(d) Subject

Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 57, Wings.

(e) Unsafe Condition

This AD was prompted by reports of cracks found in the aft support fitting for the main

landing gear (MLG) beam, and the rear spar upper chord and rear spar web. We are issuing this AD to detect and correct such cracks, which could grow and result in a fuel leak and possible fire.

(f) Compliance

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

(g) Inspections: Group 1

For airplanes identified in Group 1 of Boeing Special Attention Service Bulletin 737–57–1318, dated May 15, 2013: At the applicable time specified in paragraph 1.E., ''Compliance,'' of Boeing Special Attention Service Bulletin 737–57–1318, dated May 15, 2013, except as required by paragraph (i) of this AD, do inspections and applicable corrective actions using a method approved in accordance with the procedures specified in paragraph (j) of this AD.

(h) Inspection: Groups 2–7

For airplanes identified in Groups 2 through 7 of Boeing Special Attention Service Bulletin 737–57–1318, dated May 15, 2013: At the applicable time specified in paragraph 1.E., ''Compliance,'' of Boeing Special Attention Service Bulletin 737–57–1318, dated May 15, 2013, except as required by paragraph (i) of this AD, do high frequency eddy current inspections to detect cracking of the aft support fitting for the MLG beam, and the rear spar upper chord and rear spar web in the area of rear spar station 224.14, as applicable, in accordance with Option 1, 2, or 3 of the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–57–1318, dated May 15, 2013.

(1) If no crack is found, repeat the inspection thereafter at the time specified in paragraph 1.E., ''Compliance,'' of Boeing Special Attention Service Bulletin 737–57–1318, dated May 15, 2013, as applicable. Accomplishment of the inspection of the 12 fastener holes (locations 1–12) in accordance with Option 2, Action 3; or Option 3, Action 3; as specified in note (b) of tables 2 through 5 of paragraph 1.E., ''Compliance,'' of Boeing Special Attention Service Bulletin 737–57–1318, dated May 15, 2013, terminates only the corresponding inspections that include note (b) in the ''Repeat Interval'' column of the applicable table.

(2) If any crack is found during any inspection required by this paragraph, repair before further flight using a method approved in accordance with the procedures specified in paragraph (j) of this AD.

(i) Exception to Service Information Specifications

Where Boeing Special Attention Service Bulletin 737–57–1318, dated May 15, 2013, specifies a compliance time ''after the original issue date of this service bulletin,'' this AD requires compliance within the specified compliance time after the effective date of this AD.

(j) Alternative Methods of Compliance (AMOCs)

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

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

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

(k) Related Information

(1) For more information about this AD, contact Nancy Marsh, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: 425–917–6440; fax: 425–917–6590; email: nancy.marsh@faa.gov.

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P. O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on October 17, 2013.

Jeffrey E. Duven,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–24975 Filed 10–23–13; 8:45 am]

BILLING CODE 4910–13–P

POSTAL SERVICE

39 CFR Part 20

International Mailing Services: Proposed Price Changes—CPI

AGENCY: Postal Service™.

ACTION: Proposed rule.

SUMMARY: In October 2013, the Postal Service filed a notice of mailing services price adjustments with the Postal Regulatory Commission (PRC), effective on January 26, 2014. The Postal Service proposes to revise various sections of *Mailing Standards of the United States Postal Service,* International Mail Manual (IMM®) to reflect these new price changes.

DATES: We must receive your comments on or before November 25, 2013.

ADDRESSES: Mail or deliver comments to the manager, Product Classification, U.S. Postal Service®, 475 L'Enfant Plaza SW., RM 4446, Washington, DC 20260–5015. You may inspect and photocopy all written comments at USPS® Headquarters Library, 475 L'Enfant Plaza SW., 11th Floor N, Washington DC by appointment only between the hours of 9 a.m. and 4 p.m., Monday through Friday by calling 1–202–268–2906 in advance. Email comments, containing the name and address of the commenter, may be sent to: *MailingStandards@usps.gov,* with a subject line of ''January 2014 International Mailing Services Price Change—CPI.'' Faxed comments are not accepted.

FOR FURTHER INFORMATION CONTACT: Rick Klutts at 813–877–0372.

SUPPLEMENTARY INFORMATION: Proposed prices are or will be available under Docket Number R2013–10 on the Postal Regulatory Commission's Web site at *www.prc.gov.*

This proposed rule includes price changes for First-Class Mail International® and international extra services.

First-Class Mail International

This proposed rule would increase prices for single-piece First-Class Mail International letters, postcards, and flats by approximately 2.1 percent. Specifically, there would be no increase for postcards, letters, or the nonmachinable surcharge; flats would be increased by 6.4 percent.

Under this proposal, the 2-ounce letter-size price to Canada will continue as the same price for a 1-ounce letter-size price to Canada.

International Extra Services and Customs Clearance and Delivery Fee

The Postal Service proposes to increase prices for international market dominant extra services by approximately 1.5 percent, for the following:

- Certificate of Mailing (5.5%)
- Registered Mail™ (1.2%)
- Return Receipt (2.9%)
- International Business Reply™ Cards and Envelopes (2.9%)
- Customs Clearance and Delivery Fee (4.5%)

Although exempt from the notice and comment requirements of the Administrative Procedure Act [5 U.S.C.

553(b), (c)] regarding proposed rulemaking by 39 U.S.C. 410(a), the Postal Service invites public comment on the following proposed revisions to the *Mailing Standards of the United States Postal Service,* International Mail Manual (IMM), incorporated by reference in the *Code of Federal Regulations.* See 39 CFR 20.1.

List of Subjects in 39 CFR Part 20

Foreign relations, International postal services.

Accordingly, 39 CFR part 20 is proposed to be amended as follows:

PART 20—[AMENDED]

■ 1. The authority citation for 39 CFR part 20 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, 407, 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,* International Mail Manual (IMM) as follows:

Mailing Standards of the United States Postal Service, International Mail Manual (IMM)

* * * * *

Individual Country Listings

* * * * *

Extra Services

Certificate of Mailing (313)

[For each country that offers certificate of mailing service, revise the fees to read as follows:]

Individual pieces	Fee
Individual article (PS Form 3817)	$1.25
Firm mailing books (PS Form 3877), per article listed (minimum 3)	0.45
Duplicate copy of PS Form 3817 or PS Form 3877 (per page)	1.25
Bulk quantities	**Fee**
First 1,000 pieces (or fraction thereof)	$7.50
Each additional 1,000 pieces (or fraction thereof)	0.90
Duplicate copy of PS Form 3606	1.25

* * * * *

International Business Reply Service (382)

[For each country that offers International Business Reply service, revise the fees to read as follows:]

Fee: Envelopes up to 2 ounces $1.80; Cards $1.30.

* * * * *

Registered Mail (330)

[For each country that offers international Registered Mail service, revise the fee to read as follows:]

Fee: $13.10.

* * * * *

Return Receipt (340)

[For each country that offers international return receipt service, revise the fee to read as follows:]

Fee: $3.60.

* * * * *

We will publish an appropriate amendment to 39 CFR part 20 to reflect these changes if our proposal is adopted.

Stanley F. Mires,

Attorney, Legal Policy & Legislative Advice.

[FR Doc. 2013–24929 Filed 10–23–13; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

39 CFR Part 20

International Mailing Services: Proposed Price Changes—Exigent

AGENCY: Postal Service™.

ACTION: Proposed rule.

SUMMARY: In October 2013, the Postal Service filed a notice of mailing services price adjustments with the Postal Regulatory Commission (PRC), effective on January 26, 2014. The Postal Service proposes to revise various sections of *Mailing Standards of the United States Postal Service,* International Mail Manual (IMM®) to reflect these new price changes.

DATES: We must receive your comments on or before November 25, 2013.

ADDRESSES: Mail or deliver comments to the manager, Product Classification, U.S. Postal Service®, 475 L'Enfant Plaza SW., RM 4446, Washington, DC 20260–5015. You may inspect and photocopy all written comments at USPS® Headquarters Library, 475 L'Enfant Plaza SW., 11th Floor N, Washington DC by appointment only between the hours of 9 a.m. and 4 p.m., Monday through Friday by calling 1–202–268–2906 in advance. Email comments, containing the name and address of the commenter, may be sent to: *MailingStandards@usps.gov,* with a subject line of ''January 2014 International Mailing Services Price Change—Exigent.'' Faxed comments are not accepted.

FOR FURTHER INFORMATION CONTACT: Rick Klutts at 813–877–0372.

SUPPLEMENTARY INFORMATION: Proposed prices are or will be available under Docket Number R2010/4R on the Postal Regulatory Commission's Web site at *www.prc.gov.*

This proposed rule includes price changes for First-Class Mail International® and international extra services.

First-Class Mail International

This proposed rule would increase prices for single-piece First-Class Mail International letters, postcards, and flats by approximately 4.4 percent. Specifically, postcards would be increased by 4.5 percent, letters would be increased by 4.5 percent, and flats would be increased by 4.3 percent. In addition the nonmachinable surcharge would increase by 5.0 percent.

Under this proposal, the 2-ounce letter-size price to Canada will continue as the same price for a 1-ounce letter-size price to Canada.

International Extra Services and Customs Clearance and Delivery Fee

The Postal Service proposes to increase prices for international market dominant extra services by approximately 4.2 percent, for the following:

- Certificate of Mailing (4.1%)
- Registered Mail™ (4.2%)
- Return Receipt (4.2%)
- International Business Reply™ Cards and Envelopes (2.8%)

• Customs Clearance and Delivery Fee (4.3%)

Although exempt from the notice and comment requirements of the Administrative Procedure Act [5 U.S.C. 553(b), (c)] regarding proposed rulemaking by 39 U.S.C. 410(a), the Postal Service invites public comment on the following proposed revisions to the *Mailing Standards of the United States Postal Service,* International Mail Manual (IMM), incorporated by reference in the *Code of Federal Regulations.* See 39 CFR 20.1.

List of Subjects in 39 CFR Part 20

Foreign relations, International postal services.

Accordingly, 39 CFR part 20 is proposed to be amended as follows:

PART 20—[AMENDED]

■ 1. The authority citation for 39 CFR part 20 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, 407, 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,* International Mail Manual (IMM) as follows:

Mailing Standards of the United States Postal Service, International Mail Manual (IMM)

* * * * *

Individual Country Listings

* * * * *

Extra Services

Certificate of Mailing (313)

[For each country that offers certificate of mailing service, revise the fees to read as follows:]

Individual pieces	Fee
Individual article (PS Form 3817)	$ 1.30
Firm mailing books (PS Form 3877), per article listed (minimum 3)	0.47
Duplicate copy of PS Form 3817 or PS Form 3877 (per page)	1.30
Bulk quantities	**Fee**
First 1,000 pieces (or fraction thereof)	$ 7.80
Each additional 1,000 pieces (or fraction thereof)	0.95
Duplicate copy of PS Form 3606	1.30

* * * * *

International Business Reply Service (382)

[For each country that offers International Business Reply service, revise the fees to read as follows:]

Fee: Envelopes up to 2 ounces $1.85; Cards $1.35.

* * * * *

Registered Mail (330)

[For each country that offers international Registered Mail service, revise the fee to read as follows:]

Fee: $13.65.

* * * * *

Return Receipt (340)

[For each country that offers international return receipt service, revise the fee to read as follows:]

Fee: $3.75.

* * * * *

We will publish an appropriate amendment to 39 CFR part 20 to reflect these changes if our proposal is adopted.

Stanley F. Mires,

Attorney, Legal Policy & Legislative Advice.

[FR Doc. 2013–24931 Filed 10–23–13; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R01–OAR–2011–0148; A–1–FRL–9901–72–Region 1]

Approval and Promulgation of Air Quality Implementation Plans; Rhode Island: Prevention of Significant Deterioration; Greenhouse Gas Permitting Authority and Tailoring Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to fully approve certain revisions to the Rhode Island State Implementation Plan (SIP) primarily relating to regulation of Greenhouse Gases (GHGs) under Rhode Island's Prevention of Significant Deterioration (PSD) preconstruction permitting program. EPA is also proposing to fully approve the State's definition of ''$PM_{2.5}$'' (fine particulate matter) which is specific only to permitting. Certain of the State's SIP revisions consist of definitions that also relate more broadly to the State's PSD and nonattainment new source review (NSR) preconstruction permitting requirements, i.e., to major stationary sources that also emit regulated new source review pollutants other than GHGs. EPA is proposing to conditionally approve those definitions as they relate to the non-GHG pollutants. All of the revisions in question were submitted by Rhode Island, through the Rhode Island Department of Environmental Management (RI DEM) Office of Air Resources, on January 18, 2011. They are primarily intended to align Rhode Island's SIP regulations with EPA's ''Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule.'' Finally, EPA is not taking action on certain other SIP revisions contained in RI DEM's January 18, 2011 submittal.

DATES: Written comments must be received on or before November 25, 2013.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R01–OAR–2011–0148 by one of the following methods:

1. *www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *Email: dahl.donald@epa.gov*
3. *Fax:* (617) 918–0167
4. *Mail:* ''Docket Identification Number EPA–R01–OAR–2011–0148'', Donald Dahl, U.S. Environmental Protection Agency, EPA New England Regional Office, Office of Ecosystem Protection, Air Permits, Toxics, and Indoor Programs Unit, 5 Post Office Square—Suite 100, (Mail code OEP05–2), Boston, MA 02109–3912.
5. *Hand Delivery or Courier:* Deliver your comments to: Donald Dahl, U.S. Environmental Protection Agency, EPA New England Regional Office, Office of Ecosystem Protection, Air Permits, Toxics, and Indoor Programs Unit, 5

Post Office Square—Suite 100, (mail code OEP05–2), Boston, MA 02109–3912. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding legal holidays.

Please see the direct final rule which is located in the Rules Section of this issue of the **Federal Register** for detailed instructions on how to submit comments.

FOR FURTHER INFORMATION CONTACT: For information regarding the Rhode Island SIP, contact Donald Dahl, U.S. Environmental Protection Agency, EPA New England Regional Office, Office of Ecosystem Protection, Air Permits, Toxics, and Indoor Programs Unit, 5 Post Office Square—Suite 100, (mail code OEP05–2), Boston, MA 02109–3912. Mr. Dahl's telephone number is (617) 918–1657; email address: *dahl.donald@epa.gov.*

SUPPLEMENTARY INFORMATION: In the Final Rules Section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the notice published today for the direct final rule. If no adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should 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.

For additional information, see the direct final rule which is located in the Final Rules Section of this **Federal Register**.

Dated: September 20, 2013.

H. Curtis Spalding,

Regional Administrator, EPA New England.

[FR Doc. 2013–24846 Filed 10–23–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2013–0136, EPA–R05–OAR–2013–0215, EPA–R05–OAR–2013–0344, EPA–R05–OAR–2013–0378; FRL–9901–62-Region5]

Approval and Promulgation of Air Quality Implementation Plans; Ohio; Dayton-Springfield, Steubenville-Weirton, Toledo, and Parkersburg-Marietta; 1997 8-Hour Ozone Maintenance Plan Revision to Approved Motor Vehicle Emissions Budgets

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Under the Clean Air Act, EPA is proposing to approve the request by Ohio to revise the 1997 8-hour ozone maintenance air quality state implementation plan (SIP) for the Dayton-Springfield and Toledo areas, and the Ohio portions of the Parkersburg-Marietta and Steubenville-Weirton, West Virginia-Ohio areas to replace onroad emissions inventories and motor vehicle emissions budgets (budgets) with inventories and budgets developed using EPA's Motor Vehicle Emissions Simulator (MOVES) emissions model. The Dayton-Springfield area consists of Clark, Greene, Miami, and Montgomery Counties. The Ohio portion of the Steubenville-Weirton, West Virginia-Ohio area consists of Jefferson County, Ohio. The Toledo area consists of Lucas and Wood Counties. The Ohio portion of the Parkersburg-Marietta, West Virginia-Ohio area consists of Washington County. Ohio submitted the SIP revision requests for the areas on the following dates: Dayton-Springfield on February 11, 2013; Steubenville-Weirton on March 15, 2013; Toledo on April 18, 2013; Parkersburg-Marietta on April 26, 2013.

DATES: Comments must be received on or before November 25, 2013.

ADDRESSES: Submit your comments, identified by Docket ID Nos. EPA–R05–OAR–2013–0136 (Dayton-Springfield), EPA–R05–OAR–2013–0215 (Steubenville-Weirton), EPA–R05–OAR–2013–0344 (Toledo), EPA–R05–OAR–2013–0378 (Parkersburg-Marietta), by one of the following methods:

1. *www.regulations.gov:* Follow the on-line instructions for submitting comments.

2. *Email: blakley.pamela@epa.gov*

3. *Fax:* (312) 692–2450.

4. *Mail:* Pamela Blakley, Chief, Control Strategies Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.

5. *Hand Delivery:* Pamela Blakley, Chief, Control Strategies Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Please see the direct final rule which is located in the Rules section of this **Federal Register** for detailed instructions on how to submit comments.

FOR FURTHER INFORMATION CONTACT: Anthony Maietta, Environmental Protection Specialist, Control Strategies Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353–8777, *maietta.anthony@epa.gov.*

SUPPLEMENTARY INFORMATION: In the Final Rules section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this rule, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should 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. For additional information, see the direct final rule which is located in the Rules section of this issue of the **Federal Register**.

Dated September 19, 2013.

Susan Hedman,

Regional Administrator, Region 5.

[FR Doc. 2013–24704 Filed 10–23–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2013–0492; FRL–9901–82–Region 3]

Approval and Promulgation of Air Quality Implementation Plans; Delaware; Infrastructure Requirements for the 2010 Sulfur Dioxide National Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a State Implementation Plan (SIP) submittal from the State of Delaware pursuant to the Clean Air Act (CAA). Whenever new or revised national ambient air quality standards (NAAQS) are promulgated, the CAA requires states to submit a plan for the implementation, maintenance, and enforcement of such NAAQS. The plan is required to address basic program elements, including, but not limited to, regulatory structure, monitoring, modeling, legal authority, and adequate resources necessary to assure attainment and maintenance of the standards. These elements are referred to as infrastructure requirements. Delaware has made a submittal addressing the infrastructure requirements for the 2010 sulfur dioxide (SO_2) NAAQS. This action proposes to approve portions of this submittal.

DATES: Written comments must be received on or before November 25, 2013.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2013–0492 by one of the following methods:

A. www.regulations.gov. Follow the on-line instructions for submitting comments.

B. Email: *fernandez.cristina@epa.gov.*

C. Mail: EPA–R03–OAR–2013–0492, Cristina Fernandez, Associate Director, Office of Air Program Planning, Mailcode 3AP30, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. Hand Delivery: At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID Number EPA–R03–OAR–2013–0492. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *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 *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.

Docket: All documents in the electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Delaware Department of Natural Resources and Environmental Control, 89 Kings Highway, P.O. Box 1401, Dover, Delaware 19903.

FOR FURTHER INFORMATION CONTACT: Rose Quinto, (215) 814–2182, or by email at *quinto.rose@epa.gov.*

SUPPLEMENTARY INFORMATION: On May 29, 2013, the State of Delaware through the Delaware Department of Natural Resources and Environmental Control (DNREC) submitted a revision to its SIP to satisfy the requirements of section 110(a)(2) of the CAA for the 2010 SO_2 NAAQS.

I. Background

On June 22, 2010 (75 FR 35520), EPA promulgated a revised NAAQS for the 1-hour primary SO_2 at a level of 75 parts per billion (ppb), based on a 3-year average of the annual 99th percentile of 1-hour daily maximum concentrations. Pursuant to section 110(a)(1) of the CAA, states are required to submit SIPs meeting the applicable requirements of section 110(a)(2) within three years after promulgation of a new or revised NAAQS or within such shorter period as EPA may prescribe. Section 110(a)(2) requires states to address basic SIP elements such as requirements for monitoring, basic program requirements and legal authority that are designed to assure attainment and maintenance of the NAAQS. Section 110(a) imposes the obligation upon states to make a SIP submittal to EPA for a new or revised NAAQS, but the contents of that submittal may vary depending upon the facts and circumstances. In particular, the data and analytical tools available at the time the state develops and submits the SIP for a new or revised NAAQS affect the content of the submittal. The content of such SIP submittal may also vary depending upon what provisions the state's existing SIP already contains.

In the case of the 2010 SO_2 NAAQS, states typically have met the basic program elements required in section 110(a)(2) through earlier SIP submittals in connection with the SO_2 NAAQS. More specifically, section 110(a)(1) provides the procedural and timing requirements for SIPs. Section 110(a)(2) lists specific elements that states must meet for ''infrastructure'' SIP requirements related to a newly established or revised NAAQS. As mentioned above, these requirements include basic SIP elements such as requirements for monitoring, basic program requirements and legal authority that are designed to assure attainment and maintenance of the NAAQS.

II. Summary of State Submittal

On May 29, 2013, Delaware provided a submittal to satisfy section 110(a)(2) requirements of the CAA, that is the subject of this proposed rulemaking, for

the 2010 SO_2 NAAQS. This submittal addressed the following infrastructure elements: section 110(a)(2)(A), (B), (C), (D), (E), (F), (G), (H), (J), (K), (L), and (M).

EPA has analyzed the above identified submittal and is proposing to make a determination that such submittal meets the requirements of section 110(a)(2)(A), (B), (C), (D)(i)(II), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M) of the CAA, with the exception of the part D, Title I nonattainment planning requirements of section 110(a)(2)(I) and the portion of the submittal relating to section 110(a)(2)(D)(i)(I) on which EPA will take separate action. A detailed summary of EPA's review and rationale for approving Delaware's submittal may be found in the Technical Support Document (TSD) for this action which is available on line at *www.regulations.gov,* Docket ID Number EPA–R03–OAR–2013–0492.

This proposed rulemaking action does not include section 110(a)(2)(I) which pertains to the nonattainment planning requirements of part D, Title I of the CAA, because this element is not required to be submitted by the 3-year submission deadline of section 110(a)(1) of the CAA, and will be addressed in a separate process. This proposed rulemaking action also does not address section 110(a)(2)(D)(i)(I) of the CAA. In accordance with the decision of the U.S. Court of Appeals for the District of Columbia (D.C. Circuit Court), EPA at this time is not treating the 110(a)(2)(D)(i)(I) SIP submission from Delaware as a required SIP submission. *See EME Homer City Generation, L.P. v. EPA, 696 F .3d 7* (D.C. Cir. 2012), *cert. granted,* 2013 U.S. Lexis 4801 (2013). On June 24, 2013, the Supreme Court granted the petitions of the United States and others and agreed to review this D.C. Circuit Court decision. However, at this time the D.C. Circuit Court decision remains in place and unless it is reversed or otherwise modified by the Supreme Court, states are not required to submit 110(a)(2)(D)(i)(I) SIPs until EPA has quantified their obligations under that section. EPA will address the portion of Delaware's May 29, 2013 SIP submittal addressing section 110(a)(2)(D)(i)(I) in a separate action.

III. Proposed Action

EPA is proposing to approve Delaware's submittal that provides the basic program elements specified in section 110(a)(2)(A), (B), (C), (D)(i)(II), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M), necessary to implement, maintain, and enforce the 2010 SO_2 NAAQS, with the exception of the part D, Title I nonattainment planning requirements of section 110(a)(2)(I) and the portion of the submittal relating to section 110(a)(2)(D)(i)(I) on which EPA will take separate action. EPA is soliciting public comments on the issues discussed in this document. These comments will be considered before taking final action.

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 proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub.L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rule, pertaining to Delaware's section 110(a)(2) infrastructure requirements for the 2010 SO_2 NAAQS, does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Sulfur oxides, Reporting and recordkeeping requirements.

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

Dated: September 24, 2013.

W.C. Early,

Acting Regional Administrator, Region III.

[FR Doc. 2013–25063 Filed 10–23–13; 8:45 am]

BILLING CODE 6560–50–P

NATIONAL TRANSPORTATION SAFETY BOARD

49 CFR Part 821

[Docket No. NTSB–GC–2011–0001]

Rules of Practice in Air Safety Proceedings

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

ACTION: Notice of proposed rulemaking; reopening of comment period.

SUMMARY: The NTSB amends the comment deadline for a Notice of Proposed Rulemaking (NPRM) published on September 19, 2013. The proposed change in the NPRM would require the Federal Aviation Administration (FAA) to provide releasable portions of the enforcement investigative report (EIR) to each respondent in emergency cases.

DATES: The comment period for the proposed rule published September 19, 2013, at 78 FR 57602, is reopened. Comments must be submitted by November 6, 2013.

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

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

SUPPLEMENTARY INFORMATION: On September 19, 2013, the NTSB published an NPRM and a Final Rule, finalizing changes to various sections of 49 CFR part 821, as a result of the Pilot's Bill of Rights. 78 FR 57602 (NPRM); 78 FR 57527 (Final Rule). In the NPRM, the NTSB proposed requiring the release of the EIR in emergency cases proceeding under subpart I of the NTSB's rules.

On October 1, 2013, the NTSB ceased normal agency operations due to a lapse in funding. The NTSB did not resume normal agency activities until October 17, 2013. As a result, the NTSB believes it is prudent to extend the October 21 deadline for comments on the NPRM. The NTSB will now consider all comments submitted by the end of the day on November 6, 2013; comments received after the deadline will be considered to the extent they do not affect the progress of this rulemaking.

Deborah A.P. Hersman,

Chairman.

[FR Doc. 2013–25156 Filed 10–22–13; 4:15 pm]

BILLING CODE P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 223

[Docket No. 130716626–3805–01]

RIN 0648—BD51

Endangered and Threatened Species: Designation of a Nonessential Experimental Population of Upper Columbia Spring-Run Chinook Salmon in the Okanogan River Subbasin, Washington, and Protective Regulations

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; open comment period; notice of availability.

SUMMARY: We, the National Marine Fisheries Service (NMFS), propose a rule to designate and authorize the release of a nonessential experimental population (NEP) of Upper Columbia River spring-run (UCR) Chinook salmon (*Oncorhynchus tshawytscha*) under section 10(j) of the Endangered Species Act (ESA) in the Okanogan River subbasin, and to establish a limited set of take prohibitions for the NEP. Under the proposed rule, the geographic boundary for the NEP would be the mainstem and all tributaries of the Okanogan River between the Canada-United States border and to the confluence of the Okanogan River with the Columbia River, Washington (hereafter ''Okanogan River NEP Area''). We have prepared a draft environmental assessment (EA) on this proposed action. We seek comment on both this proposed rule and the EA (see **ADDRESSES** section below).

DATES: To allow us adequate time to consider your comments on this proposed rule, they must be received no later than December 9, 2013. Comments on the EA must be received by December 9, 2013. One public meeting will be held at which the public can make comments on the draft EA and proposed rule. The meeting will be at Koala Street Grill, banquet room, 914 Koala Avenue, Omak, WA, 98841, on November 5 from 5:30 p.m. to 7:30 p.m.

ADDRESSES: You may submit comments on this proposed rule, identified by NOAA–NMFS–2013–0140, by any of the following methods:

- Electronic submissions: Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *http://www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2013-0140,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Chief, Protected Resources Division, NMFS, 1201 NE. Lloyd Blvd.-Suite 1100, Portland, OR 97232.
- *Fax:* (503) 230–5441.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are part of the public record and will generally be posted to *http://www.regulations.gov* without change. All personal identifying information (e.g., name, address), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. We will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

You may access a copy of the draft EA by one of the following:

- Visit NMFS' Reintroduction Web site at: *http://www.westcoast.fisheries.noaa.gov/protected_species/salmon_steelhead/salmon_and_steelhead_listings/chinook/upper_columbia_river_spring_run/upper_columbia_river_spring_run_chinook.html.*
- Call (503) 736–4721 and request to have a CD or hard copy mailed to you.
- Obtain a CD or hard copy by visiting NMFS, 1201 NE. Lloyd Blvd. Suite 1100, Portland, OR 97232.

Please see the draft EA for additional information regarding commenting on that document.

FOR FURTHER INFORMATION CONTACT: Garth Griffin, NMFS, Northwest Region, Portland, OR (503–231–2005) or Dwayne Meadows, NMFS, Office of Protected Resources, Silver Spring, MD 20910 (301–427–8403).

SUPPLEMENTARY INFORMATION:

Background Information Relevant to Experimental Population Designation

The UCR Chinook salmon evolutionarily significant unit (ESU) is listed as an endangered species under the ESA (16 U.S.C. 1531 *et seq.*). NMFS first designated the UCR Chinook salmon ESU as endangered on March 24, 1999 (64 FR 14308), reaffirmed this status on June 28, 2005 (70 FR 37160), and maintained its endangered status after the ESU's 5-year review (76 FR 50448, August 15, 2011). ''Take'' of the species is prohibited by section 9 of the ESA under most circumstances as defined in the ESA.

The listed ESU currently includes all naturally spawned populations of spring-run Chinook salmon in accessible reaches of Columbia River tributaries between Rock Island and Chief Joseph Dams, excluding the Okanogan River.[1] Listed spring-run Chinook salmon from this ESU currently spawn in three river subbasins in eastern Washington: The Methow, Entiat and Wenatchee. A fourth population historically inhabited the Okanogan River subbasin, but was extirpated in the 1930s because of overfishing, hydropower development, and habitat degradation (NMFS 2007). The listed UCR Chinook salmon ESU also includes six artificial propagation programs: The Twisp River, Chewuch River, Methow Composite, Winthrop National Fish Hatchery, Chiwawa River, and White River spring Chinook salmon hatchery programs.

On October 9, 2007, we adopted a final recovery plan for the UCR Chinook salmon ESU (72 FR 57303). The

[1] The Okanogan River is a major tributary of the upper Columbia River, entering the Columbia River between Wells and Chief Joseph Dams. The majority of the Okanogan River subbasin is in Canada (74 percent) with the remainder in Washington State (26 percent).

recovery plan identifies re-establishment of a population in the Okanogan River subbasin as a recovery action (NMFS 2007). More specifically, the recovery plan explains that re-establishment of a spring-run Chinook salmon population in the Okanogan River subbasin would aid recovery of this ESU by increasing abundance, by improving spatial structure, and by reducing the risk of extinction to the ESU as a whole.

On November 22, 2010, we received a letter from the Confederated Tribes of the Colville Reservation (CTCR) requesting that we authorize the release of an experimental population of spring-run Chinook salmon in the Okanogan River subbasin. The CTCR has also initiated discussions on this topic with the U.S. Fish and Wildlife Service (USFWS), the Bonneville Power Administration, the Army Corps of Engineers, the Bureau of Reclamation, the Washington Department of Fish and Wildlife (WDFW), and the Okanagan Nations Alliance of Canada. The CTCR's request included a large amount of information on the biology of UCR Chinook salmon and the possible management implications of releasing an experimental population in the Okanogan subbasin.

Statutory and Regulatory Framework for Experimental Populations

Section 10(j) of the ESA, entitled ''Experimental Populations,'' allows the Secretary to authorize the release of populations of listed species outside their current range if the release would ''further the conservation'' of the listed species. An ''experimental population'' is defined by the statute in section 10(j)(1) as one authorized for release, ''but only when and at such times as, the population is wholly separate geographically from the nonexperimental populations of the same species.''

Before authorizing the release of an experimental population, section 10(j)(2)(B) requires that we must ''by regulation identify the population and determine, on the basis of the best available information, whether or not the population is essential to the continued existence of the species.''

An experimental population is treated as a ''threatened species,'' except that ''non-essential populations'' do not receive the benefit of certain protections normally applicable to threatened species (ESA Section 10(j)(2)(C)). Below we discuss the impact of treating experimental populations as threatened species, and of exceptions that apply to NEPs.

For endangered species, section 9 of the ESA automatically prohibits take. The ESA defines take to mean harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct. For threatened species, the ESA does not automatically extend the Section 9 take prohibitions, but instead authorizes the agency to adopt regulations it deems necessary and advisable for species conservation, including prohibiting take under section 4(d).

Where, as proposed here, we designate an experimental population of an endangered species, the automatic take prohibition no longer applies; however, because the experimental population is treated as threatened, we must issue protective 4(d) regulations for that population as we deem necessary and advisable for the conservation of the population. Such regulations may include take prohibitions.

Section 7 of the ESA provides for Federal interagency cooperation and consultation to conserve listed species, ensure survival, help in recovery of the species, and protect designated critical habitat. Section 7(a)(1) directs all Federal agencies to use their authorities to further the purposes of the ESA in aiding the recovery of listed species. Section 7(a)(2) requires all Federal agencies, in consultation with NMFS, to ensure that any action they authorize, fund or carry out is not likely to jeopardize the continued existence of a listed species, or result in the destruction or adverse modification of designated critical habitat. Section 7 applies equally to endangered and threatened species.

Although ESA section 10(j) provides that an experimental population is treated as a threatened species, if the experimental population is deemed non-essential, section 10(j)(C) requires that we apply the section 7(a)(4) consultation provisions to the NEP as if the NEP were a species proposed to be listed, rather than a species that is listed (unless it is located within a National Wildlife Refuge or National Park, in which case it is treated as listed). This means that the section 7(a)(2) consultation requirement would not apply to Federal agency actions affecting the NEP. Formal consultation may be required for actions in the Okanogan River NEP Area if there are effects on other ESA-listed species.

Only two provisions of ESA section 7 would apply to the proposed Okanogan NEP: section 7(a)(1) and section 7(a)(4). Section 7(a)(1) requires Federal agencies to use their authorities in furtherance of the purposes of the ESA by carrying out programs for the conservation of threatened and endangered species. Section 7(a)(4) requires Federal agencies to confer (rather than consult) with NMFS on actions that are likely to jeopardize the continued existence of a species proposed to be listed. The results of a conference are advisory and do not restrict agencies from carrying out, funding, or authorizing activities.

The USFWS has authorized many experimental populations and developed regulations to implement section 10(j), which can be found at 50 CFR 17.80 through 17.84. We have not promulgated regulations implementing section 10(j) of the ESA, and the USFWS regulations do not govern NMFS' 10(j) authorizations. However, we considered USFWS regulations where appropriate in making the required statutory determinations under section 10(j) and in formulating this proposed rule. The USFWS implementing regulations contain the following provisions:

The USFWS regulations define an essential experimental population as one ''whose loss would be likely to appreciably reduce the likelihood of the survival of the species in the wild.'' All other experimental populations are classified as non-essential (50 CFR 17.81). This definition was apparently directly derived from the legislative history to the ESA amendments that created section 10(j).

In determining whether the experimental population will further the conservation of the species, the USFWS regulations require that agency to consider: (1) Any possible adverse effects on extant populations of a species as a result of removal of individuals, eggs, or propagules for introduction elsewhere; (2) the likelihood that any such experimental population will become established and survive in the foreseeable future; (3) the relative effects that establishing an experimental population will have on the recovery of the species; and (4) the extent to which the introduced population may be affected by existing or anticipated Federal or State actions or private activities within or adjacent to the experimental population area (50 CFR 17.81(b)).

USFWS regulations at 50 CFR 17.81(c) also describe four components that must be provided in any USFWS regulations promulgated with regard to an experimental population under section 10(j). The components are: (1) Appropriate means to identify the experimental population, including its actual or proposed location, actual or anticipated migration, number of specimens released or to be released, and other criteria appropriate to identify

the experimental population(s); (2) a finding of whether the experimental population is, or is not, essential to the continued existence of the species in the wild; (3) management restrictions, protective measures, or other special management concerns of that population, which may include measures to isolate and/or contain the experimental population designated in the regulation from natural populations; and (4) a process for periodic review and evaluation of the success or failure of the release and the effect of the release on the conservation and recovery of the species.

As indicated, we are not bound by the USFWS regulations but we consider them as appropriate in the course of making the statutorily mandated determinations found in ESA section 10(j). To summarize, the statute requires that we determine: (1) Whether the release will further the conservation of the species, and (2) whether the population is essential or non-essential. In addition, because section 10(j) provides that the population will only be experimental when and at such times it is wholly separate geographically from nonexperimental populations of the same species, we must establish that there are such times and places when the experimental population is wholly geographically separate. Similarly, the statute requires that we identify the experimental population; the legislative history indicates that the purpose of this requirement is to provide notice as to which populations of listed species are experimental (See, Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep No. 97–835, at 15 (1982)).

Status of the Species

UCR Chinook salmon are anadromous fish that migrate as adults from the ocean during the spring to spawn in freshwater streams where their offspring hatch and rear prior to migrating back to the ocean to forage until maturity. At spawning, adults pair to lay and fertilize thousands of eggs in freshwater gravel nests or ''redds'' excavated by females. Depending on temperatures, eggs incubate for several weeks to months before hatching as ''alevins'' (a larval life stage dependent on food stored in a yolk sac). Following yolk sac absorption, alevins emerge from the gravel as young juveniles called ''fry'' and begin actively feeding. UCR Chinook salmon juveniles spend a year in freshwater areas before migrating to the ocean. The physiological and behavioral changes required for the transition to salt water result in a distinct ''smolt'' stage. On their journey to the ocean juveniles migrate downstream through a riverine and estuarine corridor between their natal lake or stream and the ocean.

After 2 to 3 years in the ocean, adult UCR Chinook salmon begin returning from the ocean in the early spring, with the run into the Columbia River peaking in mid-May (NMFS 2007). Spring-run Chinook salmon enter the upper Columbia River tributaries from April through July. After migration, they hold in these tributaries until spawning occurs in the late summer, peaking in mid to late August.

Section 4(f) of the ESA requires the Secretary of Commerce to develop recovery plans for all listed species unless the Secretary determines that such a plan will not promote the conservation of a listed species. Prior to developing recovery plans for salmon in the interior Columbia River Basin, we assembled a team of scientists from Federal and state agencies, tribes, and academia. This group, known as the Interior Columbia Technical Recovery Team (ICTRT), was tasked with identifying population structure and recommending recovery criteria (also known as delisting criteria) for ESA-listed salmon and steelhead in the Middle Columbia, Upper Columbia, and Snake River basins. The ICTRT recommended specific abundance and productivity goals for each population in the UCR Chinook salmon ESU. The team also identified the current risk level of each population based on the gap between recent abundance and productivity and the desired recovery goals. The ICTRT (2008) considered all three extant populations to be at high risk of extinction based on their current abundance and productivity levels.

The ICTRT also recommended spatial structure and diversity metrics for each natural population (ICTRT 2007). Spatial structure refers to the geographic distribution of a population and the processes that affect the distribution. Populations with restricted distribution and few spawning areas are at a higher risk of extinction from catastrophic environmental events (e.g., a single landslide) than are populations with more widespread and complex spatial structure. A population with complex spatial structure typically has multiple spawning areas containing the expression of diverse life history characteristics. Diversity is the phenotypic (morphology, behavior, and life-history traits) and genotypic (DNA) characteristics within and between populations. Phenotypic diversity allows more diverse populations to use a wider array of environments and protects populations against short-term temporal and spatial environmental changes. Genotypic diversity, on the other hand, provides populations with the ability to survive long-term changes in the environment by providing genetic variations that may prove successful under different situations. It is the combination of phenotypic and genotypic diversity expressed in a natural setting that provides populations with the ability to utilize the full range of habitat and environmental conditions and to have the resiliency to survive and adapt to long-term changes in the environment. The mixing of hatchery fish (or excessive numbers of out-of-basin stocks) with naturally produced fish on spawning grounds can decrease genetic diversity within a population (NMFS 2007). The ICTRT (2008) considers all three extant populations of this ESU at high risk of extinction based on their current lack of spatial structure and diversity.

On March 18, 2010, we announced the initiation of 5-year status reviews for 16 ESUs of Pacific salmon including the UCR Chinook salmon ESU (75 FR 13082). As part of this review, our Northwest Fisheries Science Center compiled and issued a report on the newest scientific information on the viability of this ESU. The report states:

> The Upper Columbia Spring-run Chinook salmon ESU is not currently meeting the viability criteria (adapted from the ICTRT) in the Upper Columbia Recovery Plan. Increases in natural origin abundance relative to the extremely low spawning levels observed in the mid-1990s are encouraging; however, average productivity levels remain extremely low. Large-scale directed supplementation programs are underway in two of the three extant populations in the ESU. These programs are intended to mitigate short-term demographic risks while actions to improve natural productivity and capacity are implemented. While these programs may provide short-term demographic benefits, there are significant uncertainties regarding the long-term risks of relying on high levels of hatchery influence to maintain natural populations (Ford *et al.* 2010).

All extant populations are still considered to be at high risk of extinction based on the abundance/productivity and spatial structure/diversity metrics. When the risk levels for these attributes are integrated, the overall risk of extinction for this ESU is high (Ford *et al.* 2010).

Analysis of the Statutory Requirements

1. Will authorizing release of an Okanogan UCR Chinook salmon experimental population further the conservation of the species?

The ESA defines ''conservation'' as ''the use of all methods and procedures

which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this [Act] are no longer necessary.'' We discuss in more detail below each of the factors we considered in determining if release of an experimental population into the Okanogan River NEP Area would ''further the conservation'' of UCR Chinook salmon.

The consideration of whether authorizing release of an experimental population will further the conservation of the species raises various issues, including the potential negative effects to the ESU posed by the release; the likelihood that the experimental population will become established and self-sustaining; and the extent to which a self-sustaining experimental population reduces the threats to the ESU's viability. The USFWS regulations also suggest considering whether the experimental population will be affected by other state- or federally-approved actions in the area. This last factor may not be subject to precise evaluation, but where possible we intend to take into account all factors such as other approved actions that affect whether a population can become established and self-sustaining.

An experimental population can lead to improved spatial structure of the species. Here, the Upper Columbia Spring Chinook Salmon and Steelhead Recovery Plan contains specific management strategies for recovering UCR Chinook salmon that include securing existing populations and reintroducing spring-run Chinook salmon into historically occupied habitats in the Okanogan River. The plan concludes, and we continue to agree, that establishing an experimental population of UCR Chinook salmon in the Okanogan River that persist into the foreseeable future is expected to reduce the species' overall extinction risk from natural and anthropogenic factors by increasing its abundance, productivity, spatial structure, and diversity within the Upper Columbia River. These expected improvements in the overall viability of UCR Chinook salmon, in addition to other actions being implemented throughout the Columbia River migration corridor, will contribute to the species' near-term viability and recovery.

Regarding whether the release will result in a successful reintroduction, one issue to consider is what is the most appropriate source of broodstock to establish an experimental population, and is that source available? Reintroduction efforts have the best chance for success when the donor population has life history characteristics compatible with the anticipated environmental conditions of the habitat into which fish will be reintroduced (Araki *et al.* 2008). Populations found in watersheds closest to the reintroduction area are most likely to have adaptive traits that will lead to a successful reintroduction, and therefore, only spring-run Chinook salmon populations found in the Upper Columbia River basin will be used in establishing the experimental population in the Okanogan River NEP Area.

Fish produced from the Methow Composite spring-run Chinook salmon program at Winthrop National Fish Hatchery are proposed to be the initial source of individuals to establish an experimental population of UCR Chinook salmon in the Okanogan River. These fish are from the neighboring river subbasin and have evolved in an environment similar to that of the Okanogan River NEP Area. They are likely to be the most similar genetically to the extirpated Okanogan spring-run Chinook salmon population. For the past several years, enough adult salmon from this hatchery program have returned to the Methow subbasin that excess eggs and sperm are available to begin raising fish for reintroduction into the Okanogan River NEP Area.

We also consider the suitability of habitat available to the experimental population. The Columbia basin as a whole is estimated to have supported pre-development spring-run Chinook salmon returns as large as 588,000 fish (Chapman 1986). The UCR Chinook salmon ESU component of the Columbia basin is estimated to have comprised up to 68,900 fish (Mullan 1987; UCSRB 2007). The Okanogan population of the UCR Chinook salmon ESU is estimated to have historically contained at least 500 spring-run Chinook salmon (UCSRB 2007), and the Upper Columbia Spring Chinook Salmon and Steelhead Recovery Plan estimates that the Okanogan still has the capacity for at least 500 spring-run Chinook salmon.

Over the past century, ecosystem processes in the Okanogan and other subbasins have been severely impacted, creating a fragmented mixture of altered or barren fish and wildlife habitats. Disruptions in the hydrologic system have resulted in widespread loss of migratory corridors and access to productive habitat (CTCR 2007). Low base stream flow and warm summer water temperatures have limited salmonid production both currently and historically. Stream flow and fish passage in the Okanogan subbasin are affected by a series of dams and water diversions.

The Upper Columbia Spring Chinook Salmon and Steelhead Recovery Plan nevertheless characterizes the Okanogan subbasin as having the potential to support a viable population of spring-run Chinook salmon (UCSRB 2007). The recovery plan establishes a framework for accomplishing restoration goals for the Okanogan subbasin including restoring connectivity throughout their historical range where feasible and practical. Short- and long-term actions will protect riparian habitat along spawning and rearing streams and establish, restore, and protect stream flows suitable for spawning, rearing, and migration. In addition, water quality will be protected and restored where feasible and practical. In the mainstem Columbia River, implementation of the Federal Columbia River Power System ESA section 7 Biological Opinion (NMFS 2008a, NMFS 2010) provides a number of new actions and continuation of existing programs that will likely continue to increase passage survival through the Columbia River passage corridor.

Based on the available information, we believe that implementation of these actions will continue to improve habitat conditions in the Okanogan River NEP Area to support reestablishing a potential fourth independent population of UCR Chinook salmon. Salmon Creek and Omak Creek offer the best spawning and rearing habitat for natural production in the subbasin, and major efforts by the CTCR are underway to restore tributary habitat for spring-run Chinook salmon in both the U.S. and Canadian portions of the Okanogan subbasin.

In addition to actions taken under the Upper Columbia Spring Chinook Salmon and Steelhead Recovery Plan, there are many Federal and State laws and regulations that will also help ensure the establishment and survival of the experimental population by protecting aquatic and riparian habitat. Section 404 of the Clean Water Act (CWA)(40 CFR parts 100 through 149) requires avoidance, minimization, and mitigation for the potential adverse effects of dredge and fill activities within the nation's waterways. Section 404(b) of the CWA requires that section 404 permits be granted only in the absence of practicable alternatives to the proposed project, that would have a less adverse impact on the aquatic ecosystem. CWA section 401 provides protection against adverse water quality conditions. In addition, construction and operational storm water runoff is subject to restrictions under CWA

Section 402 and state water quality laws. Also, the Magnuson-Stevens Fishery Conservation and Management Act, as amended (16 U.S.C. 1801 *et seq.*), requires that Essential Fish Habitat (EFH) be identified, and Federal action agencies must consult with NMFS on any activity which they fund, permit, or carry out that may adversely affect EFH. Freshwater EFH for Chinook salmon in the Upper Columbia River basin includes the Okanogan subbasin, which is the area where this NEP would be introduced. For each of these authorities, we do not assume complete implementation and compliance for all actions potentially affecting the experimental population or the listed ESU. However, we expect compliance and assume, at a minimum, that these authorities provide a regulatory regime that tends to encourage actions consistent with that regime.

The habitat improvement actions called for in the Upper Columbia Spring Chinook Salmon and Steelhead Recovery Plan, in combination with the protective measures proposed in this rule, as well as compliance with existing Federal, State and local laws, statutes, and regulations, including those mentioned above, are expected to contribute to the survival of the experimental population in the Okanogan River into the foreseeable future. Although any reintroduction effort is likely to require supplementation with hatchery-origin fish for several years, we conclude there is the potential for a population of spring-run Chinook salmon to become established. Furthermore, we conclude that such a self-sustaining population of genetically compatible individuals is likely to further the conservation of the species as discussed above.

2. Identification of the Experimental Population and Geographic Separation From the Nonexperimental Populations of the same Species

ESA Section 10(j) requires that we identify the population by regulation and, as indicated, the Congressional intention was to provide notice as to which populations are experimental. The statute also provides that the population is only considered experimental when and at such times as it is wholly separate geographically from the nonexperimental populations of the same species. In this case, the analysis and information that identifies the population also demonstrates when and where it will be wholly geographically separate from other UCR Chinook salmon. Under this proposed rule, the experimental population would be defined as the UCR Chinook salmon population released in the Okanogan River, and their subsequent progeny, when they are geographically located anywhere in the Okanogan River NEP Area. When juvenile Okanogan River UCR Chinook salmon pass downstream into the Columbia River to the Pacific Ocean, they would no longer be geographically separated from the other extant UCR Chinook salmon populations, and the ''experimental'' designation would not apply, unless and until they return as adults to spawn in the Okanogan subbasin.

More specifically, the released UCR Chinook salmon and their progeny would only be part of the experimental population when they are present in the Okanogan River NEP Area. UCR Chinook salmon would not be part of the experimental population when they are outside the Okanogan River NEP Area (including use of migration corridors and if they stray to other locations to spawn), even if they originated within the Okanogan River NEP Area.

The Okanogan River NEP Area provides the requisite level of geographic separation because spring-run Chinook salmon are currently extirpated from this area and straying of fish from other spring-run Chinook populations into this area is extremely low (Colville Business Council 2010). As a result, the ESU is defined to not include the Okanogan River and the status of the ESU does not rely on the Okanogan subbasin for recovery. If any other UCR Chinook salmon stray into the Okanogan River NEP Area, they would acquire experimental status while within that area (i.e., and therefore no longer be covered by the ''endangered'' listing, nor by the full range of section 9 prohibitions). Said another way, the ''experimental'' designation is geographically based and does not travel with the fish outside the Okanogan River NEP Area.

If the 10(j) authorization and designation were to occur, hatchery-origin fish used for the reintroduction would be marked, for example, with specific fin clips and/or coded-wire tags to evaluate the stray rate and allow for brood stock collection of returning NEP adults. It may be possible to mark NEP juvenile fish released into the Okanogan River NEP Area in an alternative manner (other than coded-wire tags) that would distinguish them from other Chief Joseph Hatchery-raised Chinook salmon, and we will consider this during the Chief Joseph Hatchery annual review. During the Chief Joseph Hatchery annual review process, information on fish interactions and stray rates, productivity rates of hatchery-origin and natural-origin populations and harvest effects are analyzed and evaluated for consistency with best management practices for artificial production as developed by the Hatchery Scientific Review Group and other science groups in the Pacific Northwest. Any such clips or tags would not, however, be for the purpose of identifying the NEP since, as discussed above, the experimental population is identified based on the geographic location of the fish. Indeed, if the reintroduction is successful, and fish begin reproducing naturally, their offspring would not be distinguishable from fish from other Chinook salmon populations. Outside of the experimental population area, e.g., in the Columbia River below the Okanogan or in the ocean, any such unmarked fish (juveniles and adults alike) would not be considered members of experimental population. They would be considered part of the ESU currently listed as endangered. Likewise, any fish that were marked before release in the NEP area would not be considered part of the experimental population once they left the Okanogan River NEP Area; rather, they would be considered part of the ESU currently listed as endangered.

3. Is the experimental population essential to the continued existence of the species?

As discussed above, the ESA requires the Secretary, in authorizing the release of an experimental population, to determine whether the population would be ''essential to the continued existence'' of the ESU. The statute does not elaborate on how this determination is to be made. However, as noted above, Congress gave some further definition to the term when it described an essential experimental population as one whose loss ''would be likely to appreciably reduce the likelihood of the survival of the species in the wild.'' (see, Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 97–835, at 15 (1982)). The USFWS incorporated this concept into its definition of an essential population.

Based on the best available information, as required by ESA section 10(j)(2)(B), we conclude that the proposed experimental population would not be one whose loss would be likely to appreciably reduce the likelihood of survival of the UCR Chinook salmon ESU.

The Upper Columbia Salmon and Steelhead Recovery Plan states that recovery of spring-run Chinook salmon in the Okanogan subbasin is not a requirement for delisting. Based on the recovery plan's recovery criteria and

proposed management strategies, the UCR Chinook salmon ESU could recover to the point where listing under the ESA is no longer necessary, solely with contributions from the three extant populations. Specifically, if the Wenatchee and Methow populations could achieve a 12-year geometric mean abundance of 2,000 natural-origin fish and the Entiat population reaches a 12-year geometric mean abundance of 500 natural-origin fish, the UCR Chinook salmon ESU would meet the recovery criteria for abundance. This would require a minimum productivity of between 1.2 and 1.4 recruits per spawner for the 12-year time period (NMFS 2007). The extant populations would also need to meet other specific criteria, identified in the recovery plan, which would result in a moderate or lower risk for spatial structure and diversity. The Upper Columbia Salmon and Steelhead Recovery Plan identifies several harvest, hatchery management, hydropower and habitat related actions that could be taken to improve viability of the three extant UCR Chinook salmon populations.

The Upper Columbia Salmon and Steelhead Recovery Plan estimates recovery of the UCR Chinook salmon ESU will take 10 to 30 years without the addition of the Okanogan population. Based on the best available current evidence and information, we conclude that recovery of the UCR Chinook salmon ESU is still likely under the above-discussed conditions.

NMFS' 2011 5-year review states that even though there has been an increase in abundance and a decrease in productivity of the UCR Chinook salmon ESU, information considered in the review does not indicate a change in the biological extinction risk category since the last status review in 2005. Neither status review considered the potential for spring-run Chinook salmon in the Okanogan subbasin to alter this risk, because spring-run Chinook salmon were extirpated from the Okanogan subbasin in the 1930s and no spring-run Chinook salmon currently exist in the Okanogan subbasin. The status reviews only evaluated the status of the extant Wenatchee, Entiat, and Methow spring-run Chinook salmon populations.

In summary then, even without the establishment of an Okanogan population, the UCR Chinook salmon ESU could possibly be delisted, if all threats were being addressed and the species was otherwise recovered in all three existing populations. Because we conclude that a population of UCR Chinook salmon in the Okanogan River NEP Area is not essential for conservation of the ESU, we conclude the proper designation is as an NEP. Under Section 10(j)(2)(C)(ii) of the ESA we cannot designate critical habitat for a NEP.

Additional Management Restrictions, Protective Measures, and Other Special Management Considerations

As indicated above, section 10(j) requires that experimental populations be treated as threatened species, except for certain portions of section 7 (Section 10(j)(2)(C)) and the fact that critical habitat designation is not required. Congress intended that this provision would authorize us to issue regulations we deemed necessary and advisable to provide for the conservation of the experimental population just as it does, under section 4(d), for any threatened species (Joint Explanatory Statement, *supra,* at 15). In addition, when amending the ESA to add section 10(j), Congress specifically intended to provide broad discretion and flexibility to the Secretary in managing experimental populations so as to reduce opposition to releasing listed species outside their current range (H.R. Rep. No. 567, 97th Cong. 2d Sess. 34 (1982)). Therefore, we propose to exercise the authority to issue protective regulations under section 4(d) for the proposed NEP to identify take prohibitions necessary to provide for the conservation of the species and otherwise provide assurances to people in the NEP area.

The ESA defines ''take'' to mean: Harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct. Concurrent with the ESA section 10(j) authorization, we propose protective regulations under ESA section 4(d) for the experimental population that would prohibit take of UCR Chinook salmon that are part of the experimental population except in the following circumstances in the Okanogan River NEP Area:

1. Any activity taken pursuant to a valid permit issued by us under 50 CFR 223.203(b)(1) and 223.203(b)(7) for educational purposes, scientific purposes, the enhancement of propagation or survival of the species, zoological exhibition, and other conservation purposes.

2. Aid, disposal, and salvage of fish by authorized agency personnel acting in compliance with 50 CFR 223.203(b)(3).

3. Activities associated with artificial propagation of the experimental population under an approved Hatchery Genetic Management Plan (HGMP) that complies with the requirements of-50 CFR 223.203(b)(5).

4. Any harvest-related activity undertaken by a tribe, tribal member, tribal permittee, tribal employee, or tribal agent consistent with tribal harvest regulations and an approved Tribal Resource Management Plan that complies with the requirements of 50 CFR 223.204.

5. Any harvest-related activity consistent with State harvest regulations and an approved Fishery Management Evaluation Plan that complies with the requirements of 50 CFR 223.203(b)(4).

6. Any take that is incidental [2] to an otherwise lawful activity. Otherwise lawful activities include, but are not limited to, agricultural, water management, construction, recreation, navigation, or forestry practices, when such activities are in full compliance with all applicable laws and regulations. Outside the Okanogan River NEP Area, UCR spring-run Chinook are not considered to be part of the NEP (even if they originated there), and therefore the take prohibitions applicable to non-experimental UCR Chinook salmon apply.

Process for Periodic Review

If we authorize the release of an experimental population under section 10(j), the success of the reintroduction is likely to be assessed by certain ongoing monitoring programs and new programs developed specifically for this purpose. The CTCR request identifies ongoing monitoring and evaluation programs such as the WDFW monitoring program at Wells Dam (located on the mainstem Columbia River downstream of the confluence with the Methow River) that could be slightly modified to include monitoring of the proposed experimental population. The CTCR request also identifies their commitment to additional monitoring in the Okanogan subbasin, including spawning ground and carcass surveys, weir counts, and video surveillance at Zosel Dam (located at river mile 79 of the Okanogan River, just south of Osoyoos Lake and the U.S.-Canada border). As data are collected through these monitoring efforts, NMFS, the CTCR, and other potential project partners can evaluate the success of the program. In addition, results of the reintroduction project will be evaluated during the next 5-year status review for the UCR Chinook salmon ESU in about 2016.

Proposed Determinations

Based on the best available scientific information, we determine that the

[2] Incidental take refers to takings that result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or applicant. See 50 CFR 402.02.

release of a NEP of UCR Chinook salmon in the Okanogan River NEP Area will further the conservation of UCR Chinook salmon. Fish used for the reintroduction will come from the Methow Composite hatchery program located at Winthrop National Fish Hatchery. These fish are included in the UCR spring-run Chinook salmon ESU and have the best chance to survive and adapt to conditions in the Okanogan River subbasin (Jones *et al.* 2011). They are expected to remain geographically separate from the UCR Chinook salmon ESU during the life stages in which they remain in or return to the Okanogan River; at all times when members of the NEP are downstream of the confluence of the Okanogan and Columbia Rivers, the experimental designation will not apply. Establishment of a fourth population of UCR Chinook salmon in the Okanogan would likely contribute to the viability of the ESU as a whole. This experimental population release is being implemented as recommended in the Upper Columbia Spring Chinook Salmon and Steelhead Recovery Plan, while at the same time ensuring that the reintroduction would not impose undue regulatory restrictions on landowners and third parties.

We further determine, based on the best available scientific information, that the proposed experimental population would not be essential to the ESU, because absence of the experimental population would not reduce the likelihood of survival of the ESU. An Okanogan spring-run Chinook salmon population is not a requirement for delisting because the population is extirpated. Implementation of habitat actions in the Upper Columbia Salmon and Steelhead Recovery Plan are expected to increase the viability of the Methow, Wenatchee, and Entiat populations to meet ESU recovery criteria without establishment of an Okanogan population. We therefore propose that the released population be designated a Non-Essential Population.

Public Comment

We want the final rule to be as effective and accurate as possible, and the final EA to evaluate the potential issues and reasonable range of alternatives. Therefore, we invite the public, State, Tribal, and government agencies, the scientific community, environmental groups, industry, local landowners, and all interested parties to provide comments on the proposed rule and draft EA (see **ADDRESSES** section above). We request that submitted comments be relevant to the proposed release of an experimental population designation and not include comments on the Upper Columbia Chinook Salmon and Steelhead Recovery Plan or Okanogan subbasin HGMP, which are beyond the scope of the action described in this proposed rule. Comments should be as specific as possible, provide relevant information or suggested changes, the basis for the suggested changes, and any additional supporting information where appropriate. 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.

Prior to issuing a final rule, we will take into consideration the comments and supporting materials received. The final rule may differ from the proposed rule based on this information and other considerations. We are interested in all public comments, but are specifically interested in obtaining feedback on:

(1) Whether the Methow Composite stock of UCR Chinook salmon is the best fish to use in establishing an experimental population and the scientific basis for your comment.

(2) The proposed geographical boundary of the experimental population.

(3) The extent to which the experimental population would be affected by current or future Federal, State, Tribal, or private actions within or adjacent to the experimental population area.

(4) Any necessary management restrictions, protective measures, or other management measures that we may not have considered.

(5) The likelihood that the experimental population will become established in the Okanogan River NEP Area.

(6) Whether the proposed experimental population is essential or nonessential.

(7) Whether the proposed designation furthers the conservation of the species and we have used the best available science in making this determination.

Information Quality Act and Peer Review

In December 2004, the Office of Management and Budget (OMB) issued a Final Information Quality Bulletin for Peer Review pursuant to the Information Quality Act (Section 515 of Pub. L. 106–554) published in the **Federal Register** on January 14, 2005 (70 FR 2664). The Bulletin established minimum peer review standards, a transparent process for public disclosure of peer review planning, and opportunities for public participation with regard to certain types of information disseminated by the Federal Government. The peer review requirements of the OMB Bulletin apply to influential or highly influential scientific information disseminated on or after June 16, 2005. There are no documents supporting this proposed rule that meet these criteria.

Classification

Executive Order 12866

This proposed rule has been determined to be not significant under Executive Order (E.O.) 12866.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 801 *et seq.*), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

We are certifying that this proposed rule, if implemented, would not have a significant economic effect on a substantial number of small entities. The following discussion explains our rationale.

This proposal would designate and authorize the release of a nonessential experimental population of Upper Columbia River spring-run Chinook salmon into the Okanogan River subbasin. While in the subbasin, the NEP would be protected from some types of take, but we would impose no prohibitions on the incidental take of the NEP pursuant to otherwise legal activities (see below). The effect of the proposal would not increase the regulatory burdens associated with the ESA on affected entities, including small entities, to conduct otherwise lawful activities as a result of reintroduction of UCR Chinook salmon to the Okanogan River NEP Area. If this proposal is adopted, the area affected by this rule includes the entire Okanogan River subbasin to the extent that it

occurs in Washington state. Private land ownership is significant in the NEP area. Land uses are primarily agriculture, livestock grazing, and suburban development. Accordingly, the rule, if implemented, may impact those uses.

However, this proposed rule would apply only limited take prohibitions as compared with the prohibitions that typically apply to listed UCR Chinook salmon; in particular, the proposed rule expressly allows take of NEP fish provided that the take is unintentional, not due to negligent conduct and incidental to otherwise lawful activity (such as recreational, agriculture, and municipal usage), and also allows take in other specified activities, such as tribal or state-regulated harvest. Under the proposed rule, there would only be the requirement to confer under ESA section 7, but not the more burdensome requirement to consult with respect to the NEP, and no critical habitat could be designated for the NEP. Because of the minimal regulatory overlay provided by this NEP designation, we do not expect this rule to have any significant effect on recreational, agricultural, or development activities within the NEP area.

Because this proposal would require no additional regulatory requirements on small entities and would impose little to no regulatory requirements for activities within the affected area, the Chief Council for Regulation certified that this proposed rule would not have a significant economic effect on a substantial number of small entities. Accordingly, no initial regulatory flexibility analysis is required, and none has been prepared.

Executive Order 12630

In accordance with E.O. 12630, the proposed rule does not have significant takings implications. A takings implication assessment is not required because this proposed rule: (1) Would not effectively compel a property owner to have the government physically invade their property, and (2) would not deny all economically beneficial or productive use of the land or aquatic resources. This proposed rule would substantially advance a legitimate government interest (conservation and recovery of a listed fish species) and would not present a barrier to all reasonable and expected beneficial use of private property.

Executive Order 13132

In accordance with E.O. 13132, we have determined that this proposed rule does not have federalism implications as that termed is defined in E.O. 13132.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

OMB regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), require that Federal agencies obtain approval from OMB before collecting information from the public. A Federal 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. This proposed rule does not include any new collections of information that require approval by OMB under the Paperwork Reduction Act.

National Environmental Policy Act

In compliance with all provisions of the National Environmental Policy Act of 1969 (NEPA), we have analyzed the impact on the human environment and considered a reasonable range of alternatives for this proposed rule. We have prepared a draft EA on this proposed action and have made it available for public inspection (see **ADDRESSES** section above). All appropriate NEPA documents will be finalized before this rule is finalized.

Government-to-Government Relationship With Tribes (E.O. 13175)

E.O. 13175, Consultation and Coordination with Indian Tribal Governments, outlines the responsibilities of the Federal Government in matters affecting tribal interests. If we issue a regulation with tribal implications (defined as having 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) we must consult with those governments or the Federal Government must provide funds necessary to pay direct compliance costs incurred by tribal governments.

The CTCR Reservation lies within the experimental population area. In 2010 staff members of CTCR met with NMFS' Northwest Region (NWR) Protected Resources Division staff. They discussed the Tribe's developing proposal to re-introduce spring Chinook salmon in the Okanogan subbasin and designate it as a 10(j) experimental population.

Since that meeting CTCR and NWR staffs have been in frequent contact, including to explain the rule-making process and evaluate any proposal from the Tribes. These contacts and conversations included working together on public meetings held in Okanogan and Omak,WA (December 5, 2011), and monthly status/update calls describing activity associated with the NEPA and ESA reviews associated with the proposal.

In addition to frequent contact and coordination among CTCR and senior NMFS technical and policy staff, we also discussed hatchery production changes affected by the Chief Joseph Hatchery and the associated aspects of the 10(j) proposal with the Parties to *U.S.* v *Oregon* (Confederated Tribes and Bands of the Yakama Nation, Confederated Tribes of the Umatilla Indian Reservation, Confederated Tribes of the Warm Springs Reservation of Oregon, Nez Perce Tribe, and the Shoshone-Bannock Tribes of the Fort Hall Reservation; the States of Washington, Oregon, and Idaho; and the United States (NMFS, USFWS, Bureau of Indian Affairs, and the Department of Justice)). The current *2008–2017 United States* v. *Oregon Management Agreement* (2008) anticipated the development of the Chief Joseph Hatchery. Footnote #5 to *Table B–1 Spring Chinook Production for Brood Years 2008–2017* states that the parties to the Agreement ''anticipate that the proposed Chief Joseph Hatchery is likely to begin operations during the term of this Agreement. The Parties agree to develop options for providing . . . spring Chinook salmon eggs to initiate the Chief Joseph program when it comes online.'' (p. 99). This will include coordinating with the ''Production Advisory Committee'' (PAC) which is responsible to ''coordinate information, review and analyze . . . future natural and artificial production programs . . . and to submit recommendations to the management entities.'' (p. 14) The *U.S.* v. *Oregon* Policy Committee, in February 2012, approved changes to the Agreement that identified the marking and transfer of 200,000 pre-smolts to Okanogan River acclimation ponds, and the prioritization of this production, in relation to other hatchery programs in the Methow River subbasin. The footnote has been modified to reflect these changes. The PAC includes technical representatives from '' . . . the Warm Springs Tribe, the Umatilla Tribes, the Nez Perce Tribe, the Yakama Nation, and the Shoshone-Bannock Tribes.'' (p. 14). It is these technical representatives who will review adult management proposals associated with this proposed rule. Those representatives are senior staff from the identified tribes and will be in communication with their respective governments. We invite meetings with

tribes to have detailed discussions that could lead to government-to-government consultation meetings with tribal governments. We will continue to coordinate with the affected tribes as we gather public comment on this proposed rule and consider next steps.

References Cited

A complete list of all references cited in this proposed rule is available upon request from National Marine Fisheries Service office (see **FOR FURTHER INFORMATION CONTACT**).

Dated: October 17, 2013.

Alan D. Risenhoover,

Director, Office of Sustainable Fisheries, performing the functions and duties of the Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

List of Subjects in 50 CFR Part 223

Endangered and threatened species, Exports, Imports.

For the reasons set out in the preamble, we propose to amend part 223 of chapter 1, title 50 of the Code of Federal Regulations, as set forth below.

PART 223—THREATENED MARINE AND ANADROMOUS SPECIES

■ 1. The authority citation for part 223 continues to read as follows:

Authority: 16 U.S.C. 1531–1543; subpart B, § 223.201–202 also issued under 16 U.S.C. 1361 et seq.; 16 U.S.C. 5503(d) for § 223.206(d)(9).

■ 2. In § 223.102 the table for ''*Enumeration of threatened marine and anadromous species''* add the entry for (c)(30) to read as follows:

§ 223.102 Enumeration of threatened marine and anadromous species.

* * * * *

Species [1]		Where listed	Citation(s) for listing determination	Citation(s) for critical habitat designation(s)
Common name	Scientific name			
*	* *	*	*	*
(30) Upper Columbia River spring-run Chinook salmon (non-essential experimental population).	*Oncorhynchus tshawytscha*	U.S.A.—WA, only when, and at such times, as they are found in the mainstem or tributaries of the Okanogan River from the Canada-United States border to the confluence of the Okanogan River with the Columbia River, Washington.	Insert FEDERAL REGISTER citation and date when published as a final rule].	N/A.
*	* *	*	*	*

■ 3. In § 223.301, add paragraph (c) to read as follows:

§ 223.301 Special rules—marine and anadromous fishes.

* * * * *

(c) Okanogan River UCR spring-run Chinook Salmon Experimental Population (*Oncorhynchus tshawytscha*).

(1) Upper Columbia River (UCR) spring-run Chinook salmon located in the geographic area identified in paragraph (c)(5) of this section shall comprise the Okanogan River nonessential experimental population (NEP).

(2) *Prohibitions.* Except as provided in paragraph (c)(3) of this section, the prohibitions of section 9(a)(1) of the ESA (16 U.S.C. 1538(a)(1)) relating to endangered species apply to UCR spring-run Chinook salmon in the NEP area identified in paragraph (c)(5) of this section.

(3) *Take of this species that is allowed in the NEP Area.* Taking of UCR spring-run Chinook salmon that is otherwise prohibited by paragraph (c)(2) of this section and 50 CFR 223.203(a) in the NEP area identified in paragraph (c)(5) of this section is allowed, provided it falls within one of the following categories:

(i) Any activity taken pursuant to a valid permit issued by us under 50 CFR 223.203(b)(1) and § 223.203(b)(7) for educational purposes, scientific purposes, the enhancement of propagation or survival of the species, zoological exhibition, and other conservation purposes.

(ii) Aid, disposal, and salvage of fish by authorized agency personnel acting in compliance with 50 CFR 223.203(b)(3);

(iii) Activities associated with artificial propagation of the experimental population under an approved Hatchery Genetic Management Plan that complies with the requirements of 50 CFR 223.203(b)(5).

(iv) Any harvest-related activity undertaken by a tribe, tribal member, tribal permittee, tribal employee, or tribal agent consistent with tribal harvest regulations and an approved Tribal Resource Management Plan that complies with the requirements of 50 CFR 223.204.

(v) Any harvest-related activity consistent with state harvest regulations and an approved Fishery Management Evaluation Plan that complies with the requirements of 50 CFR 223.203(b)(4).

(vi) Any take that is incidental to an otherwise lawful activity, provided that the taking is unintentional; not due to negligent conduct; and incidental to, and not the purpose of, the carrying out of the otherwise lawful activity. Otherwise lawful activities include agricultural, water management, construction, recreation, navigation, or forestry practices, when such activities are in full compliance with all applicable laws and regulations.

(4) *Prohibited take outside the NEP area.* Outside the NEP Area, UCR spring-run Chinook are not considered to be part of the NEP, irrespective of their origin, and therefore the take prohibitions for non-experimental UCR Chinook salmon apply.

(5) *Okanogan River NEP Area.* The geographic boundary defining the Okanogan River NEP Area for UCR spring-run Chinook salmon is the mainstem and all tributaries of the Okanogan River between the Canada-United States border to the confluence of the Okanogan River with the Columbia River. All UCR Chinook salmon in this defined NEP area are considered part of the Okanogan River NEP Area, irrespective of where they originated. Conversely, when UCR spring-run Chinook salmon are outside this defined Okanogan River NEP Area, they are not considered part of the Okanogan River NEP.

[FR Doc. 2013–24845 Filed 10–23–13; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 78, No. 206
Thursday, October 24, 2013

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Document No. AMS–ST–13–0059]

Plant Variety Protection Board; Open Meeting

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice of meeting.

SUMMARY: This notice is intended to notify the public of their opportunity to attend an open meeting of the Plant Variety Protection Board.

DATES: December 9, 2013, 1:00 p.m. to 5:00 p.m. and December 10, 2013, 8:00 a.m. to 5:00 p.m., open to the public.

ADDRESSES: The meeting will be held at the Water Tower Room of the Hyatt Regency Chicago Hotel, 151 East Wacker Drive, Chicago, IL 60601.

FOR FURTHER INFORMATION CONTACT: Ms. Maria Pratt, Plant Variety Protection Office, Science and Technology Programs, Agricultural Marketing Service, United States Department of Agriculture, 1400 Independence Avenue SW., Washington, DC 20250. Telephone number (202) 260–8983, fax (202) 260–8976, or email: *maria.pratt@ams.usda.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to the provisions of section 10(a) of the Federal Advisory Committee Act (5 U.S.C., Appendix 2), this notice is given regarding an upcoming Plant Variety Protection (PVP) Board meeting. The Plant Variety Protection Act (PVPA) (7 U.S.C. 2321 et seq.) provides legal protection in the form of intellectual property rights to developers of new varieties of plants, which are reproduced sexually by seed or are tuber-propagated. A Certificate of Plant Variety Protection is awarded to an owner of a crop variety after an examination shows that it is new, distinct from other varieties, genetically uniform and stable through successive generations. The term of protection is 20 years for most crops and 25 years for trees, shrubs, and vines. The PVPA also provides for a statutory Board (7 U.S.C. 2327). The duties of the Board are to: (1) Advise the Secretary concerning the adoption of rules and regulations to facilitate the proper administration of the Act; (2) provide advisory counsel to the Secretary on appeals concerning decisions on applications by the PVP Office and on requests for emergency public-interest compulsory licenses; and (3) advise the Secretary on any other matters under the Regulations and Rules of Practice and on all questions under Section 44 of the Act, ''Public Interest in Wide Usage'' (7 U.S.C. 2404).

The purpose of the meeting will be to discuss the PVP Office's 2013 achievements, 2014 work plan and outreach plan, ongoing process improvements, updates on electronic applications/database conversion, plans for PVP recognition by other countries, the activity of the subcommittee to evaluate molecular techniques for PVP distinctness characterization and proposals for procedure changes. The proposed agenda for the PVP Board meeting will include a welcome by Department officials followed by a discussion focusing on program activities that encourage the development of new plant varieties and address appeals to the Secretary. The agenda will also include presentations on PVP plans for the future, electronic PVP application/computer database development, and the use of molecular markers for PVP applications.

The meeting will be open to the public. Those wishing to attend or phone into the meeting are encouraged to pre-register by December 2, 2013 with the person listed under **FOR FURTHER INFORMATION CONTACT**. Meeting Accommodations: The meeting hotel is ADA Compliant, and the USDA provides reasonable accommodation to individuals with disabilities where appropriate. If you require accommodations, such as sign language interpreter, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**. Determinations for reasonable accommodation will be made on a case-by-case basis. Minutes of the meeting will be available for public review 30 days following the meeting at the Internet Web site *http://www.ams.usda.gov/PVPO.*

Dated: October 17, 2013.

Rex A. Barnes,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2013–24820 Filed 10–23–13; 8:45 am]

BILLING CODE M

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2013–0017]

Notice of Decision To Allow Interstate Movement of Sapote Fruit From Puerto Rico Into the Continental United States

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public of our decision to begin allowing the interstate movement into the continental United States of fresh sapote fruit from Puerto Rico. Based on the findings of a pest risk analysis, which we made available to the public for review and comment through a previous notice, we believe that the application of one or more designated phytosanitary measures will be sufficient to mitigate the risks of introducing or disseminating plant pests or noxious weeds via the interstate movement of sapote fruit from Puerto Rico.

DATES: *Effective Date:* October 24, 2013.

FOR FURTHER INFORMATION CONTACT: Mr. David Lamb, Regulatory Policy Specialist, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737–1231; (301) 851–2103.

SUPPLEMENTARY INFORMATION:

Background

Under the regulations in ''Subpart—Regulated Articles From Hawaii and the Territories'' (7 CFR 318.13–1 through 318.13–26, referred to below as the regulations), the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture prohibits or restricts the interstate movement of fruits and vegetables into the continental United States from Hawaii, Puerto Rico, the U.S. Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands to prevent plant pests and noxious weeds from being introduced into and spread within the continental United States.

(The continental United States is defined in § 318.13–2 of the regulations as the 48 contiguous States, Alaska, and the District of Columbia.)

Section 318.13–4 contains a performance-based process for approving the interstate movement of commodities that, based on the findings of a pest risk analysis, can be safely moved subject to one or more of the designated phytosanitary measures listed in paragraph (b) of that section. Under that process, APHIS publishes a notice in the **Federal Register** announcing the availability of the pest risk analysis that evaluates the risks associated with the interstate movement of a particular fruit or vegetable. Following the close of the 60-day comment period, APHIS may begin allowing the interstate movement of the fruit or vegetable subject to the identified designated measures if: (1) No comments were received on the pest risk analysis; (2) the comments on the pest risk analysis revealed that no changes to the pest risk analysis were necessary; or (3) changes to the pest risk analysis were made in response to public comments, but the changes did not affect the overall conclusions of the analysis and the Administrator's determination of risk.

In accordance with that process, we published a notice [1] in the **Federal Register** on April 24, 2013 (78 FR 24155–24156, Docket No. APHIS–2013–0017), in which we announced the availability, for review and comment, of a pest risk analysis that evaluates the risks associated with the interstate movement of sapote fruit (*Pouteria sapota*) from Puerto Rico into the continental United States. We solicited comments on the notice for 60 days ending on June 24, 2013. We received no comments by that date.

Therefore, in accordance with the regulations in § 318.13–4, we are announcing our decision to begin allowing the interstate movement of sapote fruit from Puerto Rico into the continental United States subject to the following phytosanitary measures:

- Inspection in Puerto Rico; and
- Movement of the sapote fruit as commercial consignments only.

These conditions will be listed in the Puerto Rico Manual, found on the Internet at *http://www.aphis.usda.gov/import_export/plants/manuals/ports/downloads/puerto_rico.pdf.* In addition to those specific measures, sapote fruit from Puerto Rico will be subject to the general requirements listed in § 318.13–3 that are applicable to the interstate movement of all fruits and vegetables from Puerto Rico.

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

Done in Washington, DC, this 18th day of October 2013.

Kevin Shea,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2013–25003 Filed 10–23–13; 8:45 am]

BILLING CODE 3410–34–P

[1] To view the notice and the pest risk analysis, go to *http://www.regulations.gov/#!docketDetail;D=APHIS-2013-0017.*

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: Bureau of Industry and Security (BIS).

Title: International Import Certificate.

OMB Control Number: 0694–0017.

Form Number(s): BIS–645P.

Type of Request: Regular submission (extension of a current information collection).

Burden Hours: 52.

Number of Respondents: 195.

Average Hours per Response: 16 minutes.

Needs and Uses: The United States and several other countries have increased the effectiveness of their respective controls over international trade in strategic commodities by means of an Import Certificate procedure. For the U.S. importer, this procedure provides that, where required by the exporting country, the importer submits an international import certificate to the U.S. Government to certify that he/she will import commodities into the United States and will not reexport such commodities, except in accordance with the export control regulations of the United States. The U.S. Government, in turn, certifies that such representations have been made.

Affected Public: Businesses and other for-profit organizations.

Frequency: On occasion.

Respondent's Obligation: Required to obtain benefits.

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.*

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Jasmeet Seehra, OMB Desk Officer, by email to *Jasmeet_K._Seehra@omb.eop.gov,* or by fax to (202) 395–5167.

Dated: October 18, 2013.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2013–24867 Filed 10–23–13; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: Bureau of Industry and Security (BIS).

Title: Delivery Verification Procedure for Imports.

OMB Control Number: 0694–0016.

Form Number(s): BIS–647P.

Type of Request: Regular submission (extension of a current information collection).

Burden Hours: 56.

Number of Respondents: 100.

Average Hours Per Response: 31 minutes.

Needs and Uses: Foreign governments, on occasions, require U.S. importers of strategic commodities to furnish their foreign supplier with a U.S. Delivery Verification Certificate validating that the commodities shipped to the U.S. were in fact received. This procedure increases the effectiveness of controls on the international trade of strategic commodities.

Affected Public: Businesses and other for-profit organizations.

Frequency: On occasion.

Respondent's Obligation: Required to obtain benefits.

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.*

Written comments and recommendations for the proposed

information collection should be sent within 30 days of publication of this notice to Jasmeet Seehra, OMB, by email to *Jasmeet_K._Seehra@omb.eop.gov,* or by fax to (202) 395–5167.

Dated: October 18, 2013.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2013–24866 Filed 10–23–13; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: Bureau of Industry and Security.

Title: Application for NATO International Competitive Bidding.

OMB Control Number: 0694–0128.

Form Number(s): BIS–4023P.

Type of Request: Regular submission (extension of a current information collection).

Burden Hours: 40.

Number of Respondents: 40.

Average Hours Per Response: 1 hour.

Needs and Uses: Opportunities to bid for contracts under the North Atlantic Treaty Organization (NATO) Security Investment Program (NSIP) are only open to firms of member NATO countries. NSIP procedures for international competitive bidding (AC/4–D/2261) require that each NATO country certify that their respective firms are eligible to bid on such contracts. This is done through the issuance of a ''Declaration of Eligibility.'' The U.S. Department of Commerce, Bureau of Industry and Security (BIS) is the executive agency responsible for certifying U.S. firms. The BIS–4023P is the application form used to collect information needed to ascertain the eligibility of a U.S. firm. BIS will review applications for completeness and accuracy, and determine a company's eligibility based on its financial viability, technical capability, and security clearances with the U.S. Department of Defense.

Affected Public: Businesses and other for-profit organizations.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

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).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Jasmeet Seehra, OMB Desk Officer, by email to *Jasmeet_K._Seehra@omb.eop.gov,* or by fax to (202) 395–5167.

Dated: October 21, 2013.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2013–25016 Filed 10–23–13; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

International Trade Administration,

[A–351–832, A–560–815, A–201–830, A–841–805, A–274–804, A–823–812]

Carbon and Certain Alloy Steel Wire Rod From Brazil, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine: Final Results of the Expedited Second Sunset Reviews of the Antidumping Duty Orders

AGENCY: Enforcement and Compliance, formerly Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On June 3, 2013, the Department of Commerce (''the Department'') published the initiation of the second sunset reviews of the antidumping duty orders on carbon and certain alloy steel wire rod (''wire rod'') from Brazil, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine pursuant to section 751(c) of the Tariff Act of 1930, as amended (''the Act''). As a result of its analysis, the Department finds that revocation of these AD orders would be likely to lead to continuation or recurrence of dumping at the margins indicated in the ''Final Results of Sunset Reviews'' section of this notice.

DATES: *Effective Date:* October 24, 2013.

FOR FURTHER INFORMATION CONTACT: James Terpstra, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street & Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–3965.

SUPPLEMENTARY INFORMATION:

Background

On June 3, 2013, the Department published the notice of initiation of the sunset reviews of the antidumping duty orders on wire rod from Brazil, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine, pursuant to section 751(c) of the Act. *See Initiation of Five-Year* (''*Sunset*'') *Reviews,* 78 FR 33063 (June 3, 2013) (''*Notice of Initiation*''). The Department received a notice of intent to participate from the following domestic parties: Schnitzer Steel Industries, Inc., DBA Cascade Steel Rolling Mills, Inc.; Arcelor Mittal USA LLC; [1] Evraz Rocky Mountain Steel Mills; Gerdau Ameristeel U.S. Inc.; Keystone Consolidated Industries, Inc.; and Nucor Corporation within the deadline specified in 19 CFR 351.218(d)(1)(i). Each of the companies claimed interested party status under section 771(9)(C) of the Act as a producer in the United States of a domestic like product.

On July 2, 2013, the Department received adequate substantive responses from the domestic interested parties identified above within the 30-day deadline specified in 19 CFR 351.218(d)(3)(i).[2] The Department received no responses from respondent interested parties with respect to any of the orders covered by these sunset reviews. As a result, pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(*2*), the Department has conducted expedited (120-day) sunset reviews of the antidumping duty orders on wire rod from Brazil, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine.

Scope of the Orders

The merchandise subject to these orders is certain hot-rolled products of carbon steel and alloy steel, in coils, of approximately round cross section, 5.00 mm or more, but less than 19.00 mm, in solid cross-sectional diameter. The full

[1] Arcelor Mittal USA LLC is not participating in the sunset review of the antidumping duty order on wire rod from Trinidad and Tobago.

[2] Gerdau Ameristeel U.S. Inc. reported that it is a subsidiary of Gerdau Ameristeel Corp., which is a wholly-owned subsidiary of Gerdau S.A. of Brazil. Evraz Rocky Mountain Steel reported that it is doing business as CF&I Steel LP, which is majority-owned by Evraz Inc. NA and that Evraz Inc. NA is wholly-owned by the Evraz Group, S.A. of Russia. ArcelorMittal USA reported that it is a wholly-owned subsidiary of ArcelorMittal S.A., a company headquartered in Luxembourg. Pursuant to section 771(4)(B) of the Act, a domestic interested party may be excluded from participating as part of the domestic industry if it is related to an exporter of subject merchandise. In these sunset reviews, even if we excluded these three parties from participating as part of the domestic industry, there would still be sufficient participation by other domestic interested parties to merit sunset reviews of the orders.

scope language of each of the antidumping duty orders is listed in the Issues and Decision Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Enforcement and Compliance, dated concurrently with this notice (''Issues and Decision Memorandum''), which is hereby adopted by this notice.

The merchandise is currently classifiable under the following subheadings of the Harmonized Tariff Schedule of the United States (''HTSUS''): 7213.91.3011, 7213.91.3015, 7213.91.3020, 7213.91.3093, 7213.91.4500, 7213.91.6000, 7213.99.0030, 7213.99.0060, 7213.99.0090, 7227.20.0030, 7227.20.0080, 7227.90.6010, 7227.90.6020, and 7227.90.6085 of the HTSUS. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of these orders is dispositive.

Analysis of Comments Received

All issues raised in these reviews are addressed in the Issues and Decision Memorandum, including the likelihood of a continuation or recurrence of dumping in the event of revocation and the magnitude of the dumping margins likely to prevail upon revocation. Parties can find a complete discussion of these issues and the corresponding recommendations in this public document, which is on file electronically via IA ACCESS. IA ACCESS is available to registered users at *http://iaaccess.trade.gov* and in the Central Records Unit (''CRU'') in Room 7046 of the main Department of Commerce building. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly on the internet at *http://enforcement.ita.doc.gov/frn/index.html.* The signed Issues and Decision Memorandum and the electronic versions of the Issues and Decision Memorandum are identical in content.

Final Results of Sunset Reviews

We determine that revocation of the antidumping duty orders on wire rod from Brazil, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine would be likely to lead to continuation or recurrence of dumping at the following weighted-average percentage margins:

Manufacturers/Exporters/ Producers	Weighted-Average Margin (percent)
Brazil:	
Belgo Mineira	94.73
All-Others Rate	74.45
Indonesia:	
P.T. Ispat Indo	4.05
All-Others Rate	4.05
Mexico:	
SICARTSA	20.11
All-Others Rate	20.11
Moldova:	
Moldova-wide Rate	369.10
Trinidad and Tobago:	
Caribbean Ispat Ltd.[3]	11.40
All-Others Rate	11.40
Ukraine:	
Krivorozhstal	116.37
All-Others Rate	116.37

Notification to Interested Parties

This notice also serves as the only reminder to parties subject to administrative protective orders (''APO'') of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of the return or destruction of APO materials or conversion to judicial protective orders is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

We are issuing and publishing the final results of these sunset reviews in accordance with sections 751(c), 752(c), and 777(i)(1) of the Act and 19 CFR 351.221(c)(5)(ii).

Dated: October 17, 2013.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

Appendix I

List of Topics Discussed in the Issues and Decision Memorandum

1. Likelihood of continuation or recurrence of dumping
2. Magnitude of the margins likely to prevail

[FR Doc. 2013–25042 Filed 10–23–13; 8:45 am]

BILLING CODE 3510–DS–P

[3] Arcelor Mittal Point Lisas is the successor-in-interest to Caribbean Ispat Ltd.

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC925

South Atlantic Fishery Management Council (Council); Public Meetings

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of public scoping via webinar.

SUMMARY: The South Atlantic Fishery Management Council (Council) will hold a scoping meeting pertaining to Amendment 31 to the Snapper Grouper Fishery Management Plan (FMP).

DATES: The scoping meeting will be held via webinar on November 7, 2013, beginning at 6 p.m. Information on how to register for the webinar will be posted to the Council's Web site at *www.safmc.net*.

Written comments: Written comments for Snapper Grouper Amendment 31 will be accepted November 1–20, 2013. Email comments to: *SGAmend31Comments@safmc.net*. Comments may also be submitted in writing to: Bob Mahood, South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, N. Charleston, SC 29405.

FOR FURTHER INFORMATION CONTACT: Kim Iverson, Public Information Officer, SAFMC; phone 843/571–4366 or toll free 866/SAFMC–10; FAX 843/769–4520; email: *kim.iverson@safmc.net.*

SUPPLEMENTARY INFORMATION: The Council will hold a scoping meeting via webinar on Amendment 31 to the Snapper Grouper FMP. The amendment addresses actions to separate blueline tilefish from the deepwater management complex; establish Acceptable Biological Catch (ABC), Annual Catch Limit (ACL), Sector ACLs, and a Recreational Annual Catch Target (ACT) for blueline tilefish and for the remainder of the deepwater management complex; and establish a rebuilding program for blueline tilefish.

Council staff will present an overview of the amendment and be available for questions at the beginning of the hearing. Members of the public will have the opportunity to go on record after the presentation to formally record their comments for consideration by the Council. A summary document for the amendment will be posted to the Council's Web site at *www.safmc.net*.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for auxiliary aids should be directed to the council office (see **ADDRESSES**) three (3) days prior to the meeting.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: October 18, 2013.

Tracey Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2013–24903 Filed 10–23–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2013–HA–0203]

Proposed Collection; Comment Request

AGENCY: Office of the Assistant Secretary of Defense for Health Affairs, DoD.

ACTION: Notice.

SUMMARY: In compliance with Section 3506(c)(2)(A) of the *Paperwork Reduction Act of 1995,* the Office of the Assistant Secretary of Defense for Health Affairs announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by December 23, 2013.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to Commanding Officer, Naval Health Research Center, ATTN: Michael Galarneau, MS, NREMT, Code161, 140 Sylvester Road, San Diego, CA 92106, or call at (619) 553–8411 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Traumatic Brain Injury, Post-Traumatic Stress Disorder, and Long-Term Quality of Life Outcomes in Injured Tri-Service U.S. Military Personnel; OMB Control Number 0720–TBD.

Needs and Uses: The information collection requirement is necessary for the Naval Health Research Center (NHRC) to carry out the research study it has been tasked to perform. This research study will assess the long-term health impact of injury on quality of life outcomes in injured tri-service U.S. military personnel, with a special focus on the effects of traumatic brain injury (TBI) and Post-traumatic Stress Disorder (PTSD). Information collected will be used to investigate the long-term effects of injury, TBI, and PTSD on the overall physical and psychological health of military personnel injured in overseas contingency operations. Participants will respond to a health-related questionnaire bi-annually for three to six years. Respondents to this study will include both active-duty and separated members of all branches of the U.S. Armed Forces that have been injured and that have indicated a desire to participate through an Institutional Review Board (IRB)-approved informed consent process.

Affected Public: Current and former members of the U.S. Armed Forces that have been injured in overseas contingency operations and that have indicated a desire to participate.

Annual Burden Hours: 3,096 hours.

Number of Respondents: 4,644.

Responses Per Respondent: 2.

Average Burden Per Response: 20 minutes.

Frequency: Bi-annual.

This information collection is necessary for the Naval Health Research Center (NHRC) to carry out the research study ''TRAUMATIC BRAIN INJURY, POST-TRAUMATIC STRESS DISORDER, AND LONG-TERM QUALITY OF LIFE OUTCOMES IN INJURED TRI-SERVICE U.S. MILITARY PERSONNEL.'' NHRC has been tasked by the office of Congressionally Directed Medical Research Programs (CDMRP) to conduct this longitudinal epidemiological study. The NHRC team will collect information about physical and psychological health from members of the U.S. Armed Forces that have been injured in overseas contingency operations by administering a voluntary web, phone, or mail survey bi-annually for a period of three (3) to six (6) years. In all cases, informed consent will be obtained prior to survey administration. The information collected will be used to ascertain the long-term effects of traumatic brain injury (TBI), Posttraumatic Stress Disorder (PTSD), and other injuries on quality of life outcomes. Pinpointing the effects of these injuries will allow for the development of more effective treatments and early interventions in the management of TBI, PTSD, and other injuries sustained by U.S. military personnel in overseas contingency operations.

Dated: October 21, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2013–24977 Filed 10–23–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Meeting of the National Commission on the Structure of the Air Force; Correction to Meetings of October 24, 2013 and October 25, 2013

AGENCY: Director of Administration and Management, DoD.

ACTION: Notice of Advisory Committee Meeting; correction.

SUMMARY: On Thursday, October 3, 2013 (78 FR 61343–61344), the Department of Defense published a notice announcing a meeting of the National Commission on the Structure of the Air Force on October 24, 2013 and October 25, 2013. This notice corrects the time of the October 24, 2013 meeting, which is now scheduled to run from 8:00 a.m. to 5:00 p.m. and also provides notice that the meeting is now partially closed to the public. The open afternoon meeting from 1:00 p.m. to 5:00 p.m. and the all-day meeting on Friday, October 25, 2013

remain as previously scheduled, with some modifications to the list of witnesses scheduled to testify.

DATES: *Date of Partially Closed/Partially Open Meeting, including Hearing and Commission Discussion:* Thursday, October 24, 2013, from 8:00 a.m. to 5:00 p.m. The period from 8:00 a.m. to 12:30 p.m. in Suite 525 is closed to the public. The period from 1:00 to 5:00 p.m. in Suite 200 is open to the public. Registration for the open meeting will begin at 12:30 p.m.

ADDRESSES: 2521 South Clark Street, Suites 525 & 200, Crystal City, VA 22202.

FOR FURTHER INFORMATION CONTACT: Mrs. Marcia Moore, Designated Federal Officer, National Commission on the Structure of the Air Force, 1950 Defense Pentagon, Room 3A874, Washington, DC 20301–1950. Email: *marcia.l.moore12.civ@mail.mil.* Desk (703) 545–9113. Facsimile (703) 692–5625.

SUPPLEMENTARY INFORMATION:

Purpose of Meeting: A notice was published in the **Federal Register** on October 3, 2013 to announce an open meeting of the Commission on October 24–25, 2013. This announcement corrects the length of the October 24, 2013 date which is now scheduled to run from 8:00 a.m. to 5:00 p.m. and also provides notice that the meeting is now partially closed to the public. Commissioners will now hold a closed meeting in the morning in order to receive a classified briefing from the Air Force's Total Force Task Force and hold classified deliberations from 8:00 a.m. until 12:30 p.m. The open afternoon meeting from 1:00 p.m. to 5:00 p.m. and the all-day meeting on Friday, October 25, 2013 remain as previously scheduled, with some modifications to the list of witnesses scheduled to testify.

October 24, 2013 Agenda from 8:00 a.m. to 12:00 p.m.: Major General Brian Meenan, Mobilization Assistant to the Commander, Air Mobility Command, Scott Air Force Base, IL; Major General John Posner, Director of Global Power Programs in the Office of the Assistant Secretary of the Air Force, Acquisition, Headquarters U.S. Air Force, Washington DC; and Major General Mark Bartman, Assistant Adjutant General—Air, Ohio National Guard, who are all also members of the Total Force Task Force, will provide their classified briefing on their recommendations for the balance requirements, capabilities, risk, and costs across all defense forces, as previously given to the Acting Secretary of the Air Force and the Chief of Staff of the Air Force, for the Commissioners. The Commissioners will also deliberate on their information gathering exercises with the leadership of the U.S. Northern Command; Joint Base Langley-Eustis, National Air & Space Intelligence Center, and other site visits; and classified information gathered by the staff and/or members.

October 24, 2013 Agenda from 1:00 p.m. to 5:00 p.m.: The afternoon agenda has been updated to include testimonies from: Lieutenant General James Jackson, Chief of Air Force Reserve/Commander, Air Force Reserve Command, Headquarters U.S. Air Force, Pentagon, Washington, DC; and Lieutenant General Stanley E. Clarke III, Director, Air National Guard.

This meeting is being held under the provisions of the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR § 102–3.150.

Meeting Accessibility: In accordance with section 10(d) of the FACA, 5 U.S.C. 552b, and 41 CFR 102–3.155, the DoD has determined that the meeting scheduled for October 24, 2013 will now be partially closed to the public. Specifically, the Director of Administration and Management, with the coordination of the DoD FACA Attorney, has determined in writing that the period from 8:00 a.m. to 12:30 p.m. will be closed to the public because the Commission will discuss classified information and matters covered by 5 U.S.C. 552b(c)(1).

Meeting Announcement: Due to the lapse of appropriations, the Department of Defense did not meet the requirements of 41 CFR 102–3.150(a) for providing a corrected notice of both the partial closure of a previously published open meeting of the Commission on October 24, 2013, and accompanying change in time. Accordingly, the Advisory Committee Management Officer for the Department of Defense, pursuant to 41 CFR 102–3.150(b), waives the 15-calendar day notification requirement.

Written Comments: Pursuant to 41 CFR 102–3.105(j) and 102–3.140 and section 10(a)(3) of the FACA, the public or interested organizations may submit written comments to the Commission in response to the stated agenda of the open and/or closed meeting or the Commission's mission. The Designated Federal Officer (DFO) will review all submitted written statements before forwarding to the Commission. Written comments should be submitted to Mrs. Marcia Moore, DFO, via facsimile or electronic mail, the preferred modes of submission. Each page of the comment must include the author's name, title or affiliation, address, and daytime phone number. All contact information may be found in the **FOR FURTHER INFORMATION CONTACT** section. While written comments are forwarded to the Commissioners upon receipt, note that all written comments on the Commission's charge, as described in the ''Background'' section, must be received by November 29, 2013, and postmarked by November 8, 2013 if mailed, to be considered by the Commissioners for the final report. This deadline has been extended.

Background

The National Commission on the Structure of the Air Force was established by the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112–239). The Department of Defense sponsor for the Commission is the Director of Administration and Management, Mr. Michael L. Rhodes. The Commission is tasked to submit a report, containing a comprehensive study and recommendations, by February 1, 2014 to the President of the United States and the Congressional defense committees. The report will contain a detailed statement of the findings and conclusions of the Commission, together with its recommendations for such legislation and administrative actions it may consider appropriate in light of the results of the study. The comprehensive study of the structure of the U.S. Air Force will determine whether, and how, the structure should be modified to best fulfill current and anticipated mission requirements for the U.S. Air Force in a manner consistent with available resources.

The evaluation factors under consideration by the Commission are for a U.S. Air Force structure that—(a) Meets current and anticipated requirements of the combatant commands; (b) achieves an appropriate balance between the regular and reserve components of the Air Force, taking advantage of the unique strengths and capabilities of each; (c) ensures that the regular and reserve components of the Air Force have the capacity needed to support current and anticipated homeland defense and disaster assistance missions in the United States; (d) provides for sufficient numbers of regular members of the Air Force to provide a base of trained personnel from which the personnel of the reserve components of the Air Force could be recruited; (e) maintains a peacetime rotation force to support operational tempo goals of 1:2 for regular members

of the Air Forces and 1:5 for members of the reserve components of the Air Force; and (f) maximizes and appropriately balances affordability, efficiency, effectiveness, capability, and readiness.

Dated: October 18, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2013–24910 Filed 10–23–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Meeting of the Department of Defense Military Family Readiness Council (MFRC); Cancellation of October 18, 2013 Meeting

AGENCY: Department of Defense.

ACTION: Notice of federal advisory committee meeting; cancellation.

SUMMARY: On Tuesday, September 3, 2013 (78 FR 54244), the Department of Defense published a notice announcing a meeting of the Military Family Readiness Council (MFRC) that was to take place on Friday, October 18, 2013. The meeting of October 18, 2013 was cancelled.

FOR FURTHER INFORMATION CONTACT: Ms. Melody McDonald or Ms. Betsy Graham, Office of the Deputy Assistant Secretary of Defense (Military Community & Family Policy), 4800 Mark Center Drive Alexandria, VA 22350–2300, Room 3G15. Telephones (571) 372–0880; (571) 372–0881 and/or email: OSD Pentagon OUSD P–R Mailbox Family Readiness Council, *osd.pentagon.ousd-p-r.mbx.family-readiness-council@mail.mil.*

SUPPLEMENTARY INFORMATION: Due to the lapse of appropriations, the Department of Defense cancelled the meeting of the Department of Defense Military Family Readiness Council on October 18, 2013. As a result, the Department of Defense was unable to provide appropriate notification as required by 41 CFR 102–3.150(a). Therefore, the Advisory Committee Management Officer for the Department of Defense, pursuant to 41 CFR 102–3.150(b), waives the 15-calendar day notification requirement.

Dated: October 18, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2013–24907 Filed 10–23–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Strategic Environmental Research and Development Program, Scientific Advisory Board; Notice of Federal Advisory Committee Meeting; Cancellation of Meeting

AGENCY: Department of Defense.

ACTION: Notice; cancellation of meeting.

SUMMARY: On Tuesday, September 24, 2013 (78 FR 58526–58528), the Department of Defense published a notice announcing a meeting of the Strategic Environmental Research and Development Program, Scientific Advisory Board that was to have taken place on October 15, 2013 and October 16, 2013. This meeting was cancelled.

FOR FURTHER INFORMATION CONTACT: Mr. Jonathan Bunger, SERDP Office, 4800 Mark Center Drive, Suite 17D08, Alexandria, VA 22350–3605; or by telephone at (571) 372–6384.

SUPPLEMENTARY INFORMATION: Due to the lapse of appropriations, the Department of Defense cancelled the meeting of the Strategic Environmental Research and Development Program Scientific Advisory Board on October 15–16, 2013. As a result, the Department of Defense was unable to provide appropriate notification as required by 41 CFR 102–3.150(a). Therefore, the Advisory Committee Management Officer for the Department of Defense, pursuant to 41 CFR 102–3.150(b), waives the 15-calendar day notification requirement.

Dated: October 18, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2013–24848 Filed 10–23–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Notification of an Open Meeting of the National Defense University Board of Visitors (BOV); Cancellation of Meeting

AGENCY: National Defense University, DoD.

ACTION: Notice of open meeting; cancellation of meeting.

SUMMARY: On Thursday, September 19, 2013 (78 FR 57623), the Department of Defense published a notice announcing meetings of the National Defense University Board of Visitors that were to take place on Tuesday, October 8, 2013 and Wednesday, October 9, 2013. This notice announces that the meetings of October 8, 2013 and October 9, 2013 were cancelled due to an absence of appropriations.

FOR FURTHER INFORMATION CONTACT: The point of contact for this notice of open meeting is Ms. Joycelyn Stevens at (202) 685–0079, Fax (202) 685–3920 or *StevensJ7@ndu.edu.*

SUPPLEMENTARY INFORMATION: Due to the lapse of appropriations, the Department of Defense cancelled the meeting of the National Defense University Board of Visitors on October 8–9, 2013. As a result, the Department of Defense was unable to provide appropriate notification as required by 41 CFR 102–3.150(a). Therefore, the Advisory Committee Management Officer for the Department of Defense, pursuant to 41 CFR 102–3.150(b), waives the 15-calendar day notification requirement.

Dated: October 18, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2013–24911 Filed 10–23–13; 8:45 a.m.]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Response Systems to Adult Sexual Assault Crimes Panel; Notice of Federal Advisory Committee Meeting

AGENCY: Department of Defense.

ACTION: Notice of meeting.

SUMMARY: The Department of Defense is publishing this notice to announce the following Federal Advisory Committee meeting of the Response Systems to Adult Sexual Assault Crimes Panel.

DATES: A meeting of the Response Systems to Adult Sexual Assault Crimes Panel (''the Panel'') will be held November 7–8, 2013. The Public Session will begin at 8:30 a.m. and end at 5:00 p.m. on November 7, 2013, and will begin at 8:25 a.m. and end at 5:45 p.m. on November 8, 2013.

ADDRESSES: U.S. District Court for the District of Columbia, 333 Constitution Avenue NW., Courtroom #20, 6th Floor, Washington, DC 20001.

FOR FURTHER INFORMATION CONTACT: Ms. Terri Saunders, Deputy Staff Director, Response Systems Panel, One Liberty Center, 875 N. Randolph Street, Suite 150, Arlington, VA 22203. Email: *terri.a.saunders.civ@mail.mil.* Phone: (703) 693–3829. Web site: *http://responsesystemspanel.whs.mil.*

SUPPLEMENTARY INFORMATION: This public meeting is being held under the provisions of the Federal Advisory

Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150.

Purpose of the Meeting: At this meeting, the Panel will deliberate on the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112–239), Section 576(a)(1) requirement to conduct an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses under 10 U.S.C. 920 (article 120 of the Uniform Code of Military Justice), for the purpose of developing recommendations regarding how to improve the effectiveness of such systems. The Panel is interested in written and oral comments from the public, including non-governmental organizations, relevant to this tasking.

Agenda

November 7, 2013

- 8:30 a.m.–8:35 a.m. Comments from the Panel Chair
- 8:35 a.m.–9:30 a.m. Subcommittee Briefing
- 9:30 a.m.–10:30 a.m. Overview of DoD Victim Services and Sexual Assault Reporting Statistics Update
  - *DoD SAPRO representatives*
- 10:30 a.m.–12:00 p.m. Victim Service Programs
  - *SAPR representatives from Army, Navy, Air Force, Marines, and Coast Guard*
- 12:00 p.m.–12:30 p.m. Lunch
- 12:30 p.m.–2:30 p.m. Victim Service Provider Perspectives
  - *Service victim advocate, sexual assault response coordinator, and victim witness liaison representatives*
  - *Civilian community victim advocates*
- 2:30 p.m.–4:30 p.m. Advocacy Organization Perspectives
  - *Military victim advocacy organizations*
  - *National crime victim and sexual assault organizations*
- 4:30 p.m.–5:00 p.m. Comments from Public

November 8, 2013

- 8:25 a.m.–8:30 a.m. Comments from the Panel Chair
- 8:30 a.m.–10:00 a.m. Sexual Assault Survivor Perspectives
  - *Survivors of sexual assault*
- 10:00 a.m.–12:00 p.m. Services Special Victims' Counsel Programs
  - *Representatives from the Army, Navy, Air Force, Marines, and Coast Guard*
- 12:00 p.m.–12:30 p.m. Lunch
- 12:30 p.m.–2:00 p.m. Civilian Perspectives on Victim Participation
  - *Civilian sexual assault prosecutors*
  - *Civilian victim attorneys*
- 2:00 p.m.–4:00 p.m. Defense Bar Perspectives
  - *Defense representatives from the Army, Navy, Air Force, Marines, and Coast Guard*
  - *Civilian defense attorneys*
- 4:00 p.m.–4:15 p.m. Comments from Public
- 4:15 p.m.–5:45 p.m. Panel Deliberations

Availability of Materials for the Meeting: A copy of the agenda or any updates to the agenda for the November 7–8, 2013 meeting, as well as other materials presented in the meeting, may be obtained at the meeting or from the Panel's Web site at: *http://responsesystemspanel.whs.mil.*

Public's Accessibility to the Meeting: Pursuant to 5 U.S.C. 552b and 41 CFR 102–3.140 through 102–3.165, and the availability of space, this meeting is open to the public. Seating is limited and is on a first-come basis.

Special Accommodations: Individuals requiring special accommodations to access the public meeting should contact the Deputy Staff Director at *terri.a.saunders.civ@mail.mil* at least five (5) business days prior to the meeting so that appropriate arrangements can be made.

Procedures for Providing Public Comments: Pursuant to 41 CFR 102–3.105(j) and 102–3.140, and section 10(a)(3) of the Federal Advisory Committee Act of 1972, the public or interested organizations may submit written comments to the Panel about its mission and topics pertaining to this public session. Written comments must be received by the Deputy Staff Director at least five (5) business days prior to the meeting date so that they may be made available to the Panel for their consideration prior to the meeting. Written comments should be submitted via email to the address for the Deputy Staff Director given in this notice in the following formats: Adobe Acrobat or Microsoft Word. Please note that since the Panel operates under the provisions of the Federal Advisory Committee Act, as amended, all written comments will be treated as public documents and will be made available for public inspection. If members of the public are interested in making an oral statement, a written statement must be submitted along with a request to provide an oral statement. Oral presentations by members of the public will be permitted between 4:30 p.m. and 5:00 p.m. November 7 and between 4:00 p.m. and 4:15 p.m. November 8, 2013 in front of the Panel. The number of oral presentations to be made will depend on the number of requests received from members of the public on a first-come basis. After reviewing the requests for oral presentation, the Chairperson and the Designated Federal Officer will, having determined the statement to be relevant to the Panel's mission, allot five minutes to persons desiring to make an oral presentation.

Committee's Designated Federal Officer: The Board's Designated Federal Officer is Ms. Maria Fried, Response Systems to Adult Sexual Assault Crimes Panel, 1600 Defense Pentagon, Room 3B747, Washington, DC 20301–1600.

Due to the lapse of appropriations, the Department of Defense was unable to provide appropriate notification as required by 41 CFR 102–3.150(a) for a meeting of the Response Systems to Adult Sexual Assault Crimes Panel on November 7–8, 2013. Therefore, the Advisory Committee Management Officer for the Department of Defense, pursuant to 41 CFR 102–3.150(b), waives the 15-calendar day notification requirement.

Dated: October 21, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2013–25011 Filed 10–23–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2013–OS–0206]

Privacy Act of 1974; System of Records

AGENCY: Office of the Secretary of Defense, DoD.

ACTION: Notice to alter a system of records.

SUMMARY: The Office of the Secretary of Defense proposes to alter a system of records, DMDC 18 DoD, Synchronized Predeployment and Operational Tracker Enterprise Suite (SPOT–ES) Records, in its inventory of record systems subject to the Privacy Act of 1974, as amended. This system allows federal agencies and Combatant Commanders the ability to plan, manage, track, account for, monitor and report on contracts, companies and contractor employees during planning, operation and drawdown of any contingency, humanitarian assistance, peacekeeping,

or disaster-recovery operation both within and outside of the U.S.

This system is transferring from the Department of the Army to the Office of the Secretary of Defense, Defense Management Data Center.

DATES: This proposed action will be effective on November 25, 2013 unless comments are received which result in a contrary determination. Comments will be accepted on or before November 25, 2013.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

* *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

* *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, 2nd Floor, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Cindy Allard, Chief, OSD/JS Privacy Office, Freedom of Information Directorate, Washington Headquarters Service, 1155 Defense Pentagon, Washington, DC 20301–1155, or by phone at (571) 372–0461.

SUPPLEMENTARY INFORMATION: The Office of the Secretary of Defense notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT** or at the Defense Privacy and Civil Liberties Office Web site *http://dpclo.defense.gov/privacy/SORNs/component/osd/index.html.*

The proposed system report, as required by U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on October 7, 2013, to the House Committee on Oversight and Government Reform, the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, ''Federal Agency Responsibilities for Maintaining Records About Individuals,'' dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: October 21, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

A0715–9 DCS, G–4 DoD

Synchronized Predeployment and Operational Tracker (SPOT) Records (March 18, 2010, 75 FR 13103)

CHANGES:

SYSTEM IDENTIFIER:

Delete entry and replace with ''DMDC 18 DoD.''

SYSTEM NAME:

Delete entry and replace with ''Synchronized Predeployment and Operational Tracker Enterprise Suite (SPOT–ES) Records.''

SYSTEM LOCATION:

Delete entry and replace with ''U.S. Army Acquisition, Logistics and Technology Enterprise Systems and Services (ALTESS), Product Director ALTESS, Caller Service 4, Radford Army Ammunition Plant, Building 450, Radford, VA 24143–0004.

Defense Information Systems Agency, Defense Enterprise Computing Centers, 3990 E. Broad Street, Building 23, Columbus, OH 43213–1152.

Defense Manpower Data Center, 400 Gigling Road, Seaside CA 93955–6771.

Stand-alone Joint Asset Movement Management System (JAMMS) machines are deployed to National Deployment Centers, Central Issue Facilities and high-traffic area locations in contingency, humanitarian assistance, peacekeeping, and disaster relief operations. A list of locations can be made available by submitting a request in writing to the system manager.''

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Delete entry and replace with ''Department of Defense (DoD), Department of State (DOS) and United States Agency for International Development (USAID) contractor personnel supporting contingency, humanitarian assistance, peacekeeping, and disaster relief operations both within and outside of the U.S., and during other missions or scenarios.

DoD military personnel and civilian employees supporting contingency, humanitarian assistance, peacekeeping, and disaster relief operations both within and outside of the U.S., and during other missions or scenarios.

DOS and USAID civilian employees supporting contingency operations led by DoD or the DOS Office of Security Cooperation outside of the U.S., e.g., Iraq and Afghanistan.

Government civilian and contractor personnel of other Federal Agencies including the Department of Interior, Department of Homeland Security, Department of Treasury, Department of Justice, Department of Health and Human Services, Environmental Protection Agency, Department of Transportation, Department of Energy, and General Services Administration may use the system to account for their personnel when supporting contingency, humanitarian assistance, peacekeeping, and disaster relief operations both within and outside of the U.S.

Civilian organizations and private citizens, including first responders, who are in the vicinity, are supporting, or are impacted by contingency, humanitarian assistance, peacekeeping, or disaster relief operations, and transit through a JAMMS workstation.''

CATEGORIES OF RECORDS IN THE SYSTEM:

Delete entry and replace with ''Individual profile data: For contractor personnel, full name; blood type; Social Security Number (SSN); DoD Identification Number; Federal/foreign ID number or Government-issued ID number, such as passport and/or visa number; category of person (contractor); home, office, and deployed telephone numbers; home and deployed address; home, office, and deployed email addresses; emergency contact name and telephone number; next of kin name, phone number and address; duty location and duty station; travel authorization documentation, i.e., Letters of Authorization (LOAs), air travel itineraries, and movements in the area of operations; in-theater and Government authority points of contact; security clearance information and pre-deployment processing information, including completed training certifications. Contractor personnel performing private security functions: Type of media used to collect identity and the document ID. Authorized weapons and equipment, and other official deployment-related information, such as types of training received.

CONTRACT INFORMATION DATA:

Contract number, contractor company name, contract capabilities, contract value, contract/task order period of performance, theater business clearance, and contact name, office address and phone number.

For DoD military and civilian personnel, full name; SSN; DoD Identification Number; category of person (civilian or military) and movements in the area of operations.

For other Federal agency personnel, full name; SSN; Government-issued ID number (such as passport and/or visa number); category of person (Federal civilian) and movements in the area of operations.

For non-Government personnel, full name; Government-issued ID number (such as passport and/or visa number) and movements in the area of operations.''

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete entry and replace with ''10 U.S.C. 133, Under Secretary of Defense for Acquisition, Technology and Logistics; 10 U.S.C. 2302, note, Contracts in Iraq and Afghanistan and Private Security Contracts in Areas of Other Significant Military Operations; DoD Directive 1000.25, DoD Personnel Identity Protection (PIP) Program; DoD Directive 1404.10, DoD Civilian Expeditionary Workforce; DoD Directive 3020.49, Orchestrating, Synchronizing, and Integrating Program Management of Contingency Acquisition Planning and Its Operational Execution; DoD Instruction 3020.41, Operational Contract Support (OCS); DoD Instruction 3020.50, Private Security Contractors (PSCs) Operating in Contingency Operations, Humanitarian or Peace Operations, or Other Military Operations or Exercises; DoD Instruction 6490.03, Deployment Health; and E.O. 9397 (SSN), as amended.''

PURPOSE(S):

Delete entry and replace with ''The Synchronized Predeployment and Operational Tracker Enterprise Suite (SPOT–ES) allows federal agencies and Combatant Commanders the ability to plan, manage, track, account for, monitor and report on contracts, companies and contractor employees during planning, operation and drawdown of any contingency, humanitarian assistance, peacekeeping, or disaster-recovery operation both within and outside of the U.S. The SPOT–ES is a web-based system providing a repository of military, Government civilian and contractor personnel and contract information for DoD, DOS, USAID, other Federal agencies, and Combatant Commanders to centrally manage their deploying, deployed and redeploying assets via a single authoritative source for up-to-date visibility of personnel assets and contract capabilities. Used as a management tool for statistical analysis, tracking, reporting, evaluating program effectiveness and conducting research.

The Total Operational Picture Support System (TOPSS) web-based application integrates the information in SPOT–ES to provide trend analysis, widgets and reports from different views based on the user access level and parameters selected to support DoD, DOS, USAID, other Federal agencies, and Combatant Commanders requirements.

JAMMS is a stand-alone application that scans identity credentials (primarily held by military, Government civilians and contractors) at key decentralized locations, such as dining facilities, billeting, central issue facilities and aerial ports of debarkation. Also used as a management tool for statistical, tracking, reporting, evaluating program effectiveness, and conducting research.''

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Delete entry and replace with ''In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, as amended, the records contained herein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

To DOS and USAID to account for their Government civilian and contractor personnel supporting contingency operations outside of the U.S., and to determine status of processing and deployment documentation, contracts, weapons and equipment, current and historical locations, company or organization where an individual is employed, and contact information.

To Federal agencies associated with the categories of individuals covered by the system to account for their Government civilian and contractor personnel when supporting contingency, humanitarian assistance, peacekeeping, and disaster relief operations both within and outside of the U.S.

To contractor companies to account for their employees during contingency, humanitarian assistance, peacekeeping, and disaster relief operations both within and outside of the U.S.

To applicable civilian organizations to account for their personnel located in a contingency area.

To applicable facilities managers where JAMMS are installed to account for Government services consumed and depict usage trends.

The DoD Blanket Routine Uses set forth at the beginning of the Office of the Secretary of Defense (OSD) compilation of systems of records notices may apply to this system.''

* * * * *

RETRIEVABILITY:

Delete entry and replace with ''Within SPOT–ES: full name, SSN, DoD Identification Number or Federal/foreign ID number.

Within JAMMS: Information may be retrieved at the specific machine used at a location within specified start and ending dates by last name.''

SAFEGUARDS:

Delete entry and replace with ''Electronic records in SPOT–ES and TOPSS are maintained in a Government-controlled area accessible only to authorized personnel. Entry to these areas is restricted to those personnel with a valid requirement and authorization to enter. Physical entry is restricted by the use of lock, guards, and administrative procedures. Physical and electronic access is restricted to designated individuals having a need-to-know in the performance of official duties. Access to personal information is further restricted by the use of Public Key Infrastructure or login/password authorization. Information is accessible only by authorized personnel with appropriate clearance/access in the performance of their duties. Once access is gained, the system is set with an automatic timeout period to reduce the opportunity for unauthorized access.

For JAMMS, physical and electronic access is restricted to designated individuals having a need-to-know in the performance of official duties. Access to personal information is further restricted by the use of login/password authorization. Computers running the JAMMS software are located on Government installations where physical entry is restricted to authorized personnel. Each machine is physically secured with a combination lock and cable. While the computer is active, the view screen is oriented away from the cardholder, and access is controlled by an attendant on duty. While the data is at rest and when data is transferred to SPOT–ES, the records are encrypted. Daily exports from JAMMS are uploaded, via encrypted file transfer, to SPOT–ES as the mandated repository of information on contingency contract and contractor information.''

RETENTION AND DISPOSAL:

Delete entry and replace with ''Permanent. Close all files upon end of individual's deployment. Transfer to the National Archives and Records Administration when 25 years old.''

SYSTEM MANAGER(S) AND ADDRESS:

Delete entry and replace with ''Deputy Director for Identity, Defense

Manpower Data Center, 4800 Mark Center Drive, Alexandria, VA 22350–6000.''

NOTIFICATION PROCEDURE:

Delete entry and replace with ''Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the Deputy Director, Defense Manpower Data Center, DoD Center Monterey Bay, 400 Gigling Road, Seaside, CA 93955–6771.

Signed, written requests should contain the individual's full name, last four digits of the SSN, DoD Identification Number or Federal/foreign ID number, current address, telephone number, and when and where they were assigned during the contingency.''

RECORD ACCESS PROCEDURES:

Delete entry and replace with ''Individuals seeking access to information about themselves contained in this system should address written inquiries to the Office of the Secretary of Defense/Joint Staff Freedom of Information Act, Requester Service Center, Office of Freedom of Information, 1155 Defense Pentagon, Washington, DC 20301–1155.

If you are a foreign national seeking access to your records, your request must be submitted under the Freedom of Information Act at the above address.

Signed, written requests should contain the individual's full name, last four digits of the SSN, DoD Identification Number or Federal/foreign ID number, current address, telephone number, when and where they were assigned during the contingency, and the name and number of this system of records notice.''

CONTESTING RECORD PROCEDURES:

Delete entry and replace with ''The OSD rules for accessing records, for contesting contents, and appealing initial agency determinations are contained in OSD Administrative Instruction 81; 32 CFR part 311; or may be obtained from the system manager.''

RECORD SOURCE CATEGORIES:

Delete entry and replace with ''Individuals, individual's employer (military, Government civilians and contractor personnel), Defense Enrollment Eligibility Reporting System (DEERS), and Federal entities supporting contingency, humanitarian assistance, peacekeeping, and disaster relief operations.''

* * * * *

[FR Doc. 2013–25007 Filed 10–23–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2013–OS–0205]

Privacy Act of 1974; System of Records

AGENCY: Office of the Secretary of Defense, DoD.

ACTION: Notice to alter a System of Records.

SUMMARY: The Office of the Secretary of Defense proposes to alter a system of records, DoDEA 27, entitled ''Department of Defense Education Activity Research Approval Process'', in its inventory of record systems subject to the Privacy Act of 1974, as amended. This system will collect, validate eligibility, and maintain an official registry file that identifies individuals who apply for, and are granted, access to conduct research involving DoDEA students, staff, parents or data. Additionally will establish researcher accountability, enable future contact with researchers, and support preparation of statistical and other aggregate reports on researcher use of DoDEA records.

DATES: This proposed action will be effective on November 26, 2013 unless comments are received which result in a contrary determination. Comments will be accepted on or before November 25, 2013.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

* *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

* *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, 2nd Floor, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Cindy Allard, Chief, OSD/JS Privacy Office, Freedom of Information Directorate, Washington Headquarters Service, 1155 Defense Pentagon, Washington, DC 20301–1155, or by phone at (571) 372–0461.

SUPPLEMENTARY INFORMATION: The Office of the Secretary of Defense notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT** or at the Defense Privacy and Civil Liberties Office Web site *http://dpclo.defense.gov/privacy/SORNs/component/osd/index.html.* The proposed system report, as required by U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on September 30, 2013, to the House Committee on Oversight and Government Reform, the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, ''Federal Agency Responsibilities for Maintaining Records About Individuals,'' dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: October 21, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

DoDEA 27

SYSTEM NAME:

Department of Defense Education Activity Research Approval Process (May 9, 2007, 72 FR 26342).

CHANGES:

* * * * *

SYSTEM LOCATION:

Delete entry and replace with ''Department of Defense Education Activity, 4800 Mark Center Drive, Alexandria, VA 22350–1400.''

* * * * *

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete entry and replace with ''10 U.S.C. 113, Secretary of Defense; 10 U.S.C. 2164, Department of Defense, Domestic Dependent Elementary and Secondary Schools; and 20 U.S.C. 921–932, Overseas Defense Dependents' Education.''

PURPOSE(S):

Delete entry and replace with ''To collect, validate eligibility, and maintain an official registry file that identifies individuals who apply for, and are granted, access to conduct research involving DoDEA students, staff, parents or data.

To establish researcher accountability, enable future contact with researchers, and support preparation of statistical and other aggregate reports on researcher use of DoDEA records.''

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Delete entry and replace with ''In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, as amended, the records contained herein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The DoD Blanket Routine Uses set forth at the beginning of the Office of the Secretary of Defense (OSD) compilation of systems of records notices may apply to this system.''

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Delete entry and replace with ''Paper file folders and electronic storage media.''

* * * * *

RETENTION AND DISPOSAL:

Delete entry and replace with ''Records are destroyed or deleted when two (2) years old, or two (2) years after the date of the latest entry, whichever is applicable.''

SYSTEM MANAGER(S) AND ADDRESS:

Delete entry and replace with ''Chief, Office of Research and Evaluation, Education Directorate, Department of Defense Education Activity, 4800 Mark Center Drive, Alexandria, VA 22350–1400.''

NOTIFICATION PROCEDURE:

Delete entry and replace with ''Individuals seeking to determine whether information about themselves is contained in this system of records should address written inquiries to the Privacy Act Officer, Department of Defense Dependents Schools, 4800 Mark Center Drive, Alexandria, VA 22350–1400.

Signed, written requests should contain the individual's name and address.''

RECORD ACCESS PROCEDURES:

Delete entry and replace with ''Individuals seeking access to information about themselves contained in this system of records should address written inquiries to the Department of Defense Education Activity Freedom of Information Act Requester Service Center, 4800 Mark Center Drive, Alexandria, VA 22305–1400. Signed, written requests should contain the individual's name and address and the name and number of this System of Records Notice.''

* * * * *

[FR Doc. 2013–25000 Filed 10–23–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Air Force

Notice of Active Duty Determination

AGENCY: Department of the Air Force, DoD.

ACTION: Proposed **Federal Register** Notice of Active Duty Determination Under Public Law 95–202.

SUMMARY: On September 30, 2013, the Secretary of the Air Force, acting as Executive Agent of the Secretary of Defense, determined that the service of the group known as the ''Lycoming AVCO Vietnam Tech Reps'' shall not be considered ''active duty'' for purposes of all laws administered by the Department of Veterans Affairs.

FOR FURTHER INFORMATION CONTACT: Mr. Bruce T. Brown, Executive Secretary, DoD Civilian/Military Service Review Board, 1500 West Perimeter Road, Suite 3700, Joint Base Andrews, NAF Washington, MD 20762–7002, 240–612–5364, *bruce.brown@afncr.af.mil*.

Bao-Anh Trinh,

Air Force Federal Register Liaison Officer, DAF.

[FR Doc. 2013–24946 Filed 10–23–13; 8:45 am]

BILLING CODE 5001–10–P

DEPARTMENT OF DEFENSE

Air Force

GPS Satellite Simulator Control Working Group Meeting

AGENCY: Department of the Air Force.

ACTION: Meeting Notice.

SUMMARY: This meeting notice is to inform GPS simulator manufacturers, who supply products to the Department of Defense (DoD), and GPS simulator users, both government and DoD contractors, that the GPS Directorate will host a GPS Satellite Simulator Control Working Group (SSCWG) meeting on 1 November 2013 from 0900–1300 PST at Los Angeles Air Force Base.

The purpose of this meeting is to disseminate information about GPS simulators, discuss current and on-going efforts related to GPS simulators, and to discuss future GPS simulator development. This event will be conducted as a classified meeting.

FOR FURTHER INFORMATION CONTACT: We request that you register for this event no later than 21 October 2013. Please send your registration (name, organization, and email address) to *wayne.urubio.3@us.af.mil* and have your security personnel submit your VAR through JPAS. SMO Code: GPSD and POC: Lt Wayne Urubio, 310–653–4603. Please visit *http://www.gps.gov/technical/sscwg/* for information regarding an address and a draft agenda.

Bao-Anh Trinh, DAF,

Air Force Federal Register Liaison Officer.

[FR Doc. 2013–24938 Filed 10–23–13; 8:45 am]

BILLING CODE 5001–10–P

DEPARTMENT OF DEFENSE

Department of the Air Force

Names of Members of the Performance Review Board for the Department of the Air Force

ACTION: Notice.

SUMMARY: Notice is given of the names of members of the Performance Review Board for the Department of the Air Force.

DATES: *Effective Date:* November 4, 2013.

SUPPLEMENTARY INFORMATION: Pursuant to 5 U.S.C. 4314(c) (1–5), the Department of the Air Force (AF) announces the appointment of members to the AF's Senior Executive Service (SES) Performance Review Board (PRB). Appointments are made by the authorizing official. Each board member shall review and evaluate performance scores provided by the SES' immediate supervisor. Performance standards must be applied consistently across the AF. The board will make final recommendations to the authorizing official relative to the performance of the executive.

The members of the 2013 Performance Review Board for the U.S. Air Force are:

1. Board President—Gen Shelton, Commander, Air Force Space Command
2. Lt Gen Pawlikowski, Commander, Space & Missile Systems Center
3. Lt Gen Otto, Deputy Chief of Staff for Intelligence, Surveillance and Reconnaissance
4. Mr. Corsi, Assistant Deputy Chief of Staff for Manpower, Personnel and Services
5. Mr. Tillotson, Deputy Chief Management Officer
6. Ms. Ferguson, Acting Assistant Secretary of the Air Force for

Installations, Environment and Logistics
7. Ms. Salazar, Deputy Chief, Information Dominance and Deputy Chief Information Officer
8. Mr. Hartley, Assistant Deputy Chief of Staff for Strategic Plans and Programs
9. Mr. Gill, Executive Director, Air Force Materiel Command
10. Mr. Lombardi, Deputy Assistant Secretary for Acquisition Integration
11. Ms. Watern, Deputy Assistant Secretary for Cost and Economics
12. Mr. Hale, Director, Ground Enterprise Directorate
13. Mr. Peterson, Chief Financial Officer, US Special Operations Command

Additionally, all career status Air Force Tier 3 SES members not included in the above list are eligible to serve on the 2013 Performance Review Board and are hereby nominated for inclusion on an ad hoc basis in the event of absence(s).

FOR FURTHER INFORMATION CONTACT: Please direct any written comments or requests for information to Ms. Erin Moore, Deputy Director, Senior Executive Management, AF/DPS, 1040 Air Force Pentagon, Washington, DC 20330–1040 (PH: 703–695–7677; or via email at *erin.moore@pentagon.af.mil.*)

Bao-Anh Trinh,

DAF, Air Force Federal Register Liaison Officer.

[FR Doc. 2013–24936 Filed 10–23–13; 8:45 am]

BILLING CODE 5001–10–P

DEPARTMENT OF DEFENSE

Department of the Army

Government Owned Invention Available for Licensing, United States Patent, No. 7,837,654, Issued 23 Nov 2010, Entitled ''Precision Sensing and Treatment Delivery Device for Promoting Healing in Living Tissue''

AGENCY: Department of the Army, DoD.

SUMMARY: The Department of the Army is interested in granting an exclusive or partially exclusive license to U.S. Patent 7,837,654 for ''Precision Sensing and Treatment Delivery Device for Promoting Healing in Living Tissue'' to a licensee meeting the requirements of 35 USC 209.

DATES: Written inquiries must be filed not later than 30 days following publication of this announcement.

ADDRESSES: Commander, U.S. Army Research Development and Engineering Command, *ATTN: RDMR–S3I–CST,* Bldg 5400, Redstone Arsenal, AL 35898–5000.

FOR FURTHER INFORMATION CONTACT: Ms. Cindy Wallace, Office of Research & Technology Applications, (256) 313–0895, email: *cindy.wallace@us.army.mil.*

SUPPLEMENTARY INFORMATION: The invention relates to a micro-needle insertable in a targeted cell tissue application. More specifically, the invention is a more efficient tool for biopsies in the health arena. The instrument assists in biopsies related to treating and healing living tissue.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. 2013–24870 Filed 10–23–13; 8:45 am]

BILLING CODE 3710–08–P

DEPARTMENT OF DEFENSE

Department of the Army

Performance Review Board Membership

AGENCY: Department of the Army, DoD.

ACTION: Notice.

SUMMARY: Notice is given of the names of members of a Performance Review Board for the Department of the Army.

DATES: *Effective Date:* November 21, 2013.

FOR FURTHER INFORMATION CONTACT: Barbara Smith, Civilian Senior Leader Management Office, 111 Army Pentagon, Washington, DC 20310–0111.

SUPPLEMENTARY INFORMATION: Section 4314(c)(1) through (5) of Title 5, U.S.C., requires each agency to establish, in accordance with regulations, one or more Senior Executive Service performance review boards. The boards shall review and evaluate the initial appraisal of senior executives' performance by supervisors and make recommendations to the appointing authority or rating official relative to the performance of these executives.

The Department of the Army Performance Review Board will be composed of a subset of the following individuals:

1. Ms. Stephanie A. Barna, Deputy General Counsel (Operations and Personnel), Office of the General Counsel
2. LTG Thomas P. Bostick, Commanding General, United States Army Corps of Engineers
3. Mr. Robert S. Carter, Executive Technical Director/Deputy to the Commander, United States Army Test and Evaluation Command
4. Ms. Gwendolyn R. DeFilippi, Director, Civilian Senior Leader Management Office, Office of the Assistant Secretary of the Army (Manpower and Reserve Affairs)
5. Ms. Sue A. Engelhardt, Director of Human Resources, United States Army Corps of Engineers
6. Mr. Kevin M. Fahey, Program Executive Officer, Combat Support and Combat Service Support, Office of the Assistant Secretary of the Army (Acquisition, Logistics and Technology)
7. Mr. Patrick K. Hallinan, Executive Director of the Army National Cemeteries Program, Dept of the Army
8. Ms. Ellen M. Helmerson, Deputy Chief of Staff, G–1/4 (Personnel and Logistics), United States Army Training and Doctrine Command
9. Mr. Mark R. Lewis, Deputy Chief Management Officer, Office of the Under Secretary of the Army
10. Mr. David Markowitz, Assistant Deputy Chief of Staff for Operations, G–3/5/7, Office of the Deputy Chief of Staff, G–3/5/7
11. LTG Patricia E. McQuistion, Deputy Commanding General, United States Army Material Command
12. Ms. Kathleen S. Miller, Assistant Deputy Chief of Staff, G–4, Office of the Deputy Chief of Staff, G–4
13. Mr. John B. Nerger, Executive Deputy to the Commanding General, United States Army Materiel Command
14. Mr. Levator Norsworthy Jr., Deputy General Counsel(Acquisition)/ Senior Deputy General Counsel, Office of the General Counsel
15. Mr. Gerald B. O'Keefe, Administrative Assistant to the Secretary of the Army, Office of the Administrative Assistant to the Secretary of the Army
16. LTG William N. Phillips, Deputy Assistant Secretary of the Army (Acquisition, Logistics and Technology), Office of the Assistant Secretary of the Army (Acquisition, Logistics and Technology)
17. Mr. Wimpy D. Pybus, Deputy Assistant Secretary of the Army for Acquisition, Policy and Logisitics, Office of the Assistant Secretary of the Army (Acquisition, Logistics, and Technology)
18. Ms. Diane M. Randon, Deputy Assistant Chief of Staff for Installation Management, Office of the Assistant Chief of Staff for Installation Management
19. Mr. J. Randall Robinson, Principal Deputy to the Assistant Secretary of the Army (Installations, Energy and Environment), Office of the

Assistant Secretary of the Army (Installations and Environment)
20. Mr. Craig R. Schmauder, Deputy General Counsel (Installation, Environment and Civil Works), Office of the General Counsel
21. Mr. Karl F. Schneider, Acting Assistant Secretary of the Army (Manpower and Reserve Affairs), Office of the Assistant Secretary of the Army (Manpower and Reserve Affairs)
22. Mr. Matthew L. Scully, Deputy Chief of Staff G–8, United States Army Training and Doctrine Command
23. Ms. Heidi Shyu, Assistant Secretary of the Army (Acquisition, Logistics and Technology), Office of the Assistant Secretary of the Army (Acquisition, Logistics and Technology)
24. Mr. Lawrence Stubblefield, Deputy Assistant Secretary of the Army (Diversity and Leadership), Office of the Assistant Secretary of the Army (Manpower and Reserve Affairs)
25. MG Todd T. Semonite, Deputy Commanding General, United States Army Corps of Engineers
26. MG Peter D. Utley, Commanding General, United States Army Test and Evaluation Command
27. GEN Dennis L. Via, Commanding General, United States Army Materiel Command

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. 2013–24871 Filed 10–23–13; 8:45 am]

BILLING CODE 3710–08–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

[Docket Number DARS–2013–0036]

Information Collection Requirement; Defense Federal Acquisition Regulation Supplement; Foreign Acquisition

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Notice and request for comments regarding a proposed extension of an approved information collection requirement.

SUMMARY: In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), DoD announces the proposed extension of a public information collection requirement and seeks public comment on the provisions thereof. DoD invites comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of DoD, including whether the information will have practical utility; (b) the accuracy of the estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including the use of automated collection techniques or other forms of information technology. The Office of Management and Budget (OMB) has approved this information collection requirement for use through January 31, 2014. DoD proposes that OMB extend its approval for use for three additional years.

DATES: DoD will consider all comments received by December 23, 2013.

ADDRESSES: You may submit comments, identified by OMB Control Number 0704–0229, using any of the following methods:

○ *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

○ *Email: dfars@osd.mil.* Include OMB Control Number 0704–229 in the subject line of the message.

○ *Fax:* (571) 372–6094.

○ *Mail:* Defense Acquisition Regulations System, Attn: Amy Williams, OUSD(AT&L)DPAP(DARS), 3060 Defense Pentagon, Room 3B855, Washington, DC 20301–3060.

Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, (571) 372–6106. The information collection requirements addressed in this notice are available on the World Wide Web at: *http://www.acq.osd.mil/dpap/dars/dfars/index.htm.* Paper copies are available from Ms. Amy Williams, OUSD(AT&L)DPAP(DARS), 3060, Room 3B855, Defense Pentagon, Washington, DC 20301–30602.

SUPPLEMENTARY INFORMATION:

Title, Associated Form, and OMB Number: Foreign Acquisition—Defense Federal Acquisition Regulation Supplement Part 225 and Related Clauses at 252.225; DD Form 2139; OMB Control Number 0704–0229.

Needs and Uses: DoD needs this information to ensure compliance with restrictions on the acquisition of foreign products imposed by statute or policy to protect the industrial base; to ensure compliance with U.S. trade agreements and memoranda of understanding that promote reciprocal trade with U.S. allies; and to prepare reports for submission to the Department of Commerce on the Balance of Payments Program.

Affected Public: Businesses or other for-profit and not-for-profit institutions.

Annual Burden Hours: 64,256 (64,161 reporting hours and 95 recordkeeping hours).

Number of Respondents: 23,197.

Responses per Respondent: 9.01.

Annual Responses: 209,117.

Average Burden per Response: .31 hours.

Frequency: On occasion.

Summary of Information Collection

This information collection includes requirements related to foreign acquisition in DFARS Part 225, Foreign Acquisition, and the related clause at DFARS 252.225.

DFARS 252.225–7000, Buy American Act—Balance of Payments Program Certificate, as prescribed in 225.1101(1), requires an offeror to identify, in its proposal, supplies that are not domestic end products, separately listing qualifying country and other foreign end products.

DFARS 252.225–7003, Report of Intended Performance Outside the United States and Canada—Submission with Offer, and 252.225–7004, Report of Intended Performance Outside the United States and Canada—Submission after Award, as prescribed in 225.7204(a) and (b) respectively, require offerors and contractors to submit a Report of Contract Performance Outside the United States for subcontracts to be performed outside the United States. The reporting threshold is $550,000 for contracts that exceed $11.5 million. The contractor may submit the report on DD Form 2139, Report of Contract Performance Outside the United States, or a computer-generated report that contains all information required by DD Form 2139.

DFARS 252.225–7005, Identification of Expenditures in the United States, as prescribed in 225.1103(1), requires contractors incorporated or located in the United States to identify, on each request for payment under contracts for supplies to be used, or for construction or services to be performed, outside the United States, that part of the requested payment representing estimated expenditures in the United States.

DFARS 252.225–7006, Quarterly Reporting of Actual Contract Performance Outside the United States, as prescribed at 252.7204(c) for use in solicitations and contracts with a value exceeding $550,000, requires reporting

of subcontracts that exceed the simplified acquisition threshold.

DFARS 252.225–7010, Commercial Derivative Military Article—Specialty Metals Compliance Certificate, as prescribed at 225.7003–5(b), requires the offeror to certify that it will take certain actions with regard to specialty metals if the offeror chooses to use the alternative compliance approach when providing commercial derivative military articles to the Government.

DFARS 252.225–7013, Duty-Free Entry, as prescribed in 225.1101(4), requires the contractor to provide information on shipping documents and customs forms regarding products that are eligible for duty-free entry.

DFARS 252.225–7018, Photovoltaic Devices—Certificate, as prescribed at 225.7017–4(b), requires offerors to certify that no photovoltaic devices with an estimated value exceeding $3,000 will be utilized in performance of the contract or to specify the country of origin.

DFARS 252.225–7020, Trade Agreements Certificate, as prescribed in 225.1101(5), requires an offeror to list the item number and country of origin of any nondesignated country end product that it intends to furnish under the contract. Either 252.225–7020 or 252.225–7022 is used in any solicitation for products subject to the World Trade Organization Government Procurement Agreement.

DFARS 252.225–7021, Alternate II, Trade Agreements, as prescribed in 225.1101(6)(ii), in order to comply with a condition of the waiver authority provided by the United States Trade Representative to the Secretary of Defense, requires contractors from a south Caucasus/central or south Asian state to inform the government of its participation in the acquisition and also advise their governments that they generally will not have such opportunities in the future unless their governments provide reciprocal procurement opportunities to U.S. products and services and suppliers of such products and services.

DFARS 252.225–7023, Preference for Products or Services from Afghanistan, as prescribed in 225.7703–5(a), requires an offeror to identify, in its proposal, products or services that are not products or services from Iraq or Afghanistan.

DFARS 252.225–7025, Restriction on Acquisition of Forgings, as prescribed in 225.7102–4, requires the contractor to retain records showing compliance with the requirement that end items and their components delivered under the contract contain forging items that are of domestic manufacture only. The contractor must retain the records for 3 years after final payment and must make the records available upon request of the contracting officer. The contractor may request a waiver of this requirement in accordance with DFARS 225.7102–3.

DFARS 252.225–7032, Waiver of United Kingdom Levies—Evaluation of Offers, and 252.225–7033, Waiver of United Kingdom Levies, as prescribed in 225.1101(7) and (8), require an offeror to provide information to the contracting officer regarding any United Kingdom levies included in the offered price, and require the contractor to provide information to the contracting officer regarding any United Kingdom levies to be included in a subcontract that exceeds $1 million, before award of the subcontract.

DFARS 252.225–7035, Buy American Act—North American Free Trade Agreement Implementation Act—Balance of Payments Program Certificate, as prescribed in 225.1101(9), requires an offeror to list any qualifying country, NAFTA country, or other foreign end product that it intends to furnish under the contract. The Buy American Act no longer applies to acquisitions of commercial information technology.

DFARS 252.225–7046, Exports of Approved Community Members in Response to the Solicitation, requires a representation whether exports or transfers of qualifying defense articles were made in preparing the response to the solicitation. If yes, the offeror represents that such exports or transfers complied with the requirements of the provision.

Manuel Quinones,

Editor, Defense Acquisition Regulations System.

[FR Doc. 2013–25024 Filed 10–23–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

[Docket Number DARS–2013–0035]

Information Collection Requirement; Defense Federal Acquisition Regulation Supplement; Organizational Conflict of Interest in Major Defense Acquisition Programs

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Notice and request for comments regarding a proposed extension of an approved information collection requirement.

SUMMARY: In compliance with section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), DoD announces the proposed extension of a public information collection requirement and seeks public comment on the provisions thereof. DoD invites comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of DoD, including whether the information will have practical utility; (b) the accuracy of the estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including the use of automated collection techniques or other forms of information technology. The Office of Management and Budget (OMB) has approved this information collection requirement for use through December 31 2013. DoD proposes that OMB extend its approval for use for three additional years.

DATES: DoD will consider all comments received by December 23, 2013.

ADDRESSES: You may submit comments, identified by OMB Control Number 0704–0477, using any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Email: dfars@osd.mil.* Include OMB Control Number 0704–0477 in the subject line of the message.
- *Fax:* (571) 372–6094.
- *Mail:* Defense Acquisition Regulations System, Attn: Annette Gray, OUSD(AT&L)DPAP(DARS), 3B855, 3060 Defense Pentagon, Washington, DC 20301–3060.

Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Annette Gray,(571)372–6093. The information collection requirements addressed in this notice are available on the World Wide Web at: *http://www.acq.osd.mil/dpap/dars/dfars/index.htm.* Paper copies are available from Ms. Annette Gray, OUSD(AT&L)DPAP(DARS), 3B855, 3060 Defense Pentagon, Washington, DC 20301–3060.

SUPPLEMENTARY INFORMATION:

Title and OMB Number: Defense Federal Acquisition Regulation Supplement (DFARS) subpart 209.5, Organizational and Consultant Conflicts of Interest, and related provision at DFARS 252.209–7008, Notice of

Prohibition Relating to Organizational Conflict of Interest-Major Defense Acquisition Program; OMB Control Number 0704–0477.

Needs and Uses: This information collection requires an offeror to submit a mitigation plan if requesting an exemption from the statutory limitation on future contracting. This information will be used to resolve organizational conflicts of interest arising in a systems engineering and technical assistance contract for an MDAP, as required by section 207 of WSARA.

Affected Public: Businesses or other for-profit and not-for-profit institutions.

Annual Burden Hours: 3,000.

Number of Respondents: 25.

Responses per Respondent: 3.

Annual Responses: 75.

Average Burden per Response: 40 hours.

Frequency: On occasion.

Summary of Information Collection

This information collection includes requirements of DFARS subpart 209.5, Organizational and Consultant Conflicts of Interest, and the related provision at DFARS 252.209–7008, Notice of Prohibition Relegating to Organizational Conflict of Interest-Major Defense Acquisition Program. DFARS subpart 209.5, Organizational and Consultant Conflicts of Interest, implements section 207 of the Weapons system Acquisition Reform Act of 2009 (Pub. L. 111–23). The provision at DFARS 252.209–7008 paragraph (d) requires an offeror to submit a mitigation plan if requesting an exemption from the statutory limitation on future contracting.

Manuel Quinones,

Editor, Defense Acquisition Regulations System.

[FR Doc. 2013–25037 Filed 10–23–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army; Corps of Engineers

Intent To Prepare a Regional Environmental Impact Statement for Surface Coal and Lignite Mining in the State of Texas

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Notice of intent.

SUMMARY: The U.S. Army Corps of Engineers (USACE) is preparing a Regional Environmental Impact Statement (REIS) to analyze the direct, indirect, and cumulative effects associated with a decision to develop and assess data and information with waters of the United States and other relevant resources that may be potentially impacted by future surface coal and lignite mine expansions in the state of Texas within the Fort Worth District's area of responsibility. These coal and lignite mining activities may eventually require authorization from the USACE under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899, as well as other federal and state permits and approvals.

DATES: Public scoping meetings for the REIS will be held on:

1. Tuesday, December 3, 2013, 4 p.m.–7 p.m., Uvalde, Texas.

2. Wednesday, December 4, 2013, 4 p.m.–7 p.m., Temple, Texas.

3. Thursday, December 5, 2013, 4 p.m.–7 p.m., Tyler, Texas.

ADDRESSES: The scoping meeting locations are:

1. Tuesday, December 3, 2013, at the Uvalde County Fairplex-Event Center, 122 Veterans Lane, Uvalde, Texas 78801.

2. Wednesday, December 4, 2013, at the Railroad and Heritage Museum, 315 W. Avenue B, Temple, Texas 76501.

3. Thursday, December 5, 2013, at the Tyler Rose Garden Center, 420 South Rose Park Drive, Tyler, Texas 75702.

FOR FURTHER INFORMATION CONTACT: Questions and comments regarding the proposed action and REIS should be addressed to Mr. Darvin Messer, Project Manager, U.S. Army Corps of Engineers, Fort Worth District, P.O. Box 17300, 819 Taylor Street, Fort Worth, Texas 76102; or *Darvin.Messer@usace.army.mil.*

SUPPLEMENTARY INFORMATION: The USACE will be conducting public scoping meetings at three locations (see **DATES** and **ADDRESSES**) to describe the Project, preliminary alternatives, the National Environmental Policy Act (NEPA) compliance process, and to solicit input on the issues and alternatives to be evaluated and other related matters. Written comments for scoping will be accepted until December 20, 2013. The USACE has prepared a scoping announcement to familiarize agencies, the public and interested organizations with the proposed Action and potential environmental issues that may be involved. The scoping announcement describes the target resources to be assessed, the proposed areas of assessment, and the mines that may utilize the information developed through this effort. Copies of the scoping announcement will be available at the public scoping meetings or can be requested by mail.

Surface coal and lignite mining projects in the USACE Fort Worth's area of responsibility typically conduct work that results in impacts to waters of the U.S. Such work requires authorization under Section 404 of the Clean Water Act, and for projects affecting navigable waters, authorization under Section 10 of the Rivers and Harbors Act of 1899. These programs are administered by the USACE. The anticipated number of future permit applications requiring the USACE compliance with NEPA, along with agency resource constraints, could result in lengthy review times. Historic permit evaluations associated with mine expansions have required substantial time periods. These timeframes have been influenced in part by the need to develop resource information, undertake data gathering efforts, as well as coordination with various agencies and their permit review processes. The USACE also needs to ensure it can adapt and efficiently respond to multiple concurrent requests for permits that may occur in the future.

The USACE is undertaking a REIS to streamline the NEPA aspect of the Section 404/10 permitting process, as well as to develop information, data, and analyses to be used in 404(b)(1) guidelines and public interest review analyses for future coal and lignite mine expansions in Texas subject to permitting by the USACE.

The REIS is intended to provide an environmental evaluation focusing on the potential direct, indirect, and cumulative aquatic resource impacts, in addition to other relevant environmental and human resources, that could be affected by future surface coal and lignite mining within defined geographic regions in Texas. The REIS would facilitate future tiering or supplementation of the NEPA analysis in the REIS in the evaluation of future project-specific Section 404/10 permit applications. It also is intended to provide a cohesive framework for stream mitigation, establishment of sound performance metrics, and enhance project monitoring efforts associated with these types of activities. The REIS is intended to avoid duplication and provide efficiency and effectiveness with future decisions.

The REIS will be prepared according to the USACE's procedures for implementing the NEPA, as amended, 42 U.S.C. 4332(2)(c), and consistent with the USACE's policy to facilitate public understanding and review of agency proposals. As part of the REIS process, a full range of reasonable alternatives, including the proposed Action and no action, will be evaluated. The use of a third party contract

arrangement will be utilized to develop the REIS funded by the Texas Mining and Reclamation Association.

The USACE has invited the U.S. Environmental Protection Agency, U.S. Fish and Wildlife Service, Office of Surface Mining, Natural Resources Conservation Service, Railroad Commission of Texas, Texas Commission on Environmental Quality, Texas Parks and Wildlife Department, Texas Historical Commission and the Louisiana Department of Wildlife and Fisheries to be cooperating agencies in the formulation of the REIS.

Charles H. Klinge,

Colonel, U.S. Army, Commanding.

[FR Doc. 2013–24869 Filed 10–23–13; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF EDUCATION

William D. Ford Federal Direct Loan Program Repayment Plan Selection Form; Extension of Public Comment Period; Correction

AGENCY: Department of Education.

ACTION: Correction notice.

SUMMARY: On October 3, 2013 the U.S. Department of Education published a 30-day comment period notice in the **Federal Register** (Page 61347, Column 2) seeking public comment for an information collection entitled, ''William D. Ford Federal Direct Loan Program Repayment Plan Selection Form''. ED is extending the comment period to November 18, 2013 due to the public's inability to access the collection at the beginning of the comment period.

The Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management, hereby issues a correction notice as required by the Paperwork Reduction Act of 1995.

Dated: October 21, 2013.

Kate Mullan,

Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

[FR Doc. 2013–25001 Filed 10–23–13; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Title V Developing Hispanic-Serving Institutions Application—1894–0001; Extension of Public Comment Period; Correction

AGENCY: Department of Education.

ACTION: Correction notice.

SUMMARY: On October 2, 2013 the U.S. Department of Education published a 30-day comment period notice in the **Federal Register** (Page 60865, Column 2) seeking public comment for an information collection entitled, ''Title V Developing Hispanic-Serving Institutions Application—1894–0001''. ED is extending the comment period to November 18, 2013 due to the public's inability to access the collection at the beginning of the comment period.

The Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management, hereby issues a correction notice as required by the Paperwork Reduction Act of 1995.

Dated: October 21, 2013.

Kate Mullan,

Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

[FR Doc. 2013–25002 Filed 10–23–13; 8:45 am]

BILLING CODE 4000–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9901–69–ORD; Docket ID No. EPA–HQ–ORD–2011–0391]

Notice of Extension of the Public Comment Period on the Draft Toxicological Review of Benzo[a]pyrene: In Support of the Summary Information on the Integrated Risk Information System (IRIS) and the Addition of Benzo[a]pyrene to the Agenda for the December 2013 IRIS Bimonthly Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Extension of the Public Comment Period to November 21, 2013, and the Public Meeting.

SUMMARY: EPA is announcing an extension of the public comment period for the draft human health assessment titled, ''Toxicological Review of Benzo[a]pyrene: In Support of Summary Information on the Integrated Risk Information System (IRIS)'' (EPA/635/R–13/138) and the draft peer review charge questions from October 21, 2013, to November 21, 2013. The draft assessment will be added to the agenda for the IRIS bimonthly public meeting scheduled for December 12–13, 2013. Information on this meeting, including location, time, registration, and participation procedures will be available on the IRIS Web site (*http://www.epa.gov/iris/publicmeeting/*).

DATES: The public comment period began on August 21, 2013, and is being extended to November 21, 2013. Comments should be in writing and must be received by EPA by November 21, 2013. Discussion of the draft Toxicological Review of Benzo[a]pyrene will be included on the agenda of the bimonthly IRIS public meeting to be held on December 12–13, 2013, at EPA offices in Arlington, Virginia.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–ORD–2011–0391 by one of the following methods:

- *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Email: Docket_ORD@epa.gov.*
- *Fax:* 202–566–9744.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, (ORD Docket), Mail Code: 28221T, 1200 Pennsylvania Avenue NW., Washington, DC 20460. The phone number is 202–566–1752.
- *Hand Delivery:* The ORD Docket is located in the EPA Headquarters Docket Center, EPA West Building, Room 3334, 1301 Constitution Avenue NW., Washington, DC. The EPA Docket Center's Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is 202–566–1744. Deliveries are only accepted during the docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information. If you provide comments by mail or hand delivery, please submit one unbound original with pages numbered consecutively, and three copies of the comments. For attachments, provide an index, number pages consecutively with the comments, and submit an unbound original and three copies.

Instructions for submitting comments to the EPA Docket: Direct your comments to Docket ID No. EPA–HQ–ORD–2011–0391. Please ensure that your comments are submitted within the specified comment period. Comments received after the closing date will be marked ''late,'' and may only be considered if time permits. It is EPA's policy to include all comments it receives in the public docket without change and to make the comments available online at *http://www.regulations.gov,* including any personal information provided, unless a 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 information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

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 at *www.regulations.gov* or in hard copy at the ORD Docket in the EPA Headquarters Docket Center.

FOR FURTHER INFORMATION CONTACT: For information on the federal docket, contact the ORD Docket at the EPA Headquarters Docket Center at 202–566–1752; facsimile: 202–566–9744; or email: *Docket_ORD@epa.gov.*

For information on the bimonthly IRIS public meeting please contact Christine Ross, IRIS Staff, National Center for Environmental Assessment, (Mail Code: 8601P), U.S. EPA, 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone: 703–347–8592; facsimile: 703–347–8689; or email: *ross.christine@epa.gov.*

If you have questions about the document, contact Kathleen Newhouse, National Center for Environmental Assessment (NCEA); telephone: 703–347–8641; facsimile: 703–347–8689; or email: *newhouse.kathleen@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Information About IRIS

EPA's IRIS Program is a human health assessment program that evaluates quantitative and qualitative risk information on effects that may result from exposure to chemical substances found in the environment. Through the IRIS Program, EPA provides the highest quality science-based human health assessments to support the Agency's regulatory activities and decisions to protect public health. The IRIS database contains information for more than 500 chemical substances that can be used to support the first two steps (hazard identification and dose-response evaluation) of the human health risk assessment process. When supported by available data, IRIS provides health effects information and toxicity values for health effects (including cancer and effects other than cancer). Government and others combine IRIS toxicity values with exposure information to characterize public health risks of chemical substances; this information is then used to support risk management decisions designed to protect public health and the environment.

II. Extension of Comment Period

The EPA is extending the deadline for submitting comments on the draft Toxicological Review of Benzo[a]pyrene and on the draft peer review charge questions to November 21, 2013. The original deadline for comments was October 21, 2013, as announced in the **Federal Register** on August 21, 2013 (78 FR 51719). This decision responds to requests to extend the comment deadline from the following organizations: American Coke and Coal Chemicals Institute, American Fuel & Petrochemical Manufacturers, American Petroleum Institute, Asphalt Institute, Association of American Railroads, and the Pavement Coatings Technology Council. The EPA believes this extension will assist in providing an adequate amount of additional time for the public to review the drafts and to provide written comments. EPA released this draft assessment and peer review charge questions for the purpose of public comment. This draft assessment is not final as described in EPA's information quality guidelines, and it does not represent and should not be construed to represent Agency policy or views.

III. Bimonthly Public Meeting

In addition to the extension of the public comment period announced in this notice, the draft assessment will be discussed at the bimonthly IRIS public meeting scheduled for December 12–13, 2013. Information on this meeting, including location, time, registration, and participation procedures, will be available on the IRIS Web site (*http://www.epa.gov/iris/publicmeeting/*). The purpose of the IRIS public meeting is to allow all interested parties to present scientific and technical comments on the draft IRIS health assessment and charge questions to EPA and other interested parties attending the meeting. The public comments provided in response to this notice, and at the IRIS public meeting, will be considered by the Agency prior to submitting the draft assessment to EPA's Science Advisory Board (SAB) for peer review.

IV. Peer Review

In addition to this public comment period, the draft assessment will be sent to the SAB Chemical Assessment Advisory Committee (CAAC) for peer review. The EPA SAB is a body established under the Federal Advisory Committee Act with a broad mandate to advise the Agency on scientific matters. The public comment period and bimonthly public meeting announced in this notice are separate processes from the SAB/CAAC peer review. The SAB will schedule one or more public peer review meetings, which will be announced in a separate **Federal Register** Notice at a later date.

Dated: September 26, 2013.

Kenneth Olden,

Director, National Center for Environmental Assessment.

[FR Doc. 2013–25068 Filed 10–23–13; 8:45 am]

BILLING CODE 6560–50–P

FARM CREDIT SYSTEM INSURANCE CORPORATION

Adjusting Civil Money Penalties for Inflation

AGENCY: Farm Credit System Insurance Corporation.

ACTION: Notice.

SUMMARY: This notice assesses the need for cost-of-living adjustments to the civil money penalties (CMPs) that the Farm Credit System Insurance Corporation (FCSIC) may impose under the Farm Credit Act of 1971, as amended. The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, requires all Federal agencies with statutory authority to impose CMPs to regularly evaluate those CMPs and to adjust them periodically for inflation, so they continue to maintain their deterrent value. Consequently, FCSIC is

issuing this notice concerning any required adjustments to the CMPs.

FOR FURTHER INFORMATION CONTACT: Rick Pfitzinger, Director Risk Management or Howard Rubin, General Counsel, Farm Credit System Insurance Corporation, 1501 Farm Credit Drive, McLean, Virginia 22102, (703) 883–4380, TTY (703) 883–4390.

SUPPLEMENTARY INFORMATION:

Background

A. Statutes Concerning Inflation Adjustment of Civil Money Penalties

The Federal Civil Penalties Inflation Adjustment Act of 1990 (FCPIA Act),[1] as amended by the Debt Collection Improvement Act of 1996 (DCIA),[2] provides for the regular evaluation of CMPs and requires FCSIC, and every other Federal agency with authority to impose CMPs,[3] to ensure that CMPs continue to maintain their deterrent values. An agency must enact regulations that adjust its CMPs pursuant to the inflation adjustment formula of the FCPIA Act. The amended FCPIA Act specifies that inflation-adjusted CMPs will apply only to violations that occur after the effective date of the adjustment. The inflation adjustment is based on the percentage increase in the Consumer Price Index (CPI) for all consumers (CPI–U).[4] Specifically, the term ''cost-of-living adjustment'' is defined as ''the percentage (if any) for each civil monetary penalty by which (1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds (2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.'' Furthermore, any increase to a CMP that is adjusted for inflation must be rounded using a method prescribed by the FCPIA Act. Agencies do not have discretion in choosing whether to adjust a CMP, by how much to adjust a CMP, or the methods used to determine the adjustment.

B. CMPs Imposed Pursuant to Section 5.65 of the Farm Credit Act

First, section 5.65(c) of the Farm Credit Act, as amended (Act) provides that any insured Farm Credit System bank that willfully fails or refuses to file any certified statement or pay any required premium shall be subject to a penalty of not more than $100 for each day that such violations continue, which penalty the FCSIC may recover for its use.[5] Second, section 5.65(d) of the Act provides that, except with the prior written consent of the Farm Credit Administration, it shall be unlawful for any person convicted of any criminal offense involving dishonesty or a breach of trust to serve as a director, officer, or employee of any System institution.[6] For each willful violation of section 5.65(d) of the Act, the institution involved shall be subject to a penalty of not more than $100 for each day during which the violation continues, which the FCSIC may recover for its use.

As adjusted for inflation pursuant to the requirements of the DCIA, the current regulation at 12 CFR 1411.1, which was promulgated in 2001, provides that FCSIC can impose a maximum penalty of $117 per day for a violation under section 5.65(c) and (d) of the Act.

C. Mathematical Calculation

1. The adjustment calculation is based on the percentage by which the CPI for June 2012 exceeds the CPI for June 2001. According to the Bureau of Labor Statistics, the CPI for June 2001 was 178, and the CPI for June 2012 was 229.478, resulting in a percentage change of 28.92 percent.

2. Penalty amounts remain the same in 12 CFR 1411.1.

3. The maximum CMP in 12 CFR 1411.1 for a violation of section 5.65(c) or (d) of the Act is currently $117.

Multiplying $117 by 28.92 percent results in $33.84. When that number is rounded as required by the FCPIA Act,[7] the inflation-adjusted maximum remains the same.

Dated: October 18, 2013.

Dale L. Aultman,

Secretary to the Board, Farm Credit System Insurance Corporation.

[FR Doc. 2013–25036 Filed 10–23–13; 8:45 am]

BILLING CODE 6710–01–P

[1] Public Law 101–104, 104 Stat. 890 (October 5, 1990), codified at 28 U.S.C. 2461 *note.*

[2] Public Law 104–134, title III, section 31001(s), 110 Stat. 1321–373 (April 26, 1996), codified at 28 U.S.C. 2461 *note.*

[3] Under the amended FCPIA Act, a CMP is defined as any penalty, fine, or other sanction that: (1) Either is for a specific monetary amount as provided by Federal law or has a maximum amount provided for by Federal law; (2) is assessed or enforced by an agency pursuant to Federal law; and (3) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts. All three requirements must be met for a fine to be defined as a CMP.

[4] The CPI is published by the Department of Labor, Bureau of Labor Statistics, and is available at its Web site: *ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt.*

[5] 12 U.S.C. 2277a–14(c).

[6] 12 U.S.C. 2277a–14(d).

[7] Any increase must be rounded to the nearest multiple of $100 in the case of penalties greater than $100 but less than or equal to $1,000. Therefore, $33.84 is rounded to the nearest multiple of $100, which is $0.

FEDERAL COMMUNICATIONS COMMISSION

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice; request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burden and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s). Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden 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 burden for small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid OMB control number.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before December 23, 2013. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Submit your PRA comments to Nicholas A. Fraser, Office of Management and Budget, via fax at 202–395–5167 or via Internet at *Nicholas_A._Fraser@omb.eop.gov* and to Judith B. Herman, Federal Communications Commission, via the Internet at *Judith-b.herman@fcc.gov.* To submit your PRA comments by email send them to: *PRA@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: Judith B. Herman, Office of Managing Director, (202) 418–0214.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–1142.

Title: Electronic Tariff filing System (ETFS), WC Docket No. 10–141.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 1,500 respondents; 1,500 responses.

Estimated Time per Response: 1 hour.

Frequency of Response: On occasion and annual reporting requirements.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. 151, 152, 154(i), 201–205, and 226(h)(l)(A) of the Communications Act of 1934, as amended.

Total Annual Burden: 1,500 hours.

Total Annual Cost: $1,267,500.

Privacy Impact Assessment: N/A.

Nature and Extent of Confidentiality: The Commission does not anticipate providing confidentiality of the information submitted by local exchange carriers. Particularly, the tariffs and related documents sent to the Commission will be made public through ETFS. If the respondents submit information they believe to be confidential, they may request confidential treatment of such information under 47 CFR 0.459 of the Commission's rules.

Needs and Uses: The Commission will submit this expiring information collection to the Office of Management and Budget (OMB) for approval of an extension request (no change in the reporting requirements). There is no change in the annual hour burden or the annual cost burden.

Incumbent local exchange carriers (LECs) file their tariffs and associated documents electronically, using ETFS. ETFS has improved the usefulness of tariff filings for both filers and the public and made the entire tariff filing process more transparent. The Commission received OMB approval for the NPRM in 2010.

The Commission released a Report and Order, WC Docket No. 10–141, FCC 11–92, adopting the final rules that were unchanged from those proposed in the NPRM. Therefore, there are no changes to the reporting requirements. In particular, to create a more open, transparent and efficient flow of information to the public, we determined that the benefits of using ETFS for incumbent LEC tariff filings would also be obtained if all tariff filers filed electronically. Such action will benefit the public and carriers by creating a central system providing on-line access to all carrier tariffs and related documents filed with the Commission. As such, competitive LECs (and other nondominant carriers) must now file tariffs and associated documents electronically.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary, Office of Managing Director.

[FR Doc. 2013–24950 Filed 10–23–13; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Information Collection(s) Being Submitted for Review and Approval to the Office of Management and Budget (OMB)

AGENCY: Federal Communications Commission.

ACTION: Notice; request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burden and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3502 –3520), the Federal Communications Commission invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s). Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimates; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid OMB control number.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before November 25, 2013. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Submit your PRA comments to Nicholas A. Fraser, Office of Management and Budget (OMB), via fax at 202–395–5167 or via Internet at *Nicholas_A._Fraser@omb.eop.gov* and to Judith B. Herman, Federal Communications Commission, via the Internet at *Judith-b.herman@fcc.gov.* To submit your PRA comments by email send them to: *PRA@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: Judith B. Herman, Office of Managing Director, FCC, at 202–418–0214.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0806.

Title: Universal Service—Schools and Libraries Universal Service Program, FCC Forms 470 and 471.

Form Numbers: FCC Forms 470 and 471.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities, not-for-profit institutions and state, local or tribal government.

Number of Respondents: 82,000 respondents; 82,000 responses.

Estimated Time per Response: Three hours to complete FCC Form 470 and four hours to complete FCC Form 471. Additionally, one-half hour (.5 hours) for each form for the five year recordkeeping requirement.

Frequency of Response: On occasion and annual reporting requirements, recordkeeping requirement and third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. sections 151–154, 201–205, 218,–220, 254, 303(r), 403 and 405 of the Communications Act of 1934, as amended.

Total Annual Burden: 334,000 hours.

Total Annual Cost: N/A.

Privacy Impact Assessment: N/A.

Nature and Extent of Confidentiality: The Commission is not requesting that respondents submit confidential information to the Commission. If the applicant requests confidential treatment of their information, they may request confidential treatment under 47 CFR 0.459 of the Commission's rules.

Needs and Uses: The Commission will submit this information collection after this comment period to obtain the full, three year clearance from the Office of Management and Budget (OMB). The Commission is requesting OMB approval for a revision to this information collection.

This submission proposes revisions to the FCC Form 470 and instructions and FCC Form 471 and instructions. The Commission is revising this collection in an effort to simplify the application process and to better collect information related to the broadband services being ordered by schools and libraries under the E-rate program. We propose collapsing the telecommunications services and Internet access categories into one category of service on the FCC Form 470 to simplify the application process. We also propose eliminating outdated questions that were originally designed to determine the impact of services and create new questions that will better gauge the technology and speed related to E-rate applicants' Internet and broadband connectivity. Specifically, Block 2 of the FCC Form 471, Impact of Service Ordered for Schools and Libraries from this Form 471, will be eliminated and questions asking about broadband and other connectivity services will be added to Block 5 for each funding request. The FCC Form 471 is also revised to allow applicants to indicate whether they are a federal entity. Further, in the Commission's attempt to reduce the number of active information collections, the Commission will incorporate the information collection requirements in OMB Control No. 3060–0774 into to this collection so it can be removed from the OMB inventory.

The Commission requests a total hourly burden change for FCC Forms 470 and 471 from 325,000 burden hours to 334,000 burden hours, which is an increase of 9,000 burden hours. The adjustment reflects updated information received from the Universal Service Administrative Company, the administrator of the schools and libraries universal service support program, and is based on actual participation in the program. Specifically, for the FCC Form 470, the Commission estimates that the number of respondents has remained the same at 35,000 based on the number of forms submitted for funding years 2012 and 2013 reported by USAC. For the FCC Form 471, the Commission estimates that the number of respondents has increased from 45,000 to 47,000 based on the increased number of submitted FCC Forms 471 in funding years 2012 and 2013 as reported by USAC.

The two FCC forms serve the functions of the Universal Service Schools and Libraries Support Mechanism, 47 U.S.C. 254 of the Communications Act of 1934, as amended. They are used at the point where services provided to the program are implemented, or are about to be implemented, and are a necessary prerequisite to the distribution of payments under the program.

Applicants in the E-rate program must submit an FCC Form 470 with a description of the services needed to USAC, which administers the fund. The information from the FCC Form 470 is then posted on USAC's Web site for all potential competing service providers to review. After waiting 28 days, the applicant can enter into an agreement for services. *See* 47 CFR 54.504(b). Applicants and consultants completing the FCC Form 470 must provide basic information on the form, including contact information and demographic information to assist in the processing of the application.

The FCC Form 471 must be filed each year by all E-rate applicants. Once a school or library has complied with the Commission's competitive bidding requirements and entered into an agreement for eligible services, it must file an FCC Form 471 application to notify USAC of the services that have been ordered, the service providers with whom the applicant has entered into an agreement, and an estimate of the funds needed to cover the discounts to be given for eligible services. *See* 47 CFR 54.504(c). Applicants must now provide their FCC Registration Number. *See* 47 CFR 1.8002 and 1.8003.

Besides basic information about the applicant or consultant filling out the form, the form gathers information about the broadband services that the school or library is currently using to help USAC determine the technological needs of the E-rate program. Since economically disadvantaged schools and rural schools receive a greater share of E-rate program funding, the form also contains a discount calculation worksheet for certifying the percentage of students eligible in that school for the national school lunch program (or other acceptable indicators of economic disadvantage determined by the Commission). *See* 47 CFR 54.505(b)(1). Similarly, libraries must make certifications about students eligible for national school lunch programs in nearby areas. *See* 47 CFR 54.505(b)(2). Since rural schools and libraries receive slightly more funding than urban participants, the FCC Form 471 requires applicant's demographic location. *See* 47 CFR 54.505(b)(3).

All of the requirements contained in this information collection are necessary to implement the congressional mandates regarding No Child Left Behind as well as the schools and libraries universal service support program process.

OMB Control Number: 3060–0819.

Title: Lifeline and Link Up Reform and Modernization, Advancing Broadband Availability Through Digital Literacy Training.

Form Numbers: FCC Forms 497, 481, 550, 555, and 560.

Type of Respondents: Individuals or households and business or other for profit.

Type of Review: Revision of a currently approved collection.

Number of Respondents and Responses: 41,806,827 respondents; 41,838,290 responses.

Estimated Time per Response: .25 hours—250 hours.

Frequency of Response: On occasion, quarterly, biennially, one time, monthly, and annual reporting requirements, third party disclosure requirements and recordkeeping requirements.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this collection of information is contained in 47 U.S.C. sections 1, 4(i), 201–205, 214, 254 and 403 of the Communications Act of 1934, as amended.

Total Annual Burden: 24,184,565 hours.

Total Annual Cost: N/A.

Privacy Act Impact Assessment: Yes.

Nature and Extent of Confidentiality: The changes proposed in the 2012 Lifeline Reform Order affects individuals or households, and thus, there are impacts under the Privacy Act. As required by the Privacy Act of 1974, as amended, 5 U.S.C. 552a, the Commission will create a system of records notice (SORN) to cover the collection, storage, maintenance and disposal (when appropriate) of any personally identifiable information that the Commission may collect as part of the information collection. We note that USAC must preserve the confidentiality of all data obtained from respondents and contributors to the universal service support program mechanism, must not use the data except for purposes of administering the universal service support program mechanism, must not disclose data in company-specific form unless directed to do so by the Commission. If the Commission requests information that respondents believe is confidential, respondents may request confidential treatment of such information under 47 U.S.C. section 0.459 of the Commission's rules.

Needs and Uses: This collection is being submitted as a revision.

In this submission to the OMB, the Commission proposes to make administrative revisions to the FCC Form 555 to improve the clarity of the form and instructions. The Commission also proposes to revised FCC Form 555

Section 2 to require ETCs to report the number of subscribers claimed on their February FCC Form 497 for the current FCC Form 555 calendar year that were initially enrolled during that calendar year. Further, we propose to revise Section 3 to require the ETCs to report the percentage of de-enrolled subscribers. Finally, we propose to revise Section 4 to require the ETCs to identify whether they are ''Pre-Paid ETC'' that are in compliance with Section 54.407. *See* 47 CFR 54.407.

The Commission also proposes revision to the Broadband Pilot Program. The broadband pilot program is aimed at generating statistically significant data that will allow the Commission, ETCs, and the public to analyze the effectiveness of different approaches to using Lifeline funds to making broadband more affordable for low-income Americans while providing support that is sufficient but not excessive. By Order, on December 19, 2012, the Commission selected 14 projects to participate in the broadband pilot program. Therefore, there is no further need to solicit proposals from respondents for the Broadband Pilot Program. In this submission to the OMB, the Commission proposes to eliminate the call for Broadband Pilot Program proposals, which was included in the previous revision. The Commission also proposes revisions to FCC Form 550—Low Income Broadband Reimbursement From and FCC Form 560—Low Income Broadband Pilot Program Reporting Form). In the previous revision, the Commission estimated the number of respondents for the FCC Forms 550 and 560 because the pilot program participants had not been selected at that time. The Commission proposes revised calculations for the burden hours associated with the FCC Forms 550 and 560 based on the actual number of pilot program participants. See the Commission's 60 day notice published on August 23, 2013 (78 FR 52528) for further details.

OMB Control Number: 3060–0853.

Title: Certification by Administrative Authority to Billed Entity Compliance with the Children's Internet Protection Act Form, FCC Form 479; Certification of Compliance with the Children's Internet Protection Act and Technology Plan Requirements Form, FCC Form 486; and Funding Commitment Adjustment Request Form, FCC Form 500.

Form Numbers: FCC Forms 479, 486 and 500.

Type of Review: Revision of a currently approved collection

Respondents: Business or other for-profit, not-for-profit institutions, and state, local or tribal government.

Number of Respondents and Responses: 90,700 respondents, 90,700 responses.

Estimated Time per Response: 1–1.5 hours.

Frequency of Response: On occasion and annual reporting requirements, recordkeeping requirement and third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. 151–154, 201–205, 218–220, 254, 303(r), 403, and 405.

Total Annual Burden: 104,650 hours.

Total Annual Cost: NA.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality: The Commission is not requesting that respondents submit confidential information to the Commission. If the Commission requests applicants to submit information that the respondents believe is confidential, respondents may request confidential treatment of their information under 47 CFR 0.459 of the Commission's rules.

Needs and Uses: The Commission will submit this information collection to the Office of Management and Budget (OMB) as a revision to a currently approved collection.

This submission revises the FCC Form 479 and instructions, FCC Form 486 and instructions, and FCC Form 500 and instructions. FCC Forms 479 and 486 include revisions to existing certifications to improve clarity and ensure consistency with the Commission's rules. FCC Form 500 includes revisions that allow applicants the option to use the FCC Form 500 to: (1) Seek extensions of the implementation deadline for non-recurring services from the Universal Service Administrative Company (USAC) under 47 CFR 54.507(d) of the Commission's rules; and/or (2) notify USAC when they are transferring equipment within the three year prohibition on equipment transfers due to a permanent or temporary closure of school or library facilities under 47 CFR 54.413 of the Commission's rules.

The Commission requests a total hourly burden change for FCC Forms 479, 486 and 500 from 70,000 burden hours to 104,650 burden hours, which is an increase of 34,650 burden hours. We made adjustments in the burden hours for each of these forms to account for updated information received from the Universal Service Administrative Company, the administrator of the schools and libraries universal service support program. This estimate is based on actual participation in the program. Specifically, for the FCC Form 479, the Commission estimates that the number of respondents has increased from 10,000 to 10,300 based on the number of consortia participants for funding year 2011 and 2012 reported by USAC. For the FCC Form 486, the Commission estimates that the number of respondents has increased from 30,000 to 38,500 based on the increased number of submitted FCC Forms 486 as reported by USAC. For the FCC Form 500, the Commission increased the number of respondents from 5,000 to 6,900 based on the actual FCC Forms 500 submitted in funding year 2011 as reported by USAC and to account for the potential transfer of the requirements covered by information collections for OMB Control Numbers 3060–0992 and 3060–1062 to this information collection. The requirements covered by these collections are being moved to the FCC Form 500, and OMB Control Numbers 3060–0992 and 3060–1062 will be discontinued once this revision is approved. The burden hours were also adjusted to reflect the Commission's revised estimates of the hours required to update and maintain Internet safety policies. The Commission adjusts the number of respondents from 30,000 to 35,000 and adjusts the burden hours per response from .25 to .75. The Commission estimates that the number of respondents should be adjusted based on inclusion of the number of respondents for both the FCC Form 479 and FCC Form 486. The Commission estimates the initial year of compliance with the schools-only requirement to update Internet safety policies to provide for education of minors about appropriate online behavior, including interacting with other individuals on social networking Web sites and in chat rooms and cyber bullying awareness and response (as required by the Protecting Children in the 21st Century Act) will require .75 burden hours per response. This is an adjustment from the previously reported estimate of .25 burden hours per response.

The three FCC forms serve the functions of the Universal Service Schools and Libraries Support Mechanism, 47 U.S.C. 254 of the Communications Act of 1934, as amended. They are used at the point where services provided to the program are implemented, or are about to be implemented, and are a necessary prerequisite to the distribution of payments under the program.

FCC Forms 479 and 486 enable participants in the program to certify that they are compliant with the

Children's Internet Protection Act (CIPA), 47 U.S.C. 254(h) and (l) when they seek discounts for Internet access, internal connections and basic maintenance of internal connections. With the exception of program participants who receive only telecommunications services, CIPA compliance is a necessary prerequisite to invoicing and payment. CIPA provides that schools and libraries that have computers with Internet access must certify that they have in place certain Internet safety policies and technology protection measures in order to be eligible to receive program services under section 254(h) of the Communications Act of 1934 (the Act), as amended. 47 CFR 54.520. FCC Form 486 also is the form that school and library applicants use to notify USAC of their service start date and certify compliance with E-rate program technology plan requirements.

School and library applicants use the FCC Form 500 to make adjustments to previously filed forms, such as changing the contract expiration date filed with the FCC Form 471, changing the funding year service start date filed with the FCC Form 486, or cancelling or reducing the amount of funding commitments.

All of the requirements contained in this information collection are necessary to implement the congressional mandates regarding access to the Internet by minors and adults as well as the schools and libraries universal service support program and reimbursement process.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary, Office of Managing Director.

[FR Doc. 2013–24951 Filed 10–23–13; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Information Collection Activities: Proposed Information Collection; Submission for OMB Review

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Notice of information collection to be submitted to OMB for review and approval under the Paperwork Reduction Act, and request for comment.

SUMMARY: The Federal Deposit Insurance Corporation (FDIC), 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 a revision of a continuing information collection, as required by the Paperwork Reduction Act of 1995.

An agency may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently-valid Office of Management and Budget (OMB) control number. The FDIC is soliciting comment concerning its information collection titled, ''Annual Stress Test Reporting Template and Documentation for Covered Banks with Total Consolidated Assets of $10 Billion to $50 Billion under the Dodd-Frank Wall Street Reform and Consumer Protection Act.''

DATES: Comments must be received by November 25, 2013.

ADDRESSES: You may submit written comments by any of the following methods:

- *Agency Web site: http://www.fdic.gov/regulations/laws/federal/notices.html.* Follow the instructions for submitting comments on the FDIC Web site.
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: Comments@FDIC.gov.* Include ''Annual Stress Test Reporting Template and Documentation'' on the subject line of the message.
- *Mail:* Gary A. Kuiper, Counsel, Executive Secretary Section, Attention: Comments, FDIC, 550 17th Street NW., Washington, DC 20429.
- *Hand Delivery/Courier:* Guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m.

Public Inspection: All comments received will be posted without change to *http://www.fdic.gov/regulations/laws/federal/notices.html* including any personal information provided.

Additionally, you may send a copy of your comments to: By mail to the U.S. OMB, 725 17th Street NW., #10235, Washington, DC 20503 or by facsimile to (202) 395–6974, Attention: Federal Banking Agency Desk Officer.

FOR FURTHER INFORMATION CONTACT: You can request additional information from Gary Kuiper, 202.898.3877, Legal Division, FDIC, 550 17th Street NW., NYA–5046, Washington, DC 20429. In addition, copies of the templates referenced in this notice can be found on the FDIC's Web site (*http://www.fdic.gov/regulations/laws/federal/notices.html*).

SUPPLEMENTARY INFORMATION: The FDIC is requesting comment on the following revision of an information collection:

Annual Stress Test Reporting Template and Documentation for Covered Banks With Total Consolidated Assets of $10 Billion to $50 Billion Under the Dodd-Frank Wall Street Reform and Consumer Protection Act

Section 165(i)(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act [1] (Dodd-Frank Act) requires certain financial companies, including state nonmember banks and state savings associations, to conduct annual stress tests [2] and requires the primary financial regulatory agency [3] of those financial companies to issue regulations implementing the stress test requirements.[4] A state nonmember bank or state savings association is a ''covered bank'' and therefore subject to the stress test requirements if its total consolidated assets exceed $10 billion. Under section 165(i)(2), a covered bank is required to submit to the Board of Governors of the Federal Reserve System (Board) and to its primary financial regulatory agency a report at such time, in such form, and containing such information as the primary financial regulatory agency may require.[5] On October 15, 2012, the FDIC published in the **Federal Register** a final rule implementing the section 165(i)(2) annual stress test requirement.[6] This notice describes the reports and information required to meet the reporting requirements under section 165(i)(2) for covered banks with total consolidated assets of $10 billion to $50 billion. These information collections will be given confidential treatment to the extent allowed by law (5 U.S.C. 552(b)(4)).

The FDIC intends to use the data collected through these proposed templates to assess the reasonableness of the stress test results of covered banks and to provide forward-looking information to the FDIC regarding a covered bank's capital adequacy. The FDIC also may use the results of the stress tests to determine whether additional analytical techniques and exercises could be appropriate to identify, measure, and monitor risks at the covered bank. The stress test results are expected to support ongoing improvement in a covered bank's stress testing practices with respect to its internal assessments of capital adequacy and overall capital planning.

[1] Public Law 111–203, 124 Stat. 1376 (July 21, 2010).

[2] 12 U.S.C. 5365(i)(2)(A).

[3] 12 U.S.C. 5301(12).

[4] 12 U.S.C. 5365(i)(2)(C).

[5] 12 U.S.C. 5365(i)(2)(B).

[6] 77 FR 62417 (October 15, 2012).

The Dodd-Frank Act stress testing requirements apply to all covered banks, but the FDIC recognized that many covered banks with consolidated total assets of $50 billion or more have been subject to stress testing requirements under the Board's Comprehensive Capital Analysis and Review (CCAR). The FDIC also recognized that these banks' stress tests will be applied to more complex portfolios and therefore warrant a broader set of reports to adequately capture the results of the stress tests. These reports will necessarily require more detail than would be appropriate for smaller, less complex institutions. Therefore, the FDIC decided to specify separate reporting templates for covered banks with total consolidated assets between $10 billion and $50 billion and for covered banks with total consolidated assets of $50 billion or more.[7]

While the general reporting categories are the same (income statement, balance sheet, and capital), the level of detail for individual reporting items is less for $10 billion to $50 billion covered banks. For example, accounting for loss provisions by category is not required, and less detail is required for commercial and industrial lending. Because smaller banks with assets of $10 billion to $50 billion generally have less complex balance sheets, the FDIC believes that highly detailed reporting is not warranted, and so the FDIC is not requiring supplemental schedules on such areas as retail balances, securities and trading, operational risk, and pre-provision net revenue (PPNR). The FDIC has worked closely with the Board and the Office of the Comptroller of the Currency (OCC) (together ''the agencies'') to make the agencies' respective rules implementing annual stress testing under the Dodd-Frank Act consistent and comparable by requiring similar standards for scope of application, scenarios, data collection and reporting forms. The FDIC also has worked to minimize any potential duplication of effort related to the annual stress test requirements. The FDIC, OCC, and Board coordinated the preparation of stress testing templates in order to make the templates as similar as possible and thereby minimize the burden on affected institutions. The proposed FDIC Dodd-Frank Annual Stress Test (DFAST) reporting templates for covered banks with assets of $10 billion to $50 billion or more are described below.

Description of Reporting Templates for Banks With $10 Billion to $50 Billion in Assets

The ''Annual Stress Test Reporting Template and Documentation for Covered Banks with Total Consolidated Assets of $10 Billion to $50 Billion under the Dodd-Frank Wall Street Reform and Consumer Protection Act'' (DFAST 10–50 Results Template) includes data collection worksheets necessary for the FDIC to assess the company-run stress test results for baseline, adverse, and severely adverse scenarios as well as any other scenario specified in accordance with regulations specified by the FDIC. The DFAST 10–50 Results Template includes worksheets that collect information on the following areas:

1. Income Statement;
2. Balance Sheet, and
3. Capital.

Each $10 billion to $50 billion covered bank reporting to the FDIC using this form will be required to submit worksheets for each scenario provided to covered banks in accordance with regulations implementing Section 165(i)(2) as specified by the FDIC.

Worksheets: Income Statement

The income statement worksheet collects data for the quarter preceding the planning horizon and for each quarter of the planning horizon for the stress test on projected losses and revenues in the following categories.

1. Net charge-offs;
2. Pre-provision net revenue;
3. Provision for loan and lease losses;
4. Realized gains (losses) on held to maturity (HTM) and available-for-sale (AFS) securities;
5. All other gains (losses);
6. Taxes, and

Memoranda items:

7. Total other than temporary impairment (OTTI) losses.

This schedule provides information used to assess losses that covered banks can sustain in baseline, adverse, and severely adverse stress scenarios.

Worksheets: Balance Sheet

The balance sheet worksheet collects data for the quarter preceding the planning horizon and for each quarter of the planning horizon for the stress test on projected equity capital, as well as on assets and liabilities in the following categories.

1. Loans;
2. HTM securities;
3. AFS securities;
4. Trading assets;
5. Total intangible assets;
6. Other real estate;
7. All other assets;
8. Retail funding (core deposits);
9. Wholesale funding;
10. Trading liabilities;
11. All other liabilities, and
12. Perpetual preferred stock and related surplus;

The FDIC intends to use this worksheet to assess the projected changes in assets and liabilities that a covered bank can sustain in a baseline, adverse, or severely adverse scenario. This worksheet will also be used to assess the revenue and loss projections identified in the income statement worksheet.

Worksheets: Capital

The capital worksheet, which is appended to the balance sheet worksheet, collects data for the quarter preceding the planning horizon and for each quarter of the planning horizon for the stress test on the following areas.

1. Unrealized gains (losses) on AFS securities;
2. Disallowed deferred tax asset;
3. Tier 1 capital;
4. Qualified subordinated debt and redeemable preferred stock;
5. Allowance includable in Tier 2 capital;
6. Tier 2 capital;
7. Total risk-based capital;
8. Total capital;
9. Risk weighted assets;
10. Total assets for leverage purposes;
11. Tier 1 risk-based capital ratio;
12. Tier 1 leverage ratio;
13. Total risk-based capital ratio;

Memoranda items:

14. Sale, conversion, acquisition, or retirement of capital stock;
15. Cash dividends declared on preferred stock, and
16. Cash dividends declared on common stock.

In addition to the information collected on the capital worksheet, the Summary Schedule captures projections for regulatory capital ratios over the planning horizon by scenario.

The FDIC intends to use these worksheets to assess the impact on capital of the projected losses and projected changes in assets that the covered bank can sustain in a stressed scenario. In addition to reviewing the worksheet in the context of the balance sheet and income statement projections, the FDIC also intends to use this worksheet to assess the adequacy of capital planning processes for each covered bank.

[7] *See* 77 FR 16263 for the Paperwork Reduction Act Notice and the FDIC Web site at *http://www.fdic.gov/regulations/laws/federal/2013/2013-03-14_notice/templates.html* for the reporting templates for covered banks with total consolidated assets of $50 billion or more.

Description of DFAST 10–50 Scenario Variables Template

To conduct the stress test required under this rule, a covered bank may need to project additional economic and financial variables to estimate losses or revenues for some or all of its portfolios. In such a case, the covered bank is required to complete a DFAST 10–50 Scenario Variables Template worksheet for each scenario where such additional variables are used to conduct the stress test. Each scenario worksheet collects the variable name (matching that reported on the Scenario Variables Template Definitions worksheet), the actual value of the variable during the third quarter of the reporting year, and the projected value of the variable for nine future quarters.

Description of Supporting Documentation

Covered banks with total consolidated assets of $10 billion to $50 billion must submit clear documentation of the projections included in the worksheets to support efficient and timely review of annual stress test results by the FDIC. The supporting documentation should be submitted electronically and is not expected to be reported in the workbooks used for required data reporting. This supporting documentation must describe the types of risks included in the stress test; describe clearly the methodology used to produce the stress test projections; describe the methods used to translate the macroeconomic factors into a covered bank's projections; and also include an explanation of the most significant causes for the changes in regulatory capital ratios. The supporting documentation also should address the impact of anticipated corporate events, including mergers, acquisitions, or divestitures of business lines or entities, and changes in strategic direction, and should describe how such changes are reflected in stress test results, including the impact on estimates of losses, expenses and revenues, net interest margins, non-interest income items, and balance sheet amounts.

Where covered bank-specific assumptions are made that differ from the broad macroeconomic assumptions incorporated in stress scenarios provided by the FDIC, the documentation must also describe such assumptions and how those assumptions relate to reported projections. Where historical relationships are relied upon, the covered banks must describe the historical data and provide the basis for the expectation that these relationships would be maintained in each scenario, particularly under adverse and severely adverse conditions.

Comment Summary

In the **Federal Register** of March 14, 2013 (77 FR 16263), the FDIC published a 60-day notice requesting public comment on the templates and the collection of information. The FDIC received two comment letters on the proposed implementation of the information collection: one from an industry group and one from a financial services consulting firm.[8] The OCC and the Board together, in addition to receiving these two comments, also received five comments from individual banking organizations.[9] As noted in the initial **Federal Register** notice, the agencies each developed and requested public comment on very similar reporting forms to implement the reporting requirements. The agencies coordinated the changes made to each agency's templates in order to keep the templates as similar as possible and minimize the burden on affected institutions. As part of this coordination, in discussions with the other agencies, the FDIC considered these five comments, in addition to the two comments it directly received. The FDIC has made several changes to the proposed DFAST 10–50 Results Template in light of all comments received.

Some general comments were received regarding the report format, instructions, and timing. However, the majority of the public comments focused on specific data items on the results schedules and in some cases compared the level of detail required in the proposed DFAST 10–50 Results Template to the requirements of the Capital Assessments and Stress Testing information collection (FR Y–14A/Q/M; OMB No. 7100–0341) applicable to bank holding companies with $50 billion or more in total assets.[10] Lastly, one commenter asked for clarification regarding how regulatory capital should be calculated over the planning horizon in consideration of the phase-in period for the new capital framework that implements Basel III standards.

[8] These comment letters may be found at *http://www.fdic.gov/regulations/laws/federal/2013/2013-annual_stress_test.html*

[9] These comments may be found at *http://www.regulations.gov*

[10] The FR Y–16 reporting requirements are tailored to the $10–$50 billion institutions and require significantly less granular reporting segmentation relative to the FR Y–14A applicable to bank holding companies with $50 billion or more in total assets.

Detailed Discussion of Public Comments

A. General Comments

Some commenters expressed concern about having to submit stress testing results in a Call Report-type format, noting that the existing stress testing software of many banks and savings associations was not developed with such a format in mind, and asked for less detailed reporting forms. These commenters requested that the agencies consider further delaying implementation of the reporting requirements and/or limiting the report submissions on the DFAST 10–50 Results Template Summary Schedule. The FDIC has determined that using reporting templates modeled on the Call Report is the best solution because of familiarity with this format by the FDIC, covered banks, and the public, particularly when mandatory public disclosure of summary results under the severely adverse scenario becomes effective in 2015. The proposed DFAST 10–50 Results Template, aligned to the Call Report, provides a format that is well understood and utilized by the industry. Therefore, the FDIC believes that the reporting requirements will not place undue burden on the ability of covered banks to report stress test results. Using the Call Report format would also ensure a high level of consistency across covered banks and facilitate assessment of the results. Furthermore, the OCC and the Board are adapting the same format for their templates; utilization of the Call Report format by covered banks would maintain consistency across agencies and in reporting for all covered institutions. Finally, the FDIC has already delayed for one year the application of the stress testing rules for the $10 billion to $50 billion covered banks, in part so that they would have time to create the necessary infrastructure to submit the appropriate stress testing results.

Two commenters expressed concern about the differences among stress testing templates used to respond to different stress testing requirements and about the burden some banking organizations (companies with $50 billion or more in assets that control subsidiaries with $10 billion to $50 billion in assets) might face in preparing multiple sets of templates. The FDIC notes that the final FDIC stress testing rule allows such subsidiaries to elect to conduct its stress test and report to the FDIC on the same timeline as its parent bank holding company or savings and

loan holding company.[11] The FDIC has coordinated with the OCC and the Board in the development of the stress test templates and has attempted to minimize the duplication and reporting burden of holding companies subject to the stress test rules which have subsidiaries subject to the stress test rules.

One commenter suggested allowing covered banks to apply generalized, bank-developed loss assumptions for immaterial portfolios. The commenter also noted that an immaterial portfolio exception is allowed for firms with $50 billion or more assets in stress testing submissions. The FDIC has considered the burden of calculating losses for immaterial portfolios for covered banks with $10 billion to $50 billion in assets and determined that providing a safe harbor that defines immaterial portfolios would be contrary to the purpose of a company-run stress test and could unintentionally mask risk or cause institutions to conclude erroneously that the aggregation of immaterial portfolios would always pose little or no risk to an institution. Although stress testing should be applied to all exposures, the FDIC recognizes that the same level of detail and analysis may not be necessary for lower-risk, immaterial portfolios. For such portfolios, it may be appropriate for a covered bank to use a less sophisticated approach for its stress test projections, assuming the results of that approach are conservative and well-documented. The FDIC has therefore not established a reporting threshold for immaterial portfolios in the reporting requirements for the proposed DFAST 10–50 Results Template. Covered banks should refer to the proposed interagency supervisory guidance on implementing Dodd-Frank Act company-run stress tests for banking organizations with total consolidated assets of more than $10 billion but less than $50 billion for more information on estimates for immaterial portfolios.[12]

B. Regulatory Capital

One commenter asked for clarification regarding the calculation and reporting of regulatory capital and risk-weighted assets (RWAs), noting the expectation that capital and RWA calculations and definitions would change over the planning horizon as new rules are implemented (specifically noting new definitions when the Basel III final rule is adopted). In addition, this commenter also requested clarification on the calculation of tier 1 non-common capital elements.

There are three line items in the proposed DFAST 10–50 Results Template that would be specifically affected by the capital framework that implements Basel III standards: tier 1 common equity capital, non-common capital elements, and RWAs. Common equity tier 1 capital was recently defined in the Basel III interim final rule for all institutions and does not become effective for institutions with $10-$50 billion in assets until 2015.[13] The need to model alternative capital calculations more than halfway through the planning horizon for these banking organizations adds complexity and increases the potential or likelihood of erroneous calculations or assumptions. This complexity and increased risk of error could detract from the main purpose of conducting a company-run stress test; mainly to make a forward-looking assessment of capital planning processes and internal capital needs under various scenarios. Lastly, as the first required public disclosure will not commence until the 2014 stress test cycle with disclosure occurring in June of 2015, the additional burden of transitioning to a new capital calculation more than halfway through the 2013 stress test planning horizon will not provide the public with any insight into a firm's capital adequacy or planning process in this instance.

Accordingly, the FDIC removed tier 1 common and non-common capital line items, and the associated equity ratios, from the DFAST 10–50 Results Template for the 2013 stress test cycle. The final template allows covered banks to report capital and RWAs for the entire planning horizon using the regulatory capital rules and definitions that are applicable on the ''as of'' date of each report for this initial reporting submission. For example, the initial respondent panel would report as of September 30, 2013; therefore, that submission should apply capital calculations consistently throughout the planning horizon using the capital rules and definitions effective as of September 30, 2013. The FDIC will provide information regarding the capital and RWA calculations in the final interagency guidance and will consider adding elements of the Basel III capital requirements in future DFAST 10–50 Results Template reporting forms and instructions.

C. Data Items—Results Schedule (Balance Sheet Income Statement)

Two commenters argued that the level of detail demanded by the templates was excessive. The commenters stated that separating 1–4 family construction loans from all other construction loans would require more detailed reporting for the DFAST 10–50 Results Template than what is required of large bank holding companies subject to the Board's CCAR, and firms with $50 billion or more in assets that report stress test results using the DFAST 14A form. While the templates for firms with $50 billion or more in assets do not segment 1–4 family construction loans, large bank holding companies must submit that specific data item on both the FR Y–14Q and FR Y–14M reporting forms. More importantly, the FDIC believes this data item is particularly relevant to covered banks that previously have reported material concentrations in this product type and because a significant amount of the industry's losses during the most recent economic downturn emanated from this product. These data would provide necessary information for covered banks to manage risk effectively and appropriately assess and plan for their capital needs.

One commenter also argued that requiring separate line items for retail and wholesale funding would add unnecessary complexity and burden. The FDIC, however, believes it is necessary to maintain these separate items. The breakdown of deposits between retail and wholesale is easily facilitated through Call Report data and the proposed DFAST 10–50 Results Template instructions indicate that covered banks should use the Call Report segmentation definitions to project these line items. In addition, retail and wholesale funding historically have reacted differently under stressed economic conditions. Projecting the retail and wholesale deposit structure throughout the planning horizon as proposed would provide useful information to a covered bank and the FDIC with respect to how a covered bank assesses capital adequacy, plans for its capital needs, and manages risk.

Two commenters stated that gathering AFS and HTM balances for U.S. government obligations and obligations of government sponsored entities (GSEs) would require more detailed reporting for the DFAST 10–50 Results Template than what is required for the DFAST 14A. Another commenter suggested separating GSE obligations from other government obligations on the DFAST 10–50 Results Template Balance Sheet

[11] *See* 12 C.F.R. 325.203(d),

[12] 78 FR 47217 (August 5, 2013). This guidance is expected to be finalized in 2013.

[13] 78 FR 55340 (September 10, 2013).

consistent with the treatment on the Call Report Income Statement. While the DFAST 14A collects only total AFS and HTM balances on the balance sheet schedule, this reporting series requires more granular data than proposed for the DFAST 10–50 Results Template on government securities through other schedules within the DFAST 14A. Similarly, the reporting requirements for the Call Report Balance Sheet mandate more detailed information on AFS and HTM GSE obligations relative to the reporting requirements for the DFAST 10–50 Results Template. Gathering AFS and HTM balances for U.S. government obligations and obligations of GSEs would provide relevant and required data to project net income and regulatory capital over the planning horizon.

Commenters also favored the elimination of several line items. One commenter stated that the level of detail required by the DFAST 10–50 Results Template Balance Sheet memoranda items was not informative or necessary to the loss estimation process, or entailed more detail than what is required by the DFAST 14A. Specific memoranda items cited by the commenter included troubled debt restructurings and loans secured by 1–4 family in foreclosure. Based on this comment, the FDIC also evaluated the utility of another Balance Sheet memoranda item: Loans and leases guaranteed by either U.S. government or GSE guarantees (i.e., non-FDIC loss sharing agreements). The FDIC agrees that these memoranda data items are already captured within the proposed DFAST 10–50 Results Template reporting requirements for loans and leases and that eliminating these items from the reporting template would not affect an institution's ability to project pre-provision net revenue, net income, or regulatory capital in order to assess their capital needs under stressed conditions. Therefore, the FDIC eliminated these three supplemental Balance Sheet memoranda reporting items.

Commenters also requested that common stock, retained earnings, surplus, and other equity components be reported as a single line item. The FDIC agrees with this comment and has combined the aforementioned capital components into one line item to be reported as ''equity capital.''

One commenter noted that separately modeling average rates for each type of deposit would also involve a significant amount of work and potentially affect other company-run models. The FDIC agrees that the average rate information is not a data input that a covered bank needs to project losses, pre-provision net revenue, or capital. Further, the additional burden placed on covered banks to calculate the projected average rates could distract unnecessarily from the primary goal of the annual company-run stress test—to estimate effectively the possible impact of an economic downturn on a covered bank's capital position in order to plan for capital needs and to identify and managed risk. Therefore, the FDIC has removed all average rate memoranda items on the balance sheet.

Two commenters favored the elimination of the income statement item for Gains and Losses on Other Real Estate Owned (OREO). One commenter noted that this element could be combined effectively with forecasting of other OREO expenses. The other commenter stated that the level of detail for this element is more granular that what is required for the DFAST 14A templates. The FDIC notes that gains or losses on OREO are captured in the pre-provision net revenue metrics worksheet of the DFAST 14A templates. Therefore, this requirement would not be more burdensome for the $10 billion–$50 billion covered banks. Nevertheless, the FDIC has eliminated this item because gains and losses on OREO would already be captured within the noninterest income statement memoranda item ''itemize and describe amounts greater than 15% of noninterest income'' or in the ''itemize and describe amounts greater than 15% of noninterest expense'' when the amount meets the 15% threshold.

D. Technical Changes/Other Items

In response to a few technical comments received, the FDIC has adjusted the reporting templates and instructions. These changes include correction of formulaic errors; correction of MDRM reference errors; clarified reporting instructions for income statement memoranda items; and more detailed technical reporting instructions, including the elimination of the contact information schedule as this information would be collected through the DFAST 10–50 Results Template cover sheet and related data collection application.

Burden Estimates

The FDIC estimates the burden of this collection of information as follows:

Estimated Number of Respondents: 22.

Estimated Annual Burden per Respondent: 464 hours.

Estimated Total Annual Burden: 10,208 hours.

The burden for each $10 billion to $50 billion covered bank that completes the FDIC DFAST 10–50 Results Template is estimated to be 464 hours. The burden to complete the FDIC DFAST 10–50 Results Template is estimated to be 440 hours, including 20 hours to input these data and 420 hours for work related to modeling efforts. The burden to complete the FDIC DFAST 10–50 Scenario Variables Template is estimated to be 24 hours. The total burden for all 22 respondents to complete both templates is estimated to be 10,208 hours. The start-up burden for each new respondent is estimated to be 3,600 hours, a total of 79,200 hours, and ongoing revisions for each existing firm is estimated to be 160 hours, a total of 3,520 hours.

Comments continue to be invited on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the FDIC, including whether the information has practical utility;

(b) The accuracy of the FDIC's estimate of the burden of the collection of information;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the collection on respondents, including through the use of automated collection techniques or other forms of information technology;

(e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information; and

(f) The ability of FDIC-supervised banks and thrifts with assets between $10 billion and $50 billion to provide the requested information to the FDIC by March 31, 2014.

Dated at Washington, DC, this 21st day of October 2013.

Federal Deposit Insurance Corporation

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2013–25015 Filed 10–23–13; 8:45 am]

BILLING CODE P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on the agreements to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. Copies of the

agreements are available through the Commission's Web site (*www.fmc.gov*) or by contacting the Office of Agreements at (202)-523–5793 or *tradeanalysis@fmc.gov.*

Agreement No.: 012204–001.

Title: ELJSA-Hanjin Shipping Slot Exchange Agreement.

Parties: Evergreen Line Joint Service Agreement and Hanjin Shipping Co. Ltd.

Filing Party: Paul M. Keane, Esq.; Cichanowicz, Callan, Keane, Vengrow and Textor, LLP; 61 Broadway, Suite 3000; New York, NY 10006.

Synopsis: The amendment reflects the removal from the Agreement of the exchange of slots from specific services that are now included in ELJSA/Hanjin Shipping Vessel Sharing Agreement No. 012226, and reflects the resultant overall reduction in number of slots exchanged and tonnage in Agreement No. 012204.

Agreement No.: 012169–001.

Title: Crowley/ELJSA Space Charter Agreement.

Parties: Crowley Latin America Services, LLC and Evergreen Line Joint Service Agreement

Filing Party: Wayne R. Rohde, Esq.; Cozen O'Connor; 1627 I Street NW. Suite 1100; Washington, DC 20006.

Synopsis: The amendment revises the duration of the agreement, deletes Costa Rica from the agreement's scope, and adds a force majeure clause.

Agreement No.: 012227.

Title: Simatech/Maersk Line Space Charter Agreement.

Parties: Simatech Americas, Inc. and A.P. Moller-Maersk A/S trading under the name Maersk Line.

Filing Party: Wayne R. Rohde, Esq.; Cozen O'Connor; 1627 I Street NW. Suite 1100; Washington, DC 20006.

Synopsis: The agreement authorizes Simatech to charter space to Maersk Line in the trade between Guatemala and Honduras, on the one hand, and Miami, FL, on the other hand.

Agreement No.: 012154–001.

Title: APL/Hamburg Süd Space Charter Agreement.

Parties: APL Co. Pte, Ltd. and American President Lines, Ltd. (acting as one party); and Hamburg Süd KG

Filing Party: Wayne R. Rohde, Esq.; Cozen O'Connor; 1627 I Street NW. Suite 1100; Washington, DC 20006.

Synopsis: The amendment authorizes APL to provide Hamburg Süd with space on alternative services operated by APL in the event that the PS1 service is suspended or terminated, amends the geographic to allow for such alternative services, and extends the Agreement until March 31, 2014.

Agreement No.: 012228.

Title: COSCON/''K'' Line/WHS Space Charter and Sailing Agreement.

Parties: COSCO Container Lines Co. Ltd.; Kawasaki Kisen Kaisha, Ltd.; and Wan Hai Lines (Singapore) PTE Ltd.

Filing Party: Robert B.Yoshitomi, Esq.; Nixon Peabody LLP; 555 West Fifth Street, 46th Floor; Los Angeles, CA 90013.

Synopsis: The agreement authorizes the parties to share vessels and exchange slots in the trade between The People's Republic of China (including Hong Kong), and the Pacific Coast of the U.S. and Canada.

Agreement No.: 201221.

Title: Seattle Marine Terminal Operators/Port of Seattle Discussion Agreement.

Parties: Port of Seattle; Eagle Marine Services, Ltd.; SSA Terminals, LLC; SSA Terminals (Seattle), LLC; and Total Terminals, International, LLC.

Filing Party: Eric C. Jeffrey, Esq; Goodwin Proctor, LLP; 901 New York Avenue NW.; Washington, DC 20001

Synopsis: The agreement authorizes the parties to discuss, exchange information, and agree upon a range of matters at the Port, for the purpose of developing ways to maintain the competitiveness of the Port, and to improve service, reduce costs, increase efficiency, and otherwise optimize conditions at the Port.

By Order of the Federal Maritime Commission.

Dated: October 21, 2013.

Karen V. Gregory,

Secretary.

[FR Doc. 2013–25021 Filed 10–23–13; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Applicants

The Commission gives notice that the following applicants have filed an application for an Ocean Transportation Intermediary (OTI) license as a Non-Vessel-Operating Common Carrier (NVO) and/or Ocean Freight Forwarder (OFF) pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. 40101). Notice is also given of the filing of applications to amend an existing OTI license or the Qualifying Individual (QI) for a licensee.

Interested persons may contact the Office of Ocean Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573, by telephone at (202) 523–5843 or by email at *OTI@fmc.gov.*

Fachel International LLC dba Fachel Shipping & Logistics (NVO & OFF), 6331 Belair Road, Baltimore, MD 21206, Officers: Chinyere W. Osasuyi, Chief Executive Manager (QI), Famous I. Osasuyi, Chief Executive Member. Application Type: QI Change.

National Air Cargo, Inc. (NVO & OFF), 350 Windward Drive, Orchard Park, NY 14127. Officers: Margaret Bradford, Assistant Secretary (QI), Christopher J. Alf, President. Application Type: QI Change.

Perimeter International dba Perimeter Logistics (NVO & OFF), 2700 Story Road, Suite 150, Irving, TX 75038. Officers: John G. Eastland, Assistant Secretary (QI), Merry L. LaMothe, CEO. Application Type: New NVO & OFF License.

Sol Intercargo Inc (NVO), 2792 NW 24th Street, Rear, Miami, FL 33142. Officer: Alma J. Martinez, President (QI). Application Type: New NVO License.

By the Commission.

Dated: October 21, 2013.

Karen V. Gregory,

Secretary.

[FR Doc. 2013–25023 Filed 10–23–13; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than November 8, 2013.

A. Federal Reserve Bank of Richmond (Adam M. Drimer, Assistant Vice President) 701 East Byrd Street, Richmond, Virginia 23261–4528:

1. *Family's Future IV Limited Partnership, a proposed qualified family limited partnership with the general partner being Richard G. Perservati, Captiva, Florida, and the limited partner being the Richard G. and Karen*

N. Preservati Grandchildren's Trust, the co-trustees of which are Richard G. Preservati, II; Gina Preservati Boggess, both of Princeton, West Virginia; Nicholas S. Preservati, Charleston, West Virginia; and Arnold D. Lively, Venice, Florida; all acting in concert, and Richard G. Preservati, II, Princeton, West Virginia, individually, to acquire voting shares of New Peoples Bankshares, Inc., and thereby indirectly acquire voting shares of New Peoples Bank, Inc., both in Honaker, Virginia.

Board of Governors of the Federal Reserve System, October 21, 2013.

Margaret McCloskey Shanks,

Deputy Secretary of the Board.

[FR Doc. 2013–24994 Filed 10–23–13; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than November 7, 2013.

A. Federal Reserve Bank of Atlanta (Chapelle Davis, Assistant Vice President) 1000 Peachtree Street, NE., Atlanta, Georgia 30309:

1. *Jane Bryant Banks, Mary Banks Garnand, James Banks Garnand, and Daniel Michael Garnand,* all of Eutaw, Alabama; to collectively retain voting shares of Merchants and Farmers Bancshares, Inc., and thereby indirectly retain voting shares of Merchants & Farmers Bank of Greene County, both in Eutaw, Alabama.

Board of Governors of the Federal Reserve System, October 18, 2013.

Margaret McCloskey Shanks,

Deputy Secretary of the Board.

[FR Doc. 2013–24855 Filed 10–23–13; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than November 18, 2013.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. *Talmer Bancorp, Inc.,* Troy, Michigan; to acquire 100 percent of the voting shares of Michigan Commerce Bank, Ann Arbor, Michigan.

B. Federal Reserve Bank of San Francisco (Gerald C. Tsai, Director, Applications and Enforcement) 101 Market Street, San Francisco, California 94105–1579:

1. *Umpqua Holdings Corporation,* Portland, Oregon; to merge with Sterling Financial Corporation, and thereby indirectly acquire Sterling Savings Bank, both in Spokane, Washington.

Board of Governors of the Federal Reserve System, October 21, 2013.

Margaret McCloskey Shanks,

Deputy Secretary of the Board.

[FR Doc. 2013–24995 Filed 10–23–13; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies; Correction

This notice corrects a notice (FR Doc. 2013–24511) published on page 62363 of the issue for Monday, October 21, 2013.

Under the Federal Reserve Bank of Dallas heading, the entry for WCM-Parkway, Ltd, Dallas, Texas, is revised to read as follows:

A. Federal Reserve Bank of Dallas (E. Ann Worthy, Vice President) 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. *WCM Holdings, Inc., and WCM-Parkway, Ltd.,* both in Dallas, Texas; to acquire up to 15 percent of the voting shares of Veritex Holdings, Inc., and thereby indirectly acquire voting shares of Veritex Community Bank, both in Dallas, Texas.

Comments on this application must be received by November 14, 2013.

Board of Governors of the Federal Reserve System, October 21, 2013.

Margaret McCloskey Shanks,

Deputy Secretary of the Board.

[FR Doc. 2013–24993 Filed 10–23–13; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–D–1143]

Draft Guidance for Industry: Use of Nucleic Acid Tests To Reduce the Risk of Transmission of West Nile Virus From Donors of Human Cells, Tissues, and Cellular and Tissue-Based Products; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft document entitled ''Guidance for Industry: Use of Nucleic Acid Tests to Reduce the Risk of Transmission of West Nile Virus From Donors of Human Cells, Tissues, and Cellular and Tissue-Based Products (HCT/Ps),'' dated October 2013. The draft guidance document provides establishments that make donor eligibility determinations for donors of HCT/Ps, with recommendations for donor testing for West Nile Virus (WNV) using an FDA-licensed donor screening test. The guidance recommends the use of an FDA-licensed nucleic acid test

(NAT) for testing donors of HCT/Ps for infection with WNV. The draft guidance replaces the draft guidance entitled ''Guidance for Industry: Use of Nucleic Acid Tests to Reduce the Risk of Transmission of West Nile Virus From Donors of Whole Blood and Blood Components Intended for Transfusion and Donors of Human Cells, Tissues, and Cellular and Tissue-Based Products (HCT/Ps)'' dated April 2008, with respect to HCT/Ps. The testing recommendations in the guidance, when finalized, will supplement the donor screening recommendations for WNV (which will remain in place) that were made in the guidance entitled ''Guidance for Industry: Eligibility Determination for Donors of Human Cells, Tissues, and Cellular and Tissue-Based Products (HCT/Ps)'' dated August 2007 (2007 Donor Eligibility Guidance).

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit either electronic or written comments on the draft guidance by January 22, 2014.

ADDRESSES: Submit written requests for single copies of the draft guidance to the Office of Communication, Outreach and Development (HFM–40), Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 1401 Rockville Pike, Suite 200N, Rockville, MD 20852–1448. Send one self-addressed adhesive label to assist the office in processing your requests. The draft guidance may also be obtained by mail by calling CBER at 1–800–835–4709 or 301–827–1800. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

Submit electronic comments on the draft guidance to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Benjamin A. Chacko, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, Suite 200N, Rockville, MD 20852–1448, 301–827–6210.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft document entitled ''Guidance for Industry: Use of Nucleic Acid Tests to Reduce the Risk of Transmission of West Nile Virus From Donors of Human Cells, Tissues, and Cellular and Tissue-Based Products (HCT/Ps),'' dated October 2013. FDA is providing establishments that make donor eligibility determinations for donors of HCT/Ps with recommendations for donor testing for WNV using an FDA-licensed donor screening test. FDA believes that the use of an FDA-licensed NAT will reduce the risk of transmission of WNV from donors of HCT/Ps and therefore recommends that you use an FDA-licensed NAT for testing donors of HCT/Ps for infection with WNV. The 2007 Donor Eligibility Guidance indicated that FDA may recommend routine use of an appropriate, licensed donor screening test(s) to detect acute infections with WNV using NAT technology, once such tests were available.

The draft guidance announced in this notice replaces the draft guidance entitled ''Guidance for Industry: Use of Nucleic Acid Tests to Reduce the Risk of Transmission of West Nile Virus From Donors of Whole Blood and Blood Components Intended for Transfusion and Donors of Human Cells, Tissues, and Cellular and Tissue-Based Products (HCT/Ps)'' dated April 2008 (April 28, 2008; 73 FR 22958), with respect to HCT/Ps. The testing recommendations in the guidance, when finalized, will supplement the donor screening recommendations for WNV (which remain in place) that were made in the 2007 Donor Eligibility Guidance.

The draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents FDA's current thinking on this topic. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirement of the applicable statutes and regulations.

II. Comments

The draft guidance is being distributed for comment purposes only and is not intended for implementation at this time. Interested persons may submit either electronic comments regarding this document *http://www.regulations.gov* or written comments to the Division of Dockets Management (see **ADDRESSES**). It is only necessary to send one set of comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday, and will be posted to the docket at *http://www.regulations.gov.*

III. Electronic Access

Persons with access to the Internet may obtain the draft guidance at either *http://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/default.htm* or *http://www.regulations.gov.*

Dated: October 21, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–24940 Filed 10–23–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–D–0419]

Guidance for Industry on Active Controls in Studies To Demonstrate Effectiveness of a New Animal Drug for Use in Companion Animals; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a guidance for industry #204 entitled ''Active Controls in Studies to Demonstrate Effectiveness of a New Animal Drug for Use in Companion Animals.'' This guidance advises industry on the use of active controls in studies intended to provide substantial evidence of effectiveness of new animal drugs for use in companion animals. The intent of the guidance is to provide information to clinical investigators who conduct studies using active controls and have a basic understanding of statistical principles.

DATES: Submit either electronic or written comments on Agency guidances at any time.

ADDRESSES: Submit written requests for single copies of the guidance to the Communications Staff (HFV–12), Center for Veterinary Medicine, Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

Submit electronic comments on the guidance to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–

305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Lisa M. Troutman, Center for Veterinary Medicine (HFV–116), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240–276–8322, *lisa.troutman@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of June 20, 2012 (77 FR 37059), FDA published the notice of availability for a draft guidance entitled ''Draft Guidance for Industry on Active Controls in Studies to Demonstrate Effectiveness of a New Animal Drug for Use in Companion Animals,'' giving interested persons until August 20, 2012, to comment on the draft guidance. FDA received several comments on the draft guidance and those comments were considered as the guidance was finalized. In response to stakeholder comments, FDA provided one additional example and clarified other examples in the Appendix section of the guidance. In addition, editorial changes were made to improve clarity. The guidance announced in this notice finalizes the draft guidance dated June 20, 2012.

II. Significance of Guidance

This level 1 guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the Agency's current thinking on the topic. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

III. Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 514 have been approved under OMB control number 0910–0032.

IV. Comments

Interested persons may submit either electronic comments regarding this document to *http://www.regulations.gov* or written comments to the Division of Dockets Management (see **ADDRESSES**). It is only necessary to send one set of comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday, and will be posted to the docket at *http://www.regulations.gov.*

V. Electronic Access

Persons with access to the Internet may obtain the guidance at either *http://www.fda.gov/AnimalVeterinary/GuidanceComplianceEnforcement/GuidanceforIndustry/default.htm* or *http://www.regulations.gov.*

Dated: October 18, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–24894 Filed 10–23–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–0001]

Peripheral and Central Nervous System Drugs Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Peripheral and Central Nervous System Drugs Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the Agency on FDA's regulatory issues.

Date and Time: The meeting will be held on November 14, 2013, from 8 a.m. to 5 p.m.

Location: Sheraton Silver Spring Hotel, Cypress Ballroom, 8777 Georgia Ave., Silver Spring, MD 20910. The hotel's telephone number is 301–589–0800.

Contact Person: Glendolynn S. Johnson, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, rm. 2417, Silver Spring, MD 20993–0002, 301–796–9001, FAX: 301–847–8533, email: *PCNS@fda.hhs.gov,* or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area). A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the Agency's Web site at *http://www.fda.gov/AdvisoryCommittees/default.htm* and scroll down to the appropriate advisory committee meeting link, or call the advisory committee information line to learn about possible modifications before coming to the meeting.

Agenda: The committee will discuss new drug application (NDA) 205677, tasimelteon capsules, proposed trade name HETLIOZ, submitted by Vanda Pharmaceuticals, Inc. The proposed indication is for the treatment of Non-24 hour sleep-wake disorder in blind individuals without light perception.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee meeting link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before November 6, 2013. Oral presentations from the public will be scheduled between approximately 1 p.m. and 2 p.m. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before October 30, 2013. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by October 31, 2013.

Persons attending FDA's advisory committee meetings are advised that the Agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee

meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Glendolynn S. Johnson at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: October 18, 2013.

Jill Hartzler Warner,

Acting Associate Commissioner for Special Medical Programs.

[FR Doc. 2013–24912 Filed 10–23–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–1276]

Meta-Analyses of Randomized Controlled Clinical Trials (RCTs) for the Evaluation of Risk To Support Regulatory Decisions; Notice of Public Meeting; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public meeting; request for comments.

The Food and Drug Administration (FDA or the Agency) is announcing a public meeting to obtain input on scientific approaches for the conduct and assessment of meta-analyses of randomized controlled clinical trials (RCTs) to evaluate safety risks associated with the use of human drugs or biological products within the framework of regulatory decisionmaking. The term *meta-analysis* refers to the combining of evidence from independent studies using appropriate statistical methods. The purpose of the public workshop is to initiate constructive discussion and information sharing among regulators, researchers, health care providers, representatives from the pharmaceutical industry and health care organizations, and others from the general public, about the use of meta-analyses of randomized trials as a tool for safety assessment in the regulation of pharmaceutical products. The format of the meeting consists of a series of presentations describing and illustrating the methodological issues that arise in the use of meta-analyses to evaluate safety risks, followed by a discussion of those issues from invited panelists and audience members. This meeting satisfies an FDA commitment that is part of the fifth authorization of the Prescription Drug User Fee Act (PDUFA V). The input from the meeting will be used to develop a draft guidance that describes best practices for the conduct of meta-analyses and FDA's intended approach for the use of meta-analyses in regulatory decision-making. FDA is also publishing a white paper to facilitate discussion at the public meeting, which is available online at *http://www.fda.gov/ForIndustry/UserFees/PrescriptionDrugUserFee/ucm360080.htm.* The public is invited to comment on this paper through Docket Number FDA–2013–N–1276 and at the public meeting.

Date and Time: The meeting will be held on November 25, 2013, from 8:30 a.m. to 4:30 p.m.

Location: The public meeting will be held at FDA's White Oak Campus, 10903 New Hampshire Ave., Bldg. 31, rm. 1503, Silver Spring, MD 20993. Entrance for public meeting attendees is through Building 1, where routine security check procedures will be performed. For parking and security information, please refer to *http://www.fda.gov/AboutFDA/WorkingatFDA/BuildingsandFacilities/WhiteOakCampusInformation/ucm241740.htm.*

Contact: Indira Hills, Food and Drug Administration, Center for Drug Evaluation and Research, 10903 New Hampshire Ave., Bldg. 21, Rm. 4508, Silver Spring, MD 20993, 301–796–9686, FAX: 301–796–9907, email: *indira.hills@fda.hhs.gov.*

Registration and Requests for Oral Presentation: The FDA Conference Center at the White Oak location is a Federal facility with security procedures and limited seating. Individuals who wish to attend the public meeting must register on or before November 18, 2013, by visiting *https://www.surveymonkey.com/s/QRKMGNY* and contacting Indira Hills (see *Contact Person).* Early registration is recommended. Registration is free and will be on a first-come, first-served basis. However, FDA may limit the number of participants from each organization based on space limitations. Onsite registration on the day of the meeting will be based on space availability.

Time will be reserved during the meeting for planned presentations from the audience. If you would like to present at the meeting, please indicate this in your meeting registration. Time for audience presentations is limited and will be assigned on a first-come, first-served basis. Note also that time will be designated throughout the day for general comments and questions from the audience following the panel discussions.

In this **Federal Register** notice, FDA has included specific issues that will be addressed by the panel. If you wish to address one or more of these issues in your presentation, please indicate this at the time you register so that FDA can consider that in organizing the presentations. FDA will do its best to accommodate requests to speak, and will determine the amount of time allotted to each presenter and the approximate time that each oral presentation is scheduled to begin. An agenda will be available approximately 2 weeks before the meeting at *http://www.fda.gov/ForIndustry/UserFees/PrescriptionDrugUserFee/ucm360080.htm.*

If you need special accommodations because of disability, please contact Indira Hills (see *Contact Person*) at least 7 days before the meeting.

Streaming Webcast of the Public Meeting: A live webcast of this meeting will be viewable at *https://collaboration.fda.gov/metaanalysis1113/* on the day of the meeting. A video record of the meeting will be available at the same web address for 1 year.

Comments: Regardless of attendance at the public meeting, interested persons may submit either electronic comments regarding this document to *http://www.regulations.gov* or written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD. It is only necessary to send one set of comments. Identify comments with the docket number found in brackets in the heading of this document. To ensure consideration, submit comments by December 16, 2013. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday, and will be posted to the docket at *http://www.regulations.gov.*

Transcripts: Please be advised that as soon as a transcript is available, it will be accessible at *http://www.regulations.gov.* It may be viewed at the Division of Dockets Management (see *Comments*). A transcript will also be available in either hard copy or on CD–ROM, after submission of a Freedom of Information request. Written requests are to be sent to the Division of Freedom of Information (ELEM–1029), Food and Drug Administration,

12420 Parklawn Dr, Element Bldg., Rockville, MD 20857.

SUPPLEMENTARY INFORMATION:

I. Background

On July 9, 2012, the President signed into law the Food and Drug Administration Safety and Innovation Act (FDASIA) (Pub. L. 112–144). Title I of FDASIA reauthorizes PDUFA and provides FDA with the user fee resources necessary to maintain an efficient review process for human drug and biological products. The reauthorization of PDUFA includes performance goals and procedures for the Agency that represent FDA's commitments during fiscal years 2013–2017. These commitments are fully described in the document entitled ''PDUFA Reauthorization Performance Goals and Procedures Fiscal Years 2013 through 2017'' (''PDUFA Goals Letter''), available on FDA's Web site at *http://www.fda.gov/downloads/ForIndustry/UserFees/PrescriptionDrugUserFee/UCM270412.pdf.* Section IX of the PDUFA Goals Letter, titled ''Enhancing Regulatory Science and Expediting Drug Development,'' includes an enhancement to advance the science of meta-analysis methodologies. As part of this enhancement, FDA committed to hold a public meeting to engage stakeholders in a discussion of current and emerging scientific approaches and methods for the conduct of meta-analyses and to facilitate stakeholder input regarding the use of meta-analyses in FDA's regulatory review process. The public meeting announced by this notice will fulfill this commitment.

II. Purpose and Scope of the Meeting

The objectives of the meeting are to:

1. Initiate constructive discussion and information-sharing about best practices in meta-analyses of clinical trial data that can be used to evaluate potential drug risks while limiting spurious findings,

2. Share current experience regarding the criteria considered by FDA to be important in making regulatory decisions when evaluating the strength and quality of evidence provided by a meta-analysis, and

3. Obtain input on specific issues identified by FDA on procedures, methods, and potential sources of bias in the design, conduct and use of meta-analysis.

Although many external stakeholders conduct meta-analyses, FDA's use of meta-analyses and other safety evaluation tools has the potential to result in consequential regulatory actions, including market withdrawal or concluding that a safety concern is not supported by data. As a result, FDA must adopt a rigorous approach to these analyses and be transparent regarding its evidentiary standards and how it weighs the evidence of a meta-analysis in arriving at a decision or regulatory action. The public meeting will focus on meta-analyses conducted for purposes of safety evaluation using data from RCTs.

FDA acknowledges that meta-analyses conducted to evaluate a product's effectiveness, either overall or within specific subgroups, are occasionally of interest to the Agency, but the primary use of meta-analyses in the regulatory setting is for the assessment of product risk. Furthermore, although meta-analyses of non-randomized studies may be informative for the assessment of certain safety endpoints, the issues related to such a meta-analysis are not the focus of the meeting.

FDA expects that this meeting will build upon prior stakeholder feedback on the design, conduct, and assessment of meta-analyses obtained at the ''DIA/FDA Best Practices for Regulatory Information Synthesis of Randomized Controlled Trials for Product Safety Evaluation'' workshop held on March 10 and 11, 2011, in Bethesda, MD.

The public input from the meeting will be used to develop a draft guidance describing best practices for the conduct and use of meta-analyses of randomized controlled trials for the evaluation of risks associated with the use of human drugs or biological products within the framework of regulatory decisionmaking. The future guidance will be intended for FDA reviewers, the pharmaceutical industry, and for third-party entities that prepare or evaluate meta-analyses to assess the safety of regulated products, as there is currently no FDA guidance in this area. Specifically, this guidance will describe FDA's view of various aspects of the criteria considered important when evaluating the strength and quality of evidence provided by a meta-analysis.

To facilitate discussions at the public meeting, FDA is publishing a white paper on considerations in the conduct and use of meta-analyses of RCTs that are intended to support regulatory decisionmaking about a product's safety. This document is available on FDA's Web site at *http://www.fda.gov/ForIndustry/UserFees/PrescriptionDrugUserFee/ucm360080.htm.*

III. Scope of Public Input Requested

FDA seeks input on a range of topics related to the design and conduct of meta-analyses and the interpretation of meta-analysis results when evaluating risk in the regulation of pharmaceutical products. These include the following:

1. Potential sources of bias that may arise in designing a meta-analysis, including:

a. Advance or prior knowledge of individual study results and their influence on study selection.

b. Lack of or inadequate pre-specification of the meta-analysis hypothesis.

c. Inclusion of the hypothesis-generating study in the meta-analysis designed to confirm the hypothesis.

d. Other sources of bias that may exist but cannot be identified.

2. Potential for spurious findings because of the examination of multiple hypotheses, endpoints, and subgroups, and use of data driven analyses, in a meta-analysis.

3. Methodological issues in the conduct of the meta-analysis, including the following:

a. The use of fixed versus random effects models in evaluating a meta-analytic hypothesis, especially with regard to individual and overall study power, study heterogeneity, and generalizability.

b. The relative value of the use of frequentist versus Bayesian methods for meta-analyses.

c. The choice of statistical levels of uncertainty of the results, including the significance level for the primary and secondary hypotheses.

d. The most appropriate methods to incorporate studies with few events and those with no events.

4. Issues related to the individual studies constituting a meta-analysis, including:

a. Measures of individual study quality, including availability of protocols and amendments.

b. Outcome and exposure ascertainment in each study.

c. The use of patient-level versus study-level data.

5. Issues related to the overall quality of the meta-analysis, including the following:

a. Whether there is adequate documentation of the pre-specification and proper conduct of a meta-analysis, and more generally, how researchers should document their methods, including the important issues of pre-specification, in support of their proper conduct of a meta-analysis.

b. Use and pre-specification of the types of sensitivity analyses to evaluate the impact of various sources of bias (see section III.1) on the meta-analysis findings.

c. Evaluating the results of a meta-analysis when one or a few large studies dominate the findings (often recognized before the analysis).

d. The overall framework to evaluate the quality of the meta-analysis; whether there is a basis for establishing a hierarchy of evidence for judging the quality of the meta-analysis.

Dated: October 21, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–24939 Filed 10–23–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–0001]

Peripheral and Central Nervous System Drugs Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Peripheral and Central Nervous System Drugs Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the Agency on FDA's regulatory issues.

Date and Time: The meeting will be held on November 13, 2013, from 8 a.m. to 5 p.m.

Location: Sheraton Silver Spring Hotel, Cypress Ballroom, 8777 Georgia Ave., Silver Spring, MD 20910. The hotel's telephone number is 301–589–0800.

Contact Person for More Information: Glendolynn S. Johnson, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, Rm. 2417, Silver Spring, MD 20993–0002, 301–796–9001, FAX: 301–847–8533, email: *PCNS@fda.hhs.gov,* or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area). A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the Agency's Web site at *http://www.fda.gov/AdvisoryCommittees/default.htm* and scroll down to the appropriate advisory committee meeting link, or call the advisory committee information line to learn about possible modifications before coming to the meeting.

Agenda: The committee will discuss supplemental biologics license application (sBLA) 103948–5139, alemtuzumab injection, proposed trade name LEMTRADA, submitted by Genzyme Corporation, a Sanofi Company. The proposed indication is for the treatment of patients with relapsing forms of multiple sclerosis to slow or reverse the accumulation of physical disability and reduce the frequency of clinical exacerbations.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee meeting link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before November 6, 2013. Oral presentations from the public will be scheduled between approximately 1 p.m. and 2 p.m. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before October 30, 2013. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by October 31, 2013.

Persons attending FDA's advisory committee meetings are advised that the Agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Glendolynn S. Johnson at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: October 18, 2013.

Jill Hartzler Warner,

Acting Associate Commissioner for Special Medical Programs.

[FR Doc. 2013–24908 Filed 10–23–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–1277]

Therapeutic Area Standards Initiative Project Plan; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of the Therapeutic Area Standards Initiative Project Plan. This therapeutic area (TA) Project Plan will be the primary document for guiding all major aspects of FDA's multi-year initiative to develop and implement TA standards to support the regulatory review process for drugs and biologics. The TA Project Plan will be updated annually and made available for public comment.

DATES: Although you can comment on this TA Project Plan at any time, to ensure that the Agency considers your comment on this TA Project Plan before it begins work on the next version of the TA Project Plan, submit either electronic or written comments on the TA Project Plan by December 23, 2013.

ADDRESSES: Submit written requests for single copies of the TA Project Plan to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 2201, Silver Spring, MD 20993–0002 or Office of Communication, Outreach and Development (HFM–40). Send one self-addressed adhesive label to assist that

office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the TA Project Plan.

Submit electronic comments on the TA Project Plan to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Colleen Ratliffe, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 1158, Silver Spring, MD 20993, email: *CDERDataStandards@fda.hhs.gov;* or Stephen Ripley, Center for Biologics Evaluation and Research, Food and Drug Administration, 1401 Rockville Pike, Suite 200N, Rockville, MD 20852, 301–827–6210.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of the TA Project Plan. This TA Project Plan will be the primary document for guiding all major aspects of FDA's multi-year initiative to develop and implement TA standards to support the regulatory review process for drugs and biologics. Updated annually and made available for public comment, the plan will provide the overall management framework for addressing and accomplishing the PDUFA V objectives to develop and adopt clinical terminology standards for TAs.

Standardized data elements and terminologies enable data from multiple trials to be grouped for analysis, and meta-analyses within and across drug classes. In 2011, in response to an urgent need to further standardize study data terminologies and concepts for efficacy analysis, FDA's Center for Drug Evaluation and Research (CDER) and Center for Biologics Evaluation and Research (CBER) compiled a prioritized list of disease and TAs and made it available on FDA's Web site.[1] Several factors were considered in the identification and prioritization of these TAs: (1) Active investigational new drug applications (INDs), (2) existing standardization projects underway, and (3) industry input on drug development pipeline activity.

The Food and Drug Administration Safety and Innovation Act (FDASIA) reauthorized the Prescription Drug User Fee Act (PDUFA V) in July 2012. The PDUFA V Reauthorization Performance Goals and Procedures (Section XII)[2] states that FDA will prepare a project plan for developing distinct TA terminology standards, using a public process that allows for stakeholder input through open standards development organizations.

In November 2012, FDA requested public input relevant to study data standards by: (1) Convening a public meeting on November 5, 2012, entitled ''Regulatory New Drug Review: Solutions for Study Data Exchange Standards'' to receive input from stakeholders on the advantages and disadvantages of current and emerging alternatives for the exchange of regulated study data, and (2) issuing a notice in the August 14, 2012 **Federal Register** (77 FR 48491), informing the public of FDA's intent to prioritize and develop study data standards for identified TAs, and requesting public comment on the TA roadmap as well as recommendations on how the effort could be accomplished most efficiently. The TA Project Plan was developed based upon information from the November 5, 2012, public meeting and public comments submitted in response to the November 20, 2012, **Federal Register** notice on the prioritization of TAs.

The TA standards should enable and enhance the ability to integrate, analyze, report, and share study data. As described in the TA Project Plan, CBER and CDER are actively collaborating with external stakeholders to support the development of these TA standards. Stakeholders are encouraged to engage in and support these data standardization efforts where possible, including providing feedback on the TA Project Plan.

II. Comments

Interested persons may submit either electronic comments regarding this document to *http://www.regulations.gov* or written comments to the Division of Dockets Management (see **ADDRESSES**). It is only necessary to send one set of comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday, and will be posted to the docket at *http://www.regulations.gov.*

III. Electronic Access

Persons with access to the Internet may obtain the document at either *http://www.fda.gov/Drugs/DevelopmentApprovalProcess/FormsSubmissionRequirements/ElectronicSubmissions/ucm253101.htm, http://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/default.htm* or *http://www.regulations.gov.*

Dated: October 18, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–24909 Filed 10–23–13; 8:45 am]

BILLING CODE 4160–01–P

[1] *http://www.fda.gov/TherapeuticAreaStandards.*

[2] *http://www.fda.gov/downloads/forindustry/userfees/prescriptiondruguserfee/ucm270412.pdf.*

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Submission for OMB Review; 30-Day Comment Request; Application for the Postdoctoral Research Associate Program

SUMMARY: Under the provisions of Section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the National Institutes of Health (NIH) has submitted to the Office of Management and Budget (OMB) a request to review and approve the information collection listed below. This proposed information collection was previously published in the **Federal Register** on July 23, 2013, pages 44135–44136, and allowed 60 days for public comment. No public comments were received. The purpose of this notice is to allow an additional 30 days for public comment. The National Institute of General Medical Sciences (NIGMS), National Institutes of Health may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

Direct Comments to OMB: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the: Office of Management and Budget, Office of Regulatory Affairs, *OIRA_submission@omb.eop.gov* or by fax to 202–395–6974, Attention: NIH Desk Officer.

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 30 days of the date of this publication.

FOR FURTHER INFORMATION CONTACT: To obtain a copy of the data collection plans and instruments or request more information on the proposed project contact: Ms. Tammy Dean-Maxwell, NIGMS, NIH, Natcher Building, Room 3AN–44, 45 Center Drive, MSC 6200,

Bethesda, MD 20892–6200, or call non-toll-free number 301–594–2755 or Email your request, including your address to *deanmat@mail.nih.gov*. Formal requests for additional plans and instruments must be requested in writing.

Proposed Collection: The Postdoctoral Research Associate Program is an Reinstatement without change for the currently approved collection, OMB No. 0925–0378, National Institute of General Medical Sciences (NIGMS), National Institutes of Health (NIH).

Need and Use of Information Collection: The Postdoctoral Research Associate (PRAT) Program will use the applicant and referee information to award opportunities for training and experience in laboratory or clinical investigation to individuals with a Ph.D. degree in an NIGMS designated emerging area of research or a related science, M.D., or other professional degree through appointments as PRAT Fellows at the National Institutes of Health or the Food and Drug Administration. The goal of the program is to develop leaders in designated emerging areas of research for key positions in academic, industrial, and Federal research laboratories.

OMB approval is requested for 3 years. There are no costs to respondents other than their time. The total estimated annualized burden hours are 331.

ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Type of respondent	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total annual burden hour
PRAT Primary Application (NIH 2721–1)	Applicants	25	1	8	200
PRAT Request for Evaluation Form (NIH 2721–2)	Referee	75	1	105/60	131

Dated: September 27, 2013.

Sally Lee,

Executive Officer, National Institute of General Medical Sciences, National Institutes of Health.

[FR Doc. 2013–24997 Filed 10–23–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; Atlas of Lung Development Research Centers and Tissue Core.

Date: November 7, 2013.

Time: 8:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: The Dupont Hotel, 1500 New Hampshire Avenue NW., Washington, DC 20036.

Contact Person: Stephanie L Constant, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7189, Bethesda, MD 20892, 301–443–8784, *constantsl@nhlbi.nih.gov*.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; Atlas of Lung Development Data Coordinating Center.

Date: November 7, 2013.

Time: 2:30 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: The Dupont Hotel, 1500 New Hampshire Avenue NW., Washington, DC 20036.

Contact Person: Stephanie L. Constant, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7189, Bethesda, MD 20892, 301–443–8784, *constantsl@nhlbi.nih.gov*.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; SBIR Phase IIB Bridge Awards.

Date: November 8, 2013.

Time: 8:00 a.m. to 12:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Crystal City at Washington Reagan National, 2399 Jefferson Davis Hwy, Arlington, VA 22202.

Contact Person: Tony L Creazzo, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7180, Bethesda, MD 20892–7924, 301–435–0725, *creazzotl@mail.nih.gov*.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; SBIR Phase IIB Small Market Awards.

Date: November 8, 2013.

Time: 1:00 p.m., to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Crystal City at Washington Reagan National, 2399 Jefferson Davis Hwy, Arlington, VA 22202.

Contact Person: Tony L Creazzo, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7180, Bethesda, MD 20892–7924, 301–435–0725, *creazzotl@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: October 18, 2013.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–24874 Filed 10–23–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which

would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Alcohol Abuse and Alcoholism Special Emphasis Panel NIAAA Member Conflict Applications—Epidemiology and Clinical studies.

Date: October 28, 2013.

Time: 2:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 5635 Fishers Lane, Rockville, MD 20852. (Telephone Conference Call).

Contact Person: Ranga Srinivas, Ph.D., Chief, Extramural Project Review Branch EPRB, NIAAA, National Institutes of Health, 5365 Fishers Lane, Room 2085, Rockville, MD 20852 (301) 451–2067, *srinivar@mail.nih.gov*.

This meeting notice is being published less than 15 days in advance of the meeting due to the Government shutdown of October 2013.

(Catalogue of Federal Domestic Assistance Program No. 93.273, Alcohol Research Programs; National Institutes of Health, HHS)

Dated: October 18, 2013.

Carolyn A. Baum,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–24876 Filed 10–23–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Alcohol Abuse and Alcoholism Special Emphasis Panel; NIAAA Member Conflict Applications—Behavioral Sciences.

Date: October 25, 2013.

Time: 11:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 5635 Fishers Lane, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Ranga Srinivas, Ph.D., Chief, Extramural Project Review Branch EPRB, NIAAA, National Institutes of Health, 5365 Fishers Lane, Room 2085, Rockville, MD 20852 (301) 451–2067, *srinivar@mail.nih.gov.*

This meeting notice is being published less than 15 days in advance of the meeting due to the Government shutdown of October 2013.

(Catalogue of Federal Domestic Assistance Program No. 93.273, Alcohol Research Programs; National Institutes of Health, HHS).

Dated: October 18, 2013.

Carolyn A. Baum,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–24875 Filed 10–23–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–3365–EM; Docket ID FEMA–2013–0001]

Colorado; Amendment No. 3 to Notice of an Emergency Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency declaration for the State of Colorado (FEMA–3365–EM), dated September 12, 2013, and related determinations.

DATES: *Effective Date:* September 30, 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: Notice is hereby given that the incident period for this disaster is closed effective September 30, 2013.

(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. 2013–24935 Filed 10–23–13; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–3365–EM; Docket ID FEMA–2013–0001]

Colorado; Emergency and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of an emergency for the State of Colorado (FEMA–3365–EM), dated September 12, 2013, and related determinations.

DATES: *Effective Date:* September 12, 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: Notice is hereby given that, in a letter dated September 12, 2013, the President issued an emergency declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5207 (the Stafford Act), as follows:

I have determined that the emergency conditions in certain areas of the State of Colorado resulting from severe storms, flooding, landslides, and mudslides beginning on September 11, 2013, and continuing, are of sufficient severity and magnitude to warrant an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 et seq. (''the Stafford Act''). Therefore, I declare that such an emergency exists in the State of Colorado.

You are authorized to provide appropriate assistance for required emergency measures, authorized under Title V of the Stafford Act, to save lives and to protect property and public health and safety, and to lessen or avert the threat of a catastrophe in the designated areas. Specifically, you are authorized to provide assistance for emergency protective measures (Category B), limited to direct Federal assistance, under the Public Assistance program.

Consistent with the requirement that Federal assistance is supplemental, any

Federal funds provided under the Stafford Act for Public Assistance will be limited to 75 percent of the total eligible costs. In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal emergency assistance and administrative expenses.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, Department of Homeland Security, under Executive Order 12148, as amended, William J. Doran III, of FEMA is appointed to act as the Federal Coordinating Officer for this declared emergency.

The following areas of the State of Colorado have been designated as adversely affected by this declared emergency:

Boulder, El Paso, and Larimer Counties for emergency protective measures (Category B), limited to direct federal assistance, under the Public Assistance program.

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. 2013–24924 Filed 10–23–13; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–3365–EM; Docket ID FEMA–2013–0001]

Colorado; Amendment No. 4 to Notice of an Emergency Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency declaration for State of Colorado (FEMA–3365–EM), dated September 12, 2013, and related determinations.

DATES: *Effective Date:* October 15, 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, Thomas J. McCool, of FEMA is appointed to act as the Federal Coordinating Officer for this emergency.

This action terminates the appointment of Michael J. Hall as Federal Coordinating Officer for this emergency.

(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. 2013–24922 Filed 10–23–13; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4145–DR; Docket ID FEMA–2013–0001]

Colorado; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Colorado (FEMA–4145–DR), dated September 14, 2013, and related determinations.

DATES: *Effective Date:* September 14, 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: Notice is hereby given that, in a letter dated September 14, 2013, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage in certain areas of the State of Colorado resulting from severe storms, flooding, landslides, and mudslides beginning on September 11, 2013, and continuing, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 et seq. (the ''Stafford Act''). Therefore, I declare that such a major disaster exists in the State of Colorado.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Individual Assistance and assistance for debris removal and emergency protective measures (Categories A and B) under the Public Assistance program in the designated area, Hazard Mitigation throughout the State, and any other forms of assistance under the Stafford Act that you deem appropriate subject to completion of Preliminary Damage Assessments (PDAs). Direct Federal assistance is authorized.

Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Hazard Mitigation and Other Needs Assistance will be limited to 75 percent of the total eligible costs. Federal funds provided under the Stafford Act for Public Assistance also will be limited to 75 percent of the total eligible costs, with the exception of projects that meet the eligibility criteria for a higher Federal cost-sharing percentage under the Public Assistance Alternative Procedures Pilot Program for Debris Removal implemented pursuant to Section 428 of the Stafford Act.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for a period not to exceed six months after the date of this declaration.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Michael J. Hall, of

FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Colorado have been designated as adversely affected by this major disaster:

Boulder County for Individual Assistance.

Boulder County for debris removal and emergency protective measures (Categories A and B), including direct federal assistance, under the Public Assistance program.

All counties within the State of Colorado are eligible to apply for assistance under the Hazard Mitigation Grant Program.

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. 2013–24923 Filed 10–23–13; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4145–DR; Docket ID FEMA–2013–0001]

Colorado; Amendment No. 6 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Colorado (FEMA–4145–DR), dated September 14, 2013, and related determinations.

DATES: *Effective Date:* October 1, 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 notice of a major disaster declaration for the State of Colorado is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of September 14, 2013.

Adams and Weld Counties for Public Assistance [Categories C–G] (already designated for Individual Assistance and debris removal and emergency protective measures [Categories A and B], including direct federal assistance, under the Public Assistance Program).

Clear Creek, El Paso, Jefferson, and Logan Counties for Public Assistance (already designated for Individual Assistance).

Morgan and Washington Counties for Public Assistance.

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. 2013–24925 Filed 10–23–13; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4116–DR; Docket ID FEMA–2013–0001]

Illinois; Amendment No. 7 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for State of Illinois (FEMA–4116–DR), dated May 10, 2013, and related determinations.

DATES: *Effective Date:* October 4, 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, David Samaniego, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of W. Michael Moore 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. 2013–24933 Filed 10–23–13; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4145–DR; Docket ID FEMA–2013–0001]

Colorado; Amendment No. 5 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Colorado (FEMA–4145–DR), dated September 14, 2013, and related determinations.

DATES: *Effective Date:* September 30, 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: Notice is hereby given that the incident period for this disaster is closed effective September 30, 2013.

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. 2013–24926 Filed 10–23–13; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4145–DR; Docket ID FEMA–2013–0001]

Colorado; Amendment No. 7 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for State of Colorado (FEMA–4145–DR), dated September 14, 2013, and related determinations.

DATES: *Effective Date:* October 15, 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, Thomas J. McCool, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Michael J. Hall 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. 2013–24927 Filed 10–23–13; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0009]

Agency Information Collection Activities: Petition for a Nonimmigrant Worker, Form I–129; Revision of a Currently Approved Collection

ACTION: 30-Day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection notice was previously published in the **Federal Register** on July 5, 2013, at 78 FR 40490, allowing for a 60-day public comment period. USCIS received comments in connection with the 60-day notice.

DATES: The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until November 25, 2013. This process is conducted in accordance with 5 CFR 1320.10.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, must be directed to the OMB USCIS Desk Officer via email at *oira_submission@omb.eop.gov.* The comments submitted to the OMB USCIS Desk Officer may also be submitted to DHS via the Federal eRulemaking Portal Web site at *http://www.regulations.gov* under e-Docket ID number USCIS–2005–0030 or via email at *uscisfrcomment@uscis.dhs.gov.* All submissions received must include the agency name and the OMB Control Number 1615–0009.

Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov*, and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. For additional information please read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

Note: The address listed in this notice should only be used to submit comments concerning this information collection. Please do not submit requests for individual case status inquiries to this address. If you are seeking information about the status of your individual case, please check ''My Case Status'' online at: *https://egov.uscis.gov/cris/Dashboard.do*, or call the USCIS National Customer Service Center at 1–800–375–5283.

Issues for Comment Focus

For Form I–129 and its supplements, USCIS is especially interested in the public's experience, input, and estimates on the burden in terms of time and money incurred by applicants for the following aspects of this information collection:

- The time burden incurred in reading the instructions, completing the form, obtaining supporting documentation; and
- For preparers who are paid, the expense to the respondent to find and secure such preparers for assistance and the amount that paid preparers charge for their services.

In addition, to truly be helpful to the improvement of this form and the program that oversees the services associated with this information collection written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection Request:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Petition for a Nonimmigrant Worker.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* Form I–129; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Business: This form is used by an employer to petition for aliens to come to the U.S. temporarily to perform services, labor, and training or to request extensions of stay or changes in nonimmigrant status for nonimmigrant workers.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:*

- Form I–129—333,891 respondents at 2.34 hours;
- E–1/E–2 Classification to Form I–129—4,760 respondents at .67 hours;
- Trade Agreement Supplement to Form I–129—3,057 respondents at .67 hours;
- H Classification Supplement to Form I–129—255,872 respondents at 2 hours;
- H–1B and H–1B1 Data Collection and Filing Fee Exemption Supplement—243,965 respondents at 1 hour;
- L Classification Supplement to Form I–129—37,831 respondents at 1.34 hours;
- O and P Classifications Supplement to Form I–129—22,710 respondents at 1 hour;
- Q–1 Classification Supplement to Form I–129—155 respondents at .34 hours; and
- R–1 Classification Supplement to Form I–129—6,635 respondents at 2.34 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 1,631,234 annual burden hours.

If you need a copy of the information collection instrument with supplementary documents, or need additional information, please visit *http://www.regulations.gov.* We may also be contacted at: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, 20 Massachusetts Avenue NW., Washington, DC 20529–2140; Telephone 202–272–8377.

Dated: October 21, 2013.

Laura Dawkins,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S., Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2013–24982 Filed 10–23–13; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5690–N–14]

60-Day Notice of Proposed Information Collection: Grant Drawdown Payment Request/LOCCS/VRS Voice Activated

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, PIH, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 60 days of public comment. Public and Indian Housing Grant recipients use the payment vouchers to request funds from HUD through the LOCCS/VRS voice activated system. The information collected on the form serves also as an internal control measure to ensure the lawful and appropriate disbursement of Federal funds.

DATES: *Comments Due Date:* December 23, 2013.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW., Room 4176, Washington, DC 20410–5000; telephone 202–402–5564 (this is not a toll-free number) or email at *Colette.Pollard@hud.gov* for a copy of the proposed forms or other available information. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

FOR FURTHER INFORMATION CONTACT: Arlette Mussington, Office of Policy, Programs and Legislative Initiatives, PIH, Department of Housing and Urban Development, 451 7th Street SW., (L'Enfant Plaza, Room 2206), Washington, DC 20410; telephone 202–402–4109, (this is not a toll-free number). Persons with hearing or speech impairments may access this number via TTY by calling the Federal Information Relay Service at (800) 877–8339. Copies of available documents submitted to OMB may be obtained from Ms. Mussington.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

A. Overview of Information Collection

Title of Information Collection: Grant Drawdown Payment Request/LOCCS/VRS Voice Activated.

OMB Approval Number: 2577–0166.

Type of Request: Revision of currently approved collection

Form Numbers: 50080–CFP; 50080–NN, RSDE, RSDF, SC; 50080–PHTA; 50080–URP; 50080–FSS; 50080–IHBG; 50080–HOMI; 50080–TIHD.

Description of the need for the information and proposed use: Grant recipients use the applicable payment information to request funds from HUD through the LOCCS/VRS voice activated system. The information collected on the payment voucher will also be used as an internal control measure to ensure the lawful and appropriate disbursement of Federal funds as well as provide a service to program recipients.

Respondents: PHAs, state or local government. Tribes and tribally designated housing entities.

Grant program	Form 50080–XXXX	Number of respondents*	Frequency of responses (drawdowns annually per program)	Hours per response	Burden hours
Capital Fund	50080–CFP		56,876	.15	8,531.4

Grant program	Form 50080–XXXX	Number of respondents*	Frequency of responses (drawdowns annually per program)	Hours per response	Burden hours
Resident Opportunities and Supportive Services (ROSS).	50080–NN, RSDE, RSDF, SC.	.....	8,400	.15	1,260
Public Housing Technical Assistance	50080–PHTA	.....	134	.15	20.1
Hope VI	50080–URP	.....	46	.15	6.9
Family Self-Sufficiency	50080–FSS	.....	300	.15	45
Indian Housing Block Grant	50080–IHBG	.....	7,290	.15	1,093.5
Indian HOME	50080–HOMI	.....	10	.15	1.5
Traditional Indian Housing Development	50080–TIHD	.....	510	.15	76.5
		4,746	73,566		11,150

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) 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) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Dated: *September 30, 2013.*

Merrie Nichols-Dixon,

Deputy Director, Office of Policy, Programs and Legislative Initiatives.

[FR Doc. 2013–24877 Filed 10–23–13; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R4–ES–2013–N232; FXES11130400000EA–123–FF04EF1000]

Endangered and Threatened Wildlife and Plants; Receipt of Application for Incidental Take Permit; Availability of Proposed Low-Effect Habitat Conservation Plan; Clermont Land Development, LLC, Lake County, FL

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comment/information.

SUMMARY: We, the Fish and Wildlife Service (Service), have received an application for incidental take permit (ITP). Clermont Land Development, LLC requests a 10-year ITP under the Endangered Species Act of 1973, as amended (Act). We request public comment on the permit application and accompanying proposed habitat conservation plan (HCP), as well as on our preliminary determination that the plan qualifies as low-effect under the National Environmental Policy Act (NEPA). To make this determination, we used our environmental action statement and low-effect screening form, which are also available for review.

DATES: To ensure consideration, please send your written comments by November 25, 2013.

ADDRESSES: If you wish to review the application and HCP, you may request documents by email, U.S. mail, or phone (see below). These documents are also available for public inspection by appointment during normal business hours at the office below. Send your comments or requests by any one of the following methods.

Email: northflorida@fws.gov. Use ''Attn: Permit number TE15414B–0'' as your message subject line.

Fax: Jay B. Herrington, Field Supervisor, (904) 731–3191, Attn.: Permit number TE15414B–0.

U.S. mail: Jay B. Herrington, Field Supervisor, Jacksonville Ecological Services Field Office, Attn: Permit number TE15414B–0, U.S. Fish and Wildlife Service, 7915 Baymeadows Way, Suite 200, Jacksonville, FL 32256.

In-person drop-off: You may drop off information during regular business hours at the above office address.

FOR FURTHER INFORMATION CONTACT: Erin M. Gawera, telephone: (904) 731–3121; email: *erin_gawera@fws.gov.*

SUPPLEMENTARY INFORMATION:

Background

Section 9 of the Act (16 U.S.C. 1531 et seq.) and our implementing Federal regulations in the Code of Federal Regulations (CFR) at 50 CFR part 17 prohibit the ''take'' of fish or wildlife species listed as endangered or threatened. Take of listed fish or wildlife is defined under the Act as ''to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct'' (16 U.S.C. 1532). However, under limited circumstances, we issue permits to authorize incidental take—i.e., take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

Regulations governing incidental take permits for threatened and endangered species are at 50 CFR 17.32 and 17.22, respectively. The Act's take prohibitions do not apply to federally listed plants on private lands unless such take would violate State law. In addition to meeting other criteria, an incidental take permit's proposed actions must not jeopardize the existence of federally listed fish, wildlife, or plants.

Applicant's Proposal

The applicant is requesting take of approximately 2.0 ac of occupied sand skink foraging and sheltering habitat incidental to construction of commercial developments, and they seek a 10-year permit. The 7.81–ac project is located on parcel #s 29–22–26–0602000001A0 and 29–22–26–0603000001B0 within Section 29, Township 22 South, Range 26 East, Lake County, Florida. The project includes construction of a commercial development and the associated infrastructure, and landscaping. The applicant proposes to mitigate for the take of the sand skink by the purchase of 4.0 mitigation credits within the Morgan Lake Wales Preserve.

Our Preliminary Determination

We have determined that the applicant's proposal, including the

proposed mitigation and minimization measures, would have minor or negligible effects on the species covered in the HCP. Therefore, we determined that the ITP is a ''low-effect'' project and qualifies for categorical exclusion under the National Environmental Policy Act (NEPA), as provided by the Department of the Interior Manual (516 DM 2 Appendix 1 and 516 DM 6 Appendix 1). A low-effect HCP is one involving (1) Minor or negligible effects on federally listed or candidate species and their habitats, and (2) minor or negligible effects on other environmental values or resources.

Next Steps

We will evaluate the HCP and comments we receive to determine whether the ITP application meets the requirements of section 10(a) of the Act (16 U.S.C. 1531 et seq.). If we determine that the application meets these requirements, we will issue ITP #TE15414B–0. We will also evaluate whether issuance of the section 10(a)(1)(B) ITP complies with section 7 of the Act by conducting an intra-Service section 7 consultation. We will use the results of this consultation, in combination with the above findings, in our final analysis to determine whether or not to issue the ITP. If the requirements are met, we will issue the permit to the applicant.

Public Comments

If you wish to comment on the permit application, HCP, and associated documents, you may submit comments by any one of the methods in **ADDRESSES**.

Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comments, 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.

Authority

We provide this notice under Section 10 of the Act and NEPA regulations (40 CFR 1506.6).

Dated: October 17, 2013.

Jay B. Herrington,

Field Supervisor, Jacksonville Field Office, Southeast Region.

[FR Doc. 2013–24956 Filed 10–23–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLWO250000–L1220000.PM0000; OMB Control Number 1004–0119]

Information Collection; Permits for Recreation on Public Lands

AGENCY: Bureau of Land Management, Interior.

ACTION: 30-day notice and request for comments.

SUMMARY: The Bureau of Land Management (BLM) has submitted an information collection request to the Office of Management and Budget (OMB) to continue the collection of information needed to evaluate and process applications for commercial, competitive, and organized group recreational uses of the public lands, and individual use of special areas. The OMB has assigned control number 1004–0119 to this collection.

DATES: The OMB is required to respond to this information collection request within 60 days but may respond after 30 days. For maximum consideration, written comments should be received on or before November 25, 2013.

ADDRESSES: Submit comments directly to the Desk Officer for the Department of the Interior (OMB #1004–0119), Office of Management and Budget, Office of Information and Regulatory Affairs, fax 202–395–5806, or by electronic mail at *oira_submission@omb.eop.gov*. Please provide a copy of your comments to the BLM.

Mail: U.S. Department of the Interior, Bureau of Land Management, 1849 C Street NW., Room 2134LM, Attention: Jean Sonneman, Washington, DC 20240.

Fax: to Jean Sonneman at 202–245–0050.

Electronic mail: Jean_Sonneman@blm.gov.

Please indicate ''Attn: 1004–0119'' regardless of the form of your comments.

FOR FURTHER INFORMATION CONTACT: You may contact David Ballenger at 202–912–7642. Persons who use a telecommunication device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) on 1–800–877–8339, to leave a message for Mr. Ballenger. You may also review the information collection request online at *http://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: The Paperwork Reduction Act (44 U.S.C. 3501–3521) and OMB regulations at 5 CFR part 1320 provide 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. In order to obtain and renew an OMB control number, Federal agencies are required to seek public comment on information collection and recordkeeping activities. (see 5 CFR 1320.8(d) and 1320.12(a)). As required in 5 CFR 1320.8(d), the BLM published a 60-day notice in the **Federal Register** on May 15, 2013 (78 FR 28620) and the comment period closed on July 15, 2013. The BLM received no comments.

The BLM requests comments on the following subjects:

1. Whether the collection of information is necessary for the proper functioning of the BLM, including whether the information will have practical utility;

2. The accuracy of the BLM's estimate of the burden of collecting the information, including the validity of the methodology and assumptions used;

3. The quality, utility, and clarity of the information to be collected; and

4. How to minimize the information collection burden on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other forms of information technology.

Please send comments to the addresses listed under **ADDRESSES**. Please refer to OMB Control Number 1004–0119 in your correspondence. 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.

The following information is provided for the information collection:

Title: Permits for Recreation on Public Lands (43 CFR part 2930).

Forms: Form 2930–1, Special Recreation Permit Application.

OMB Control Number: 1004–0119.

Summary: This collection pertains to the management of recreation on public lands. The BLM is required to manage commercial, competitive and organized group recreational uses of the public lands, and individual use of special areas. This information allows the BLM to collect the required information to authorize and collect fees for recreation use on public lands. The currently approved information collection consists of the collection in accordance

with 43 CFR part 2930, and Form 2930–1 (Special Recreation Permit Application and Permit).

Frequency of Collection: On occasion.

Estimated Annual Burden Hours: 4,832.

Estimated Annual Responses: 1,208.

Estimated Annual Non-hour Burden Cost: None.

Jean Sonneman,

Information Collection Clearance Officer, Bureau of Land Management.

[FR Doc. 2013–24953 Filed 10–23–13; 8:45 am]

BILLING CODE 4310–84–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLWY910000 L16100000.XX0000]

Call for Nominations for the Wyoming Resource Advisory Council

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The purpose of this notice is to request public nominations to fill three positions for the Bureau of Land Management's (BLM) Wyoming's 10-member Resource Advisory Council (RAC). The RAC provides advice and recommendations to the BLM on land use planning and management of the National System of Public Lands within the State of Wyoming.

DATES: All nominations must be received no later than December 9, 2013.

ADDRESSES: Nominations should be sent to Mr. Christian Venhuizen, Wyoming State Office, Bureau of Land Management, 5353 Yellowstone Road, P.O. Box 1828, Cheyenne, WY 82003, (307) 775–6103.

FOR FURTHER INFORMATION CONTACT: Mr. Christian Venhuizen, Wyoming State Office, Bureau of Land Management, 5353 Yellowstone Road, P.O. Box 1828, Cheyenne, WY 82003, (307) 775–6103; or email *cvenhuizen@blm.gov*.

SUPPLEMENTARY INFORMATION: The Federal Land Policy and Management Act (FLPMA) (43 U.S.C. 1739) directs the Secretary of the Interior to involve the public in planning and issues related to management of lands administered by the Bureau of Land Management (BLM). Section 309 of FLPMA directs the Secretary to establish 10- to 15-member citizen-based advisory councils that are consistent with the Federal Advisory Committee Act (FACA). As required by FACA, RAC membership must be balanced and representative of the various interests concerned with the management of the public lands.

The RAC has one vacancy in category one (holders of Federal grazing permits and representatives of organizations associated with energy and mineral development, timber industry, transportation or rights-of-way, developed outdoor recreation, off-highway vehicle use, and commercial recreation), one vacancy in category two (representatives of nationally or regionally recognized environmental organizations; archaeological and historic organizations, dispersed recreation activities, and wild horse and burro organizations), and one vacancy in category three (representatives of state, county, or local elected office; employees of a state agency responsible for management of natural resources; representatives of Indian tribes within or adjacent to the area for which the council is organized; representatives of academia who are employed in natural sciences; or the public-at-large). Upon appointment, the individuals selected will fill the position until January 12, 2017. Nominees must be residents of Wyoming. BLM will evaluate nominees based on their education, training, experience, and their knowledge of the geographic area. Nominees should demonstrate a commitment to collaborative resource decision making. The Obama Administration prohibits individuals who are currently federal-registered lobbyists to serve on all FACA and non-FACA boards, committees, or councils. The following must accompany all nominations:

—Letters of reference from represented interest or organizations,

—A completed background information nomination form; and,

—Any other information that addresses the nominee's qualifications.

Simultaneous with this notice, the BLM Wyoming State Office will issue a press release providing additional information for submitting nominations. Nomination forms may also be downloaded from *http://www.blm.gov/wy/st/en/advcom/rac.html*.

Certification Statement: I hereby certify that the BLM Wyoming Resource Advisory Council is necessary and in the public interest in connection with the Secretary's responsibilities to manage the lands, resources, and facilities administered by the BLM.

Donald A. Simpson,

State Director.

[FR Doc. 2013–24947 Filed 10–23–13; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

[A10–1971–1000–000–00–0–0, 2050400]

Central Valley Project Improvement Act, Water Management Plans

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of availability.

SUMMARY: The following Water Management Plans are available for review:

- Westside Water District
- Stone Corral Water District
- Dunnigan Irrigation District
- Montecito Water District
- Lindmore Water District
- Exeter Irrigation District
- Ivanhoe Irrigation District
- Saucelito Irrigation District
- Westlands Water District

To meet the requirements of the Central Valley Project Improvement Act of 1992 and the Reclamation Reform Act of 1982, the Bureau of Reclamation developed and published the Criteria for Evaluating Water Management Plans (Criteria). For the purpose of this announcement, Water Management Plans (Plans) are considered the same as Water Conservation Plans. The above entities have each developed a Plan, which Reclamation has evaluated and preliminarily determined to meet the requirements of these Criteria. Reclamation is publishing this notice in order to allow the public to review the Plans and comment on the preliminary determinations. Public comment on Reclamation's preliminary (i.e., draft) determination of Plan adequacy is invited at this time.

DATES: All public comments must be received by November 25, 2013.

ADDRESSES: Please mail comments to Ms. Laurie Sharp, Bureau of Reclamation, 2800 Cottage Way, MP–410, Sacramento, California 95825, or email at *lsharp@usbr.gov*.

FOR FURTHER INFORMATION CONTACT: To be placed on a mailing list for any subsequent information, please contact Ms. Sharp at the email address above or 916–978–5232 (TDD 978–5608).

SUPPLEMENTARY INFORMATION: We are inviting the public to comment on our preliminary (i.e., draft) determination of Plan adequacy. Section 3405(e) of the Central Valley Project Improvement Act (Title 34 Pub. L. 102–575), requires the Secretary of the Interior to establish and administer an office on Central Valley Project water conservation best management practices that shall ''develop criteria for evaluating the

adequacy of all water conservation plans developed by project contractors, including those plans required by section 210 of the Reclamation Reform Act of 1982.'' Also, according to Section 3405(e)(1), these criteria must be developed ''with the purpose of promoting the highest level of water use efficiency reasonably achievable by project contractors using best available cost-effective technology and best management practices.'' These criteria state that all parties (Contractors) that contract with Reclamation for water supplies (municipal and industrial contracts over 2,000 acre-feet and agricultural contracts over 2,000 irrigable acres) must prepare a Plan that contains the following information:

1. Description of the District;

2. Inventory of Water Resources;

3. Best Management Practices (BMPs) for Agricultural Contractors;

4. BMPs for Urban Contractors;

5. Plan Implementation;

6. Exemption Process;

7. Regional Criteria; and

8. Five-Year Revisions.

Reclamation evaluates Plans based on these criteria. A copy of these Plans will be available for review at Reclamation's Mid-Pacific Regional Office, 2800 Cottage Way, MP–410, Sacramento, California, 95825. Our practice is to make comments, including names and home addresses of respondents, available for public review. If you wish to review a copy of these Plans, please contact Ms. Sharp.

Public Disclosure

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated September 30, 2013.

Richard M. Stevenson,

Acting, Regional Resources Manager, Mid-Pacific Region, Bureau of Reclamation.

[FR Doc. 2013–24948 Filed 10–23–13; 8:45 am]

BILLING CODE 4310–MN–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–837]

Certain Audiovisual Components and Products Containing the Same; Notice of Commission Determination To Review a Final Initial Determination Finding a Violation of Section 337 in Its Entirety; Schedule for Filing Written Submissions on Certain Issues Under Review and on Remedy, Bonding, and the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Correction of Notice of Commission Determination to Review a Final Initial Determination Finding a Violation of Section 337 in Its Entirety; Schedule for Filing Written Submissions on Certain Issues Under Review and on Remedy, Bonding, and the Public Interest.

SUMMARY: Correction is made to deadline for reply submissions from Monday, November 11, 2013 to Tuesday, November 12, 2013.

By order of the Commission.

Issued: October 18, 2013.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2013–24896 Filed 10–23–13; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–847]

Certain Electronic Devices, Including Mobile Phones and Tablet Computers, and Components Thereof; Notice of Request for Statements on the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the presiding administrative law judge (''ALJ'') has issued an Initial Determination of Violation of Section 337 and Recommended Determination on Remedy and Bond in the above-captioned investigation. The ALJ recommends that the Commission issue a limited exclusion order and a cease-and-desist order against HTC Corp. and HTC America, Inc., as well as their related entities, with respect to U.S. Patent Nos. 6,393,260 and 7,415,247. The Commission is soliciting comments on public interest issues raised by the recommended relief. This notice is soliciting public interest comments from the public only. Parties are to file public interest submissions pursuant to 19 CFR 210.50(a)(4).

FOR FURTHER INFORMATION CONTACT: Robert Needham, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 708–5468. The public version of the complaint can be accessed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov,* and will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (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 this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: Section 337 of the Tariff Act of 1930 provides that if the Commission finds a violation it shall exclude the articles concerned from the United States:

> Unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry.

19 U.S.C. 1337(d)(1). A similar provision applies to cease-and-desist orders. 19 U.S.C. 1337(f)(1).

The Commission is interested in further development of the record on the public interest in these investigations. Accordingly, members of the public are invited to file submissions of no more than five (5) pages, inclusive of attachments, concerning the public interest in light of the administrative law judge's Initial Determination of Violation of Section 337 and Recommended Determination on Remedy and Bond issued in this investigation on September 23, 2013. Comments should address whether issuance of a limited exclusion order or a cease-and-desist order in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the

United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the recommended orders are used in the United States;

(ii) Identify any public health, safety, or welfare concerns in the United States relating to the recommended orders;

(iii) Identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) Indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the recommended exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) Explain how the recommended orders would impact consumers in the United States.

Written submissions must be filed no later than by close of business on November 13, 2013.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the investigation number (''Inv. No. 847'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, *http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf*). Persons with questions regarding filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. A redacted non-confidential version of the document must also be filed simultaneously with the any confidential filing. All non-confidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of sections 201.10 and 210.50 of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.50).

Issued: October 18, 2013.

By order of the Commission.

Lisa R. Barton,

Acting Secretary to the Commission.

[FR Doc. 2013–24898 Filed 10–23–13; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–13–024]

Sunshine Act Meeting Notice

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: October 29, 2013 at 11:00 a.m.

PLACE: Room 101, 500 E Street SW., Washington, DC 20436, Telephone: (202) 205–2000.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agendas for future meetings: None.
2. Minutes.
3. Ratification List.
4. Vote in Inv. Nos. 701–TA–501 and 731–TA–1126 (Preliminary)(Chlorinated Isocyanurates from China and Japan). The Commission is currently scheduled to complete and file its determinations on or before October 31, 2013; Commissioners' opinions will be issued on November 7, 2013.
5. Outstanding action jackets: None.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission.

Issued: October 22, 2013.

William R. Bishop,

Supervisory Hearings and Information Officer.

[FR Doc. 2013–25170 Filed 10–22–13; 4:15 pm]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

[OMB Number 1122–0017]

Agency Information Collection Activities; Extension of a Currently Approved Collection: Semi-Annual Progress Report for the Technical Assistance Program

ACTION: 30-day notice.

The Department of Justice, Office on Violence Against Women (OVW) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 78, page 49289 on August 13, 2013, allowing for a 60-day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until November 25, 2013. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to The Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–5806.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) T*itle of the Form/Collection:* Semi-annual Progress Report for the Technical Assistance Program.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: 1122–0017. U.S. Department of Justice, Office on Violence Against Women.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* The affected public includes the 100 programs providing technical assistance as recipients under the Technical Assistance Program.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that it will take the 100 respondents (Technical Assistance providers) approximately one hour to complete a semi-annual progress report twice a year. The semi-annual progress report for the Technical Assistance Program is divided into sections that pertain to the different types of activities in which Technical Assistance Providers are engaged.

The primary purpose of the OVW Technical Assistance Program is to provide direct assistance to grantees and their subgrantees to enhance the success of local projects they are implementing with VAWA grant funds. In addition, OVW is focused on building the capacity of criminal justice and victim services organizations to respond effectively to sexual assault, domestic violence, dating violence, and stalking and to foster partnerships between organizations that have not traditionally worked together to address violence against women, such as faith- and community-based organizations.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total annual hour burden to complete the semi-annual progress report form is 200 hours. It will take approximately one hour for the grantees to complete the form twice a year.

If additional information is required contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., Room 1407B, Washington, DC 20530.

Dated: October 21, 2013.

Jerri Murray,

Department Clearance Officer for PRA, United States Department of Justice.

[FR Doc. 2013–24988 Filed 10–23–13; 8:45 am]

BILLING CODE 4410–FX–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Clean Air Act and the Emergency Planning and Community Right-To Know Act

On September 30, 2013, the Department of Justice lodged a proposed Consent Decree with the United States District Court for Oregon in the lawsuit entitled *United States* v. *Oregon Door Company,* Civil Action No. 6:13–cv–01738–MC.

In this lawsuit filed under the Clean Air Act and the Emergency Planning & Community Right to Know Act, the United States sought to obtain civil penalties and injunctive relief against the Oregon Door Company for violations of the regulations and requirements applicable to the emission of hazardous air pollutants, air operating permits, and toxic chemicals. The violations occurred at the Oregon Door Company manufacturing facility in Dillard, Oregon. The proposed Consent Decree requires the Oregon Door Company to pay a $50,000 civil penalty and perform injunctive relief.

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* v. *Oregon Door Company,* D.J. Ref. No. 90–5–2–1–10448. 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:

To submit comments:	*Send them to:*
By e-mail	*pubcomment-ees.enrd@usdoj.gov.*
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.* 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 $7.50 (25 cents per page reproduction cost) payable to the United States Treasury.

Susan M. Akers,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2013–24884 Filed 10–23–13; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OJP (OVC) Docket No. 1636]

Meeting of the National Coordination Committee on the AI/AN SANE—SART Initiative

AGENCY: Office for Victims of Crime, Justice.

ACTION: Notice of meeting.

SUMMARY: The National Coordination Committee on the American Indian/Alaska Native (AI/AN) Sexual Assault Nurse Examiner (SANE)—Sexual Assault Response Team (SART) Initiative (''National Coordination Committee'' or ''Committee'') will meet to carry out its mission to provide valuable advice to assist the Office for Victims of Crime (OVC) to promote culturally relevant, victim-centered responses to sexual violence within AI/AN communities.

DATES: The meeting will be held via webinar on Tuesday, November 19, 2013. The start time and additional agenda information will be sent upon registration.

ADDRESSES: The webinar is open to the public for observation and participation. OVC anticipates that there will be fifteen minutes of time at the end of the webinar designated for the public to speak. Additionally, the public may submit comments to Kathleen Gless, the Designated Federal Official (DFO) for the Committee. The number of people who may participate via webinar is limited, and registration is required for participation. To register for the webinar, please provide your full contact information to Kathleen Gless (contact information below).

FOR FURTHER INFORMATION CONTACT: Kathleen Gless, Designated Federal Officer (DFO) for the National Coordination Committee, Office for Victims of Crime, Office of Justice Programs, 810 7th Street NW., Washington, DC 20531; Phone: (202) 307–6049 [note: this is not a toll-free number]; Email: *kathleen.gless@usdoj.gov.*

SUPPLEMENTARY INFORMATION: The National Coordination Committee on

the American Indian/Alaskan Native (AI/AN) Sexual Assault Nurse Examiner (SANE)- Sexual Assault Response Team (SART) Initiative (''National Coordination Committee'' or ''Committee'') was established by the Attorney General to provide valuable advice to OVC to encourage the coordination of federal, tribal, state, and local efforts to assist victims of sexual violence within AI/AN communities, and to promote culturally relevant, victim-centered responses to sexual violence within those communities.

Webinar Agenda: The agenda will include: (a) Traditional welcome and introductions; (b) remarks from the Acting Director of OVC; (c) updates on OVC, FBI and IHS efforts since the April 17, 2013 Committee meeting via webinar; (d) Committee review and discussion of its proposed recommendations to the U.S. Attorney General; (e) discussion regarding whether the recommendations and supporting context language should be submitted to the U.S. Attorney General; and (f) a traditional closing.

Kathleen Gless,

Victim Justice Program Specialist, AI/AN SANE–SART Lead, Designated Federal Official—National Coordination Committee, Office for Victims of Crime.

[FR Doc. 2013–25022 Filed 10–23–13; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Request for State or Federal Compensation Information

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Office of Workers' Compensation Programs (OWCP) sponsored information collection request (ICR) titled, ''Request for State or Federal Compensation Information,'' 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 November 25, 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=201306-1240-005* (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.*

Submit comments about this request to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–OWCP, 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.* Commenters are encouraged, but not required, to send a courtesy copy of any comments to the U.S. Department of Labor-OASAM, Office of the Chief Information Officer, Attn: Information Management Program, Room N1301, 200 Constitution Avenue, NW., Washington, DC 20210, email: *DOL_PRA_PUBLIC@dol.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.*

Authority: 44 U.S.C. 3507(a)(1)(D).

SUPPLEMENTARY INFORMATION: The Black Lung Benefits Act (BLBA) (30 U.S.C. 901 et seq.) provides for reducing a person's monthly benefits under the Act dollar for dollar for benefits attributable to black lung disability benefits from State or other Federal workers' benefits. Form CM–905 requests the amount of those benefits and is used to help determine BLBA compensation benefits awarded for pneumoconiosis.

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 1240–0032.

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 October 31, 2013. The DOL seeks to extend PRA authorization for this information collection for three (3) more years without any change to the 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. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on June 12, 2013 (78 FR 35327).

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 1240–0032. 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–OWCP.

Title of Collection: Request for State or Federal Workers' Compensation Information.

OMB Control Number: 1240–0032.

Affected Public: Federal Government and State, Local and Tribal Governments.

Total Estimated Number of Respondents: 2,000.

Total Estimated Number of Responses: 2,000.

Total Estimated Annual Burden Hours: 500.

Total Estimated Annual Other Costs Burden: $980.

Dated: October 18, 2013.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2013–24979 Filed 10–23–13; 8:45 am]

BILLING CODE 4510–CK–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Medical Travel Refund Request

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Office of Workers' Compensation Programs (OWCP) sponsored information collection request (ICR) titled, ''Medical Travel Refund Request,'' 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 November 25, 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=201306-1240-001* (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.*

Submit comments about this request to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–OWCP, 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.* Commenters are encouraged, but not required, to send a courtesy copy of any comments to the U.S. Department of Labor-OASAM, Office of the Chief Information Officer, Attn: Information Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210, email: *DOL_PRA_PUBLIC@dol.gov.*

FOR FURTHER INFORMATION CONTACT: 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.*

Authority: 44 U.S.C. 3507(a)(1)(D).

SUPPLEMENTARY INFORMATION: Respondents use Form OWCP–957 to request reimbursement for out-of-pocket expenses incurred when traveling to medical providers for covered medical testing or treatment. 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 1240–0037.

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 October 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. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on June 14, 2013 (78 FR 35981).

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 1240–0037. 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–OWCP.

Title of Collection: Medical Travel Refund Request.

OMB Control Number: 1240–0037.

Affected Public: Individuals or Households.

Total Estimated Number of Respondents: 302,794.

Total Estimated Number of Responses: 302,794.

Total Estimated Annual Burden Hours: 50,263.

Total Estimated Annual Other Costs Burden: $148,369.

Dated: October 18, 2013.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2013–24978 Filed 10–23–13; 8:45 am]

BILLING CODE 4510–CR–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for workers by (TA–W) number issued during the period of September 16, 2013 through September 20, 2013.

In order for an affirmative determination to be made for workers of a primary firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(a) of the Act must be met.

I. Under Section 222(a)(2)(A), the following must be satisfied:

(1) a significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) the sales or production, or both, of such firm have decreased absolutely; and

(3) One of the following must be satisfied:

(A) imports of articles or services like or directly competitive with articles produced or services supplied by such firm have increased;

(B) imports of articles like or directly competitive with articles into which one or more component parts produced by such firm are directly incorporated, have increased;

(C) imports of articles directly incorporating one or more component parts produced outside the United

States that are like or directly competitive with imports of articles incorporating one or more component parts produced by such firm have increased;

(D) imports of articles like or directly competitive with articles which are produced directly using services supplied by such firm, have increased; and

(4) the increase in imports contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm; or

II. Section 222(a)(2)(B) all of the following must be satisfied:

(1) a significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) One of the following must be satisfied:

(A) there has been a shift by the workers' firm to a foreign country in the production of articles or supply of services like or directly competitive with those produced/supplied by the workers' firm;

(B) there has been an acquisition from a foreign country by the workers' firm of articles/services that are like or directly competitive with those produced/supplied by the workers' firm; and

(3) the shift/acquisition contributed importantly to the workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected workers in public agencies and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(b) of the Act must be met.

(1) a significant number or proportion of the workers in the public agency have become totally or partially separated, or are threatened to become totally or partially separated;

(2) the public agency has acquired from a foreign country services like or directly competitive with services which are supplied by such agency; and

(3) the acquisition of services contributed importantly to such workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected secondary workers of a firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(c) of the Act must be met.

(1) a significant number or proportion of the workers in the workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) the workers' firm is a Supplier or Downstream Producer to a firm that employed a group of workers who received a certification of eligibility under Section 222(a) of the Act, and such supply or production is related to the article or service that was the basis for such certification; and

(3) either—

(A) the workers' firm is a supplier and the component parts it supplied to the firm described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) a loss of business by the workers' firm with the firm described in paragraph (2) contributed importantly to the workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected workers in firms identified by the International Trade Commission and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(f) of the Act must be met.

(1) the workers' firm is publicly identified by name by the International Trade Commission as a member of a domestic industry in an investigation resulting in—

(A) an affirmative determination of serious injury or threat thereof under section 202(b)(1);

(B) an affirmative determination of market disruption or threat thereof under section 421(b)(1); or

(C) an affirmative final determination of material injury or threat thereof under section 705(b)(1)(A) or 735(b)(1)(A) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)(1)(A) and 1673d(b)(1)(A));

(2) the petition is filed during the 1-year period beginning on the date on which—

(A) a summary of the report submitted to the President by the International Trade Commission under section 202(f)(1) with respect to the affirmative determination described in paragraph (1)(A) is published in the **Federal Register** under section 202(f)(3); or

(B) notice of an affirmative determination described in subparagraph (1) is published in the **Federal Register**; and

(3) the workers have become totally or partially separated from the workers' firm within—

(A) the 1-year period described in paragraph (2); or

(B) notwithstanding section 223(b)(1), the 1-year period preceding the 1-year period described in paragraph (2).

Affirmative Determinations for Worker Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date
82,872	Narroflex Inc	Stuart, VA	July 2, 2012.
82,957	Tantus Tobacco, LLC (TTM)	Russell Springs, KY	August 1, 2012.
82,969	GE Healthcare System Solutions HSS, Centricity Enterprise Business Unit, TCS Americas, Kelly Services.	Seattle, WA	August 8, 2012.
83,020	Critical-Logic, Inc	Spokane Valley, WA	July 23, 2012.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production or services) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date
82,773	Lester, Inc., Enlink Infotech	Wurland, KY	May 30, 2012.

TA–W No.	Subject firm	Location	Impact date
82,972	John Wiley and Sons, Inc., Composition Services Group	Indianapolis, IN	August 9, 2012.
83,011	Legrand North America, Inc., Cablofil Division, Transforce	Pico Rivera, CA	August 20, 2012.
83,012	Bush Industries, Inc., Mason Drive Facility, Express Employment Professionals, US Security Assoc.	Jamestown, NY	September 10, 2013.
83,012A ..	Bush Industries, Inc., Allen Street Facility, Express Employment Professionals, US Security Assoc.	Jamestown, NY	September 10, 2013.
83,012B ..	Bush Industries of Pennsylvania, Inc., Labor Ready	Erie, PA	September 10, 2013.
83,012C ..	Continuity and Manpower, Working On-Site at Bush Industries, Inc., Mason Drive Facility.	Jamestown, NY	August 20, 2012.
83,012D ..	Continuity and Manpower, Working On-Site at Bush Industries, Inc., Allen Street Facility.	Jamestown, NY	August 20, 2012.
83,019	Springs Global US, Inc., Grace Complex—Distribution Facility, Springs Global, Defender Industries.	Lancaster, SC	March 29, 2013.
83,022	The Spencer Turbine Company, Staffmark, Randstad, Aerotek and Universal.	Windsor, CT	August 23, 2012.
83,024	Blount International, Inc., Express Employment Professionals	Portland, OR	August 23, 2012.
83,042	WellPoint, Inc., Post Service Clinical Claims Review (PSCCR)	Wallingford, CT	August 29, 2012.
83,042A ..	WellPoint, Inc., Post Service Clinical Claims Review (PSCCR)	Manchester, NH	August 29, 2012.
83,042B ..	WellPoint, Inc., Post Service Clinical Claims Review (PSCCR)	South Portland, ME	August 29, 2012.
83,047	Mt. Ida Footwear Co., Munro and Company, Inc	Mount Ida, AR	August 30, 2012.
83,050	Resolute FP US, Inc., Corporate Office, Manpower and CEO	Catawba, SC	September 3, 2012.
83,054	Cooper Lighting, LLC, Eaton Corporation, Staffing Solutions	Eufaula, AL	September 4, 2012.
83,071	Applied Discovery, Inc., Behind The Brand, Scribe On Demand, Resources Global Professionals, etc.	Bellevue, WA	August 26, 2012.

Negative Determinations for Worker Adjustment Assistance

In the following cases, the investigation revealed that the eligibility criteria for worker adjustment assistance have not been met for the reasons specified.

The investigation revealed that the criterion under paragraph (a)(1), or (b)(1), or (c)(1)(employment decline or threat of separation) of section 222 has not been met.

TA–W No.	Subject firm	Location	Impact date
83,058	Sysco Denver LLC, Sysco Corporation, IT Department	Denver, CO.	

The investigation revealed that the criteria under paragraphs(a)(2)(A) (increased imports) and (a)(2)(B) (shift in production or services to a foreign country) of section 222 have not been met.

TA–W No.	Subject firm	Location	Impact date
82,907	Omega Engineering, Inc., Spectris PLC, Bear Staffing, Careers, Express, Integrity, JAP, People.	Stamford, CT.	
82,981	ARRIS Solutions, Inc., ARRIS Group, Inc	Libertyville, IL.	

Determinations Terminating Investigations of Petitions for Worker Adjustment Assistance

After notice of the petitions was published in the **Federal Register** and on the Department's Web site, as required by Section 221 of the Act (19 U.S.C. 2271), the Department initiated investigations of these petitions.

The following determinations terminating investigations were issued because the petitioner has requested that the petition be withdrawn.

TA–W No.	Subject firm	Location	Impact date
83,052	Commercial Metals Company (CMC)	Magnolia, AR.	

The following determinations terminating investigations were issued because the petitioning groups of workers are covered by active certifications. Consequently, further investigation in these cases would serve no purpose since the petitioning group of workers cannot be covered by more than one certification at a time.

TA–W No.	Subject firm	Location	Impact date
82,852	Suntrust Bank	Atlanta, GA.	
82,961	Cirk Solutions, Inc., Sanyo Solar of Oregon, LLC, Wafer Slicing & Quality, etc.	Salem, OR.	
83,084	WellPoint, Inc., Post Service Clinical Claims Review (PSCCR)	Wallingford, CT.	

TA–W No.	Subject firm	Location	Impact date
83,084A ..	WellPoint, Inc., Post Service Clinical Claims Review (PSCCR)	Manchester, NH.	

I hereby certify that the aforementioned determinations were issued during the period of September 16, 2013 through September 20, 2013. These determinations are available on the Department's Web site *tradeact/taa/taa_search_form.cfm* under the searchable listing of determinations or by calling the Office of Trade Adjustment Assistance toll free at 888–365–6822.

Signed at Washington, DC, this 25th day of September 2013.

Michael W. Jaffe,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2013–24971 Filed 10–23–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF LABOR

Employment and Training Administration

Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

TA–W–82,658
SUNTRUST BANK, SUNTRUST BANKS, INC. ENTERPRISE INFORMATION SERVICES (EIS) INCLUDING ON-SITE LEASED WORKERS FROM MDI GROUP, TEKSYSTEMS, INSIGHT GLOBAL, VEREDUS, ESPERIS, PYRAMID CONSULTING, APEX SYSTEMS, BEACON TECHNOLOGIES, RANDSTAD, MODIS AND STRATEGIC STAFFING TWO LOCATIONS IN RICHMOND, VIRGINIA
TA–W–82,658A
SUNTRUST BANK, SUNTRUST BANKS, INC. ENTERPRISE INFORMATION SERVICES (EIS) DURHAM, NORTH CAROLINA
TA–W–82,658B
SUNTRUST BANK, SUNTRUST BANKS, INC. ENTERPRISE INFORMATION SERVICES (EIS) THREE LOCATIONS IN ATLANTA, GEORGIA
TA–W–82,658C
SUNTRUST BANK, SUNTRUST BANKS, INC. ENTERPRISE INFORMATION SERVICES (EIS) ORLANDO, FLORIDA
TA–W–82,658D
SUNTRUST BANK, SUNTRUST BANKS, INC. ENTERPRISE INFORMATION SERVICES (EIS) LAUREL, MARYLAND

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on May 8, 2013, applicable to workers of SunTrust Bank, SunTrust Banks, Inc., Enterprise Information Services (EIS), Richmond, Virginia. The Department's notice of determination was published in the **Federal Register** on May 30, 2013 (Vol. 78 FR 108).

At the request of a State Workforce Official, the Department reviewed the certification for workers of the subject firm. The workers firm supplies financial services.

The Department reports that worker separations at other SunTrust Bank locations are also attributable to the acquisition of services that was the basis of the certification of the Richmond, Virginia location. The firm has reported worker separations at the following addresses: 1030 Wilmer Avenue and 1001 Semmes Avenue, Richmond, Virginia (TA–W–82,658); 2323 Operations Drive, Durham, North Carolina (TA–W–82,658A); 303 Peachtree Center Avenue, 285 Peachtree Center Avenue, and 211 Perimeter Center Parkway, Atlanta, Georgia (TA–W–82,658B); 7455 Chancellor Drive, Orlando, Florida (TA–W–82,658C); and 14401 Sweitzer Lane, Laurel, Maryland (TA–W–82,658D).

The firm also reports two teleworkers whose separations are attributable to the shift of services to a foreign country. One teleworker living in Orlando, Florida is included in TA–W–82,658C. The other teleworker living in Cincinnati, Ohio is included in TA–W–82,658B.

The amended notice applicable to TA–W–82,658 is hereby issued as follows:

All workers of SunTrust Bank, SunTrust Banks, Inc., Enterprise Information Services (EIS), including on-site leased workers from MDI Group, TEKSystems, Insight Global, Veredus, Experis, Pyramid Consulting, Apex Systems, Beacon Technologies, Randstad, and Modis and Strategic Staffing, Two locations in Richmond, Virginia (TA–W–82,658); SunTrust Bank, SunTrust Banks, Inc., Enterprise Information Services (EIS), Durham, North Carolina (TA–W–82,658A); SunTrust Bank, SunTrust Banks, Inc., Enterprise Information Services (EIS), Three locations in Atlanta, Georgia (TA–W–82,658B); SunTrust Bank, SunTrust Banks, Inc., Enterprise Information Services (EIS), Orlando, Florida (TA–W–82,658C); and SunTrust Bank, SunTrust Banks, Inc., Enterprise Information Services (EIS), Laurel, Maryland (TA–W–82,658D), who became totally or partially separated from employment on or after April 12, 2013 through May 8, 2015, and all workers in the group threatened with total or partial separation from employment on the date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed in Washington, DC, this 20th day of September, 2013.

Michael W. Jaffe,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2013–24972 Filed 10–23–13; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Eligibility To Apply for Worker Adjustment Assistance

Petitions have been filed with the Secretary of Labor under Section 221(a) of the Trade Act of 1974 (''the Act'') and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Office of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to Section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than November 4, 2013.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than November 4, 2013.

The petitions filed in this case are available for inspection at the Office of the Director, Office of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, Room N–5428, 200 Constitution Avenue NW., Washington, DC 20210.

Signed at Washington, DC this 25th day of September 2013.

Michael W. Jaffe,

Certifying Officer, Office of Trade Adjustment Assistance.

APPENDIX

[22 TAA petitions instituted between 9/16/13 and 9/20/13]

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
83081	Suzlon (State/One-Stop)	Pipestone, MN	09/16/13	09/13/13
83082	DST Retirement Solutions (State/One-Stop)	Jefferson City, MO	09/16/13	09/13/13
83083	American Wyott Corporation (Company)	Cheyenne, WY	09/16/13	09/11/13
83084	WellPoint, Inc. (State/One-Stop)	Wallingford, CT	09/16/13	09/13/13
83084A	WellPoint, Inc. (State/One-Stop)	Manchester, NH	09/16/13	09/13/13
83085	Keywell LLC (Workers)	Frewsburg, NY	09/16/13	09/09/13
83086	Rheem Manufacturing (State/One-Stop)	Fort Smith, AR	09/17/13	09/16/13
83087	SWM International, Inc (State/One-Stop)	Newberry, SC	09/17/13	09/16/13
83088	First Advantage, Information Technology Team (Workers)	Alpharetta, GA	09/17/13	09/16/13
83089	Micron Technology Inc. (and all subsidiaries) (Company)	Boise, ID	09/17/13	09/16/13
83090	IBM Corporation (State/One-Stop)	Endicott, NY	09/17/13	09/17/13
83091	Gits Manufacturing Company (Company)	Creston, IA	09/17/13	09/16/13
83092	Green Mountain Power, Meter Services, Meter Operations (State/One-Stop).	Multiple VT Locations	09/18/13	09/18/13
83093	Pilgrim's Pride (State/One-Stop)	Batesville, AR	09/18/13	09/17/13
83094	Caterpillar Reman Powertrain Services (Company)	Summerville, SC	09/18/13	09/17/13
83095	Columbus Show Case Worldwide (Union)	Columbus, OH	09/19/13	09/12/13
83096	Newark Recycled Paperboard Solutions (Workers)	Greenville, PA	09/19/13	09/18/13
83097	SB Electronics Inc., Orange Drop Product Line (State/One-Stop).	Barre, VT	09/19/13	09/18/13
83098	Palomar Medical Center, Medical Transcription Workers (Workers).	Escondido, CA	09/19/13	09/04/13
83099	Niagara Ceramics (Workers)	Buffalo, NY	09/20/13	09/19/13
83100	Oakley, Inc. (State/One-Stop)	Foothill Ranch, CA	09/20/13	09/19/13
83101	InterMetro Industries (A Subsidiary of Emerson Electric) (Company).	Fostoria, OH	09/20/13	09/19/13

[FR Doc. 2013–24973 Filed 10–23–13; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Bureau of Labor Statistics

Bureau of Labor Statistics Technical Advisory Committee; Notice of Meeting and Agenda

The Bureau of Labor Statistics Technical Advisory Committee will meet on Friday, November 8, 2013. The meeting will be held in the Postal Square Building, 2 Massachusetts Avenue NE., Washington, DC.

The Committee provides advice and makes recommendations to the Bureau of Labor Statistics (BLS) on technical aspects of the collection and formulation of economic measures. The BLS presents issues and then draws on the expertise of Committee members representing specialized fields within the academic disciplines of economics, statistics, and survey design.

The meeting will be held in rooms 1 and 2 of the Postal Square Building Conference Center. The schedule and agenda for the meeting are as follows:

8:30 a.m. Commissioner's welcome and review of agency developments
9:00 a.m. Producer Price Index New Aggregation
10:45 a.m. Preparing BLS measures of employment-based health care benefits for changes due to implementation of the Affordable Care Act
1:45 p.m. Discussion of future priorities
2:15 p.m. Employment Projections Methods for Estimation of Projected Job Openings
4:00 p.m. Approximate conclusion

The meeting is open to the public. Any questions concerning the meeting should be directed to Lisa Fieldhouse, Bureau of Labor Statistics Technical Advisory Committee, on 202–691–5025. Individuals who require special accommodations should contact Ms. Fieldhouse at least two days prior to the meeting date.

Signed at Washington, DC, this 18th day of October, 2013.

Kimberley D. Hill,

Chief, Division of Management Systems, Bureau of Labor Statistics.

[FR Doc. 2013–24970 Filed 10–23–13; 8:45 am]

BILLING CODE 4510–24–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Federal Council on the Arts and the Humanities; Arts and Artifacts Indemnity Panel Advisory Committee Meeting

AGENCY: National Endowment for the Humanities

ACTION: Notice of meeting.

SUMMARY: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. App.), notice is hereby given that the Federal Council on the Arts and the Humanities will hold a meeting of the Arts and Artifacts International Indemnity Panel. The purpose of the meeting is for panel review, discussion, evaluation, and recommendation on applications for Certificates of Indemnity submitted to the Federal Council on the Arts and the Humanities, for exhibitions beginning on or after January 1, 2014.

DATES: The meeting will be held on Wednesday, November 6, 2013, from 9:30 a.m. to 5:00 p.m.

ADDRESSES: The location of the meeting is the Old Post Office Building, 1100 Pennsylvania Ave. NW., Washington, DC 20506, in Room 730.

FOR FURTHER INFORMATION CONTACT: Lisette Voyatzis, Committee Management Officer, 1100 Pennsylvania Avenue NW., Washington, DC 20506, or call (202) 606–8322. Hearing-impaired individuals are advised that information on this matter may be obtained by contacting the National Endowment for the Humanities' TDD terminal at (202) 606–8282.

SUPPLEMENTARY INFORMATION: Because the meeting will consider proprietary financial and commercial data provided

in confidence by indemnity applicants, and material that is likely to disclose trade secrets or other privileged or confidential information, and because it is important to keep the values of objects to be indemnified, and the methods of transportation and security measures confidential, I have determined that that the meeting will be closed to the public pursuant to section 552b(c)(4) of Title 5 U.S.C., as amended. I have made this determination under the authority granted me by the Chairman's Delegation of Authority to Close Advisory Committee Meetings, dated July l9, l993.

Dated: October 21, 2013.

Lisette Voyatzis,

Committee Management Officer.

[FR Doc. 2013–25074 Filed 10–23–13; 8:45 am]

BILLING CODE 7536–01–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Meetings of Humanities Panel

AGENCY: National Endowment for the Humanities.

ACTION: Notice of meetings.

SUMMARY: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. App.), notice is hereby given that eleven meetings of the Humanities Panel will be held during November, 2013 as follows. The purpose of the meetings is for panel review, discussion, evaluation, and recommendation of applications for financial assistance under the National Foundation on the Arts and Humanities Act of 1965 (20 U.S.C. 951–960, as amended).

DATES: See **SUPPLEMENTARY INFORMATION** section for meeting dates.

ADDRESSES: The meetings will be held at the Old Post Office Building, 1100 Pennsylvania Ave. NW., Washington, DC 20506. See **SUPPLEMENTARY INFORMATION** section for meeting room numbers.

FOR FURTHER INFORMATION CONTACT: Lisette Voyatzis, Committee Management Officer, 1100 Pennsylvania Ave. NW., Room 529, Washington, DC 20506, or call (202) 606–8322. Hearing-impaired individuals are advised that information on this matter may be obtained by contacting the National Endowment for the Humanities' TDD terminal at (202) 606–8282.

SUPPLEMENTARY INFORMATION:

Meetings

1. *Date:* November 1, 2013.
Time: 8:30 a.m. to 5:00 p.m.
Room: 415.

This meeting will discuss applications on the subjects of the History of Science, Technology, and Medicine for the Humanities Collections and Reference Resources grant program, submitted to the Division of Preservation and Access.

2. *Date:* November 1, 2013.
Time: 8:30 a.m. to 5:00 p.m.
Room: 421.

This meeting will discuss applications on the subject of Art History for the America's Historical and Cultural Organizations: Implementation Grants, submitted to the Division of Public Programs.

3. *Date:* November 4, 2013.
Time: 8:30 a.m. to 5:00 p.m.
Room: 421.

This meeting will discuss applications on the subjects of World History and Culture for the America's Historical and Cultural Organizations: Implementation Grants, submitted to the Division of Public Programs.

4. *Date:* November 5, 2013.
Time: 8:30 a.m. to 5:00 p.m.
Room: 421.

This meeting will discuss applications on the subject of U.S. History for the America's Media Makers: Production Grants, submitted to the Division of Public Programs.

5. *Date:* November 5, 2013.
Time: 8:30 a.m. to 5:00 p.m.
Room: 415.

This meeting will discuss applications on the subjects of U.S. History and Culture for the Humanities Collections and Reference Resources grant program, submitted to the Division of Preservation and Access.

6. *Date:* November 7, 2013.
Time: 8:30 a.m. to 5:00 p.m.
Room: 415.

This meeting will discuss applications on the subjects of U.S. History and Culture for the Humanities Collections and Reference Resources grant program, submitted to the Division of Preservation and Access.

7. *Date:* November 7, 2013.
Time: 8:30 a.m. to 5:00 p.m.
Room: 421.

This meeting will discuss applications on the subject of American Studies for America's Historical and Cultural Organizations: Implementation Grants, submitted to the Division of Public Programs.

8. *Date:* November 19, 2013.
Time: 8:30 a.m. to 5:00 p.m.
Room: 421.

This meeting will discuss applications on the subject of U.S. History for America's Historical and Cultural Organizations: Implementation Grants, submitted to the Division of Public Programs.

9. *Date:* November 19, 2013.
Time: 8:30 a.m. to 5:00 p.m.
Room: 415.

This meeting will discuss applications on the subject of American Studies for the Humanities Collections and Reference Resources grant program, submitted to the Division of Preservation and Access.

10. *Date:* November 22, 2013.
Time: 8:30 a.m. to 5:00 p.m.
Room: 415.

This meeting will discuss applications on the subject of World Studies for the Humanities Collections and Reference Resources grant program, submitted to the Division of Preservation and Access.

11. *Date:* November 30, 2013.
Time: 8:30 a.m. to 5:00 p.m.
Room: 415.

This meeting will discuss applications on the subjects of New World Archaeology and Culture for the Humanities Collections and Reference Resources grant program, submitted to the Division of Preservation and Access.

Because these meetings will include review of personal and/or proprietary financial and commercial information given in confidence to the agency by grant applicants, the meetings will be closed to the public pursuant to sections 552b(c)(4) and 552b(c)(6) of Title 5 U.S.C., as amended. I have made this determination pursuant to the authority granted me by the Chairman's Delegation of Authority to Close Advisory Committee Meetings dated July 19, 1993.

Dated: October 21, 2013.

Lisette Voyatzis,

Committee Management Officer.

[FR Doc. 2013–25080 Filed 10–23–13; 8:45 am]

BILLING CODE 7536–01–P

NUCLEAR REGULATORY COMMISSION

[Project No. 0803; NRC–2013–0235]

Request To Submit a Two-Part Application—Northwest Medical Isotopes, LLC

AGENCY: Nuclear Regulatory Commission.

ACTION: Exemption.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing an exemption in response to an August 9, 2013, letter from Northwest Medical Isotopes, LLC (NWMI). In this letter, NWMI requested an exemption from certain regulatory requirements, which, if granted, would allow the submittal of a construction permit application for a

medical radioisotope production facility in two parts. The NRC staff has reviewed this request and determined that it is appropriate to grant the exemption, as requested.

ADDRESSES: Please refer to Docket ID NRC–2013–0235 when contacting the NRC about the availability of information regarding this document. You may access publicly-available information related to this action by the following methods:

• *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2013–0235. Address questions about NRC dockets to Carol Gallagher; telephone: 301–287–3422; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual(s) listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

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

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

FOR FURTHER INFORMATION CONTACT: Steven Lynch, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–1524; email: *Steven.Lynch@nrc.gov.*

SUPPLEMENTARY INFORMATION: The following sections include the text of the exemption in its entirety as it will be issued to NWMI.

1.0 Background

Currently, the United States receives all of its supply of molybdenum-99 (Mo-99) from international sources. In recent years, outages at these international facilities have disrupted global supply and created a need to establish domestic Mo-99 production within the United States. In response to this need, NWMI stated in a letter dated August 9, 2013 (ADAMS Accession No. ML13227A295), that it intends to ''design and construct a [radioisotope production facility] and intends to produce Mo-99'' in order to meet the emerging domestic demands for Mo-99 and its decay product, technetium-99m, in nuclear medicine procedures. Northwest Medical Isotopes, LLC, has proposed to submit an application to construct a radioisotope production facility pursuant to the requirements of part 50 of Title 10 of the *Code of Federal Regulations* (10 CFR), ''Domestic Licensing of Production and Utilization Facilities,'' and in accordance with 10 CFR 2.101(a)(5) for the purpose of producing Mo-99. As an applicant for a permit to construct such a facility, NWMI will be subject to all applicable rules, regulations, and orders of the NRC now or hereafter in effect.

Generally speaking, production and utilization facility applicants subject to 10 CFR 51.20(b) [1] may submit the information required for a construction permit, under 10 CFR part 50, in two parts, in accordance with the provisions of 10 CFR 2.101(a)(5). These provisions state that one part of the submittal must include the environmental report required by 10 CFR 50.30(f), while the other part must include the preliminary safety analysis report required by 10 CFR 50.34(a). Either part of the construction permit application may be submitted first as long as the submission of each part of the application does not precede or follow the other by longer than six months. However, the first part submitted must also contain the following:

• The description and safety assessment of the site required by 10 CFR 50.34(a)(1),

• the filing fee required by 10 CFR 50.30(e) and 10 CFR 170.21,

• the general information required by 10 CFR 50.33, and

• the agreement limiting access to Classified Information required by 10 CFR 50.37.

Thus, 10 CFR 2.101(a)(5) provides that applicable preliminary safety analysis report information required by 10 CFR 50.34(a)(2)–(a)(13) need not accompany the first part of the submittal. In order to facilitate the review of its application, NWMI would like to submit its application in two parts, as described above; however, based on the current language of 10 CFR 51.20, it cannot do so unless granted an exemption from certain provisions of 10 CFR 2.101(a)(5) by the Commission.

The NRC staff previously addressed an exemption request from SHINE Medical Technologies, Inc. (SHINE) to submit is construction permit application in two parts. The NRC staff responded to a letter from SHINE, dated July 10, 2012 (ADAMS Accession No. ML12214A434), that asked whether production or utilization facility applicants could submit a construction permit application in two parts even if an environmental impact statement is not explicitly required for the application by 10 CFR 51.20(b).

In a letter dated December 7, 2012 (ADAMS Accession No. ML12319A192), the NRC staff responded:

> SHINE's proposed action for licensing a medical isotope production facility is not an action identified in 51.20(b); therefore, 10 CFR 2.101(a)(5) is not applicable to SHINE's licensing proposal. However, SHINE could apply for an exemption under 10 CFR 50.12 in order to submit its application for a construction permit in two parts as described in 10 CFR 2.101(a)(5).

The NRC staff also explained that should an exemption to 10 CFR 2.101(a)(5) be sought, the request must set forth existing special circumstances warranting the exemption, as well as provide the proposed contents of each part of the construction permit application.

Similarly, NWMI has proposed to submit an application requesting the issuance of a construction permit for a medical radioisotope production facility—a licensing action not identified in 10 CFR 51.20(b). Therefore, its application for a construction permit cannot be submitted in two parts under 10 CFR 2.101(a)(5) unless an exemption is granted by the Commission.

2.0 Request/Action

Section 2.101(a)(5) of 10 CFR states, in part:

> An applicant for a construction permit under part 50 of this chapter . . . for a production or utilization facility which is subject to § 51.20(b) of this chapter, and is of the type specified in § 50.21(b)(2) or (b)(3) or § 50.22 of this chapter . . . may submit the information required of applicants by part 50 . . . of this chapter in two parts.

By its letter dated August 9, 2013, NWMI requests an exemption from the provision of 10 CFR 2.101(a)(5) that applications for a construction permit under 10 CFR part 50 must be of the type requiring an environmental impact statement or a supplement to an environmental impact statement as described in 10 CFR 51.20(b). The exemption would allow NWMI to submit a portion of its construction permit up to six months prior to the submittal of the remainder of the application regardless of whether an environmental impact statement or a

[1] 10 CFR 51.20(b) enumerates the types of licensing and regulatory actions requiring an environmental impact statement or a supplement to an environmental impact statement.

supplement to an environmental impact statement is prepared for its construction permit application. Specifically, in accordance with the provisions of 10 CFR 2.101(a)(5), NWMI proposes to submit the following in part one of its construction permit application:

- The description and safety assessment of the site required by 10 CFR 50.34(a)(1),
- the environmental report required by 10 CFR 50.30(f),
- the filing fee required by 10 CFR 50.30(e) and 10 CFR 170.21,
- the general information required by 10 CFR 50.33, and
- the agreement limiting access to Classified Information required by 10 CFR 50.37.

Part two of NWMI's construction permit application will contain the remainder of the preliminary safety analysis report required by 10 CFR 50.34(a) and 2.101(a)(5). Northwest Medical Isotopes, LLC, has proposed to ''design and construct a [radioisotope production facility] and intends to produce Mo–99.'' In its request for an exemption from certain requirements of 10 CFR 2.101(a)(5), NWMI states that the ''demand for medical isotopes is a significant national public health and safety concern,'' and the ability to submit its construction permit application in two parts would ''allow for an earlier determination as to whether an [environmental impact statement] is required, allowing a potential earlier completion of the environmental review and ultimate issuance of the Construction Permit . . .''

3.0 Discussion

To docket NWMI's construction permit application in two parts under 10 CFR 2.101(a)(5), as proposed, an exemption to the regulations is required. Pursuant to 10 CFR 50.12, the Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of 10 CFR part 50 when (1) the exemptions are authorized by law, will not present an undue risk to public health or safety, and are consistent with the common defense and security; and (2) when special circumstances are present. While the action requested is not for an exemption to a 10 CFR part 50 regulation, it is appropriate to evaluate this exemption request using the criteria of 10 CFR 50.12 because an application for a construction permit for a radioisotope production facility cannot be accepted for docketing in accordance with 10 CFR 2.101(a) unless it meets the requirements of 10 CFR part 50.

Special Circumstances

The application of 10 CFR 2.101(a)(5) is limited to applications for licensing actions that meet the criteria for environmental impact statements as described in the provisions of 10 CFR 51.20(b) and to facilities of the types specified in 10 CFR 50.21(b)(2) or (b)(3) or 10 CFR 50.22. Northwest Medical Isotopes, LLC, has proposed to submit an application requesting the issuance of a construction permit for a medical radioisotope production facility—a licensing action not identified in 10 CFR 51.20(b). Consequently, its application for a construction permit cannot be submitted in two parts under 10 CFR 2.101(a)(5) unless an exemption is granted by the Commission. The Commission will not consider granting an exemption under 10 CFR 50.12 unless special circumstances are present. One of the special circumstances listed in 10 CFR 50.12(a)(2) is ''(ii) [a]pplication of the regulation in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule.'' Therefore, should the Commission determine that the underlying purpose of 10 CFR 2.101(a)(5) is achieved, application of the regulation would not be necessary, and the special circumstances would exist for granting of an exemption from certain requirements of 10 CFR 2.101(a)(5).

The underlying purpose of the 10 CFR 2.101(a)(5) provision that allows certain applicants to submit an application for a construction permit in two parts is to enable the NRC review of significant portions of the application, as they become available, without unnecessary delay. The provision for two-part construction permit application submittals was added as an amendment to the regulations of 10 CFR part 2, ''Agency Rules of Practice and Procedure,'' on April 24, 1974 (39 FR 14506). The intent of this final rule was to ''reduce the time required to bring on line nuclear power plants which satisfy all environmental and safety requirements . . . [and remove] unnecessary obstacles to the construction of power plants needed to meet the nation's energy needs.'' Recognizing the procedural nature of the amendment, the Commission made the language of the final rule effective without the customary 30-day notice. It is consistent with the procedural nature of and rationale for the rule to allow NWMI to submit its construction permit application in two parts to facilitate the licensing process of this facility and NWMI's effort to respond to the nation's demand for a domestic supply of Mo-99.

Furthermore, when the rule was originally written, there was a ''deep national concern over energy sources and supply.'' Similarly, there currently exists a national concern over the sources and supply of Mo-99 in the United States. Recognizing this concern, the U.S. Department of Energy (DOE) and the National Nuclear Security Administration (NNSA) are supporting four separate entities in the development of low enriched uranium technologies to accelerate commercial production of Mo-99 in the United States through the Global Threat Reduction Initiative.[2] By producing Mo-99 to meet emerging domestic needs, NWMI's proposed medical radioisotope production facility supports the efforts of DOE and NNSA and is in alignment with the underlying purpose of 10 CFR 2.101(a)(5). Therefore, since the underlying purpose of the rule is achieved, application of the regulation is not necessary, and the special circumstances, required by 10 CFR 50.12(a)(2)(ii), exist for granting an exemption from certain requirements of 10 CFR 2.101(a)(5).

Additionally, in 2007, the rule language was modified to include applicants seeking combined licenses under 10 CFR part 52, ''Licenses, Certifications, and Approvals for Nuclear Power Plants'' (72 FR 49412). The Commission determined that ''[t]here are no considerations unique to combined licenses which would weigh against allowing a combined license applicant to submit a two part application under paragraph (a)(5) of § 2.101.'' Similarly, the NRC staff concludes that given the procedural nature of this rule, there are no unique considerations for medical radioisotope production facilities that would weigh against allowing an applicant such as NWMI to submit a two-part application under 10 CFR 2.101(a)(5).

Authorized by Law

This exemption would allow NWMI to submit its application for a 10 CFR part 50 construction permit in two parts, as provided for in 10 CFR 2.101(a)(5). The exemption would not change the quality or content of the environmental report or the preliminary safety analysis report. The NRC staff has determined that special circumstances exist to

[2] To learn more about the Global Threat Reduction Initiative and U.S. Department of Energy's support of domestic Mo-99 production, please visit *http://nnsa.energy.gov/*.

support the issuance of an exemption. Thus, the granting of the proposed exemption is consistent with the Atomic Energy Act of 1954, as amended, and the Commission's regulations. Therefore, the exemption is authorized by law.

No Undue Risk to Public Health and Safety

As described above, the requested exemption is procedural in nature and does not alter any substantive safety requirements regarding the content of a construction permit application. Due to the procedural nature of this request, no new accident precursors are created by allowing an applicant to submit a construction permit application in two parts; thus, the probability of postulated accidents is not increased. Similarly, the consequences of postulated accidents are not increased by an exemption that authorizes an application to be submitted in two parts. Therefore, there is no undue risk [3] to public health and safety.

Consistent With Common Defense and Security

As discussed above, the proposed exemption would allow NWMI to submit its application for a 10 CFR part 50 construction permit application in two parts as provided for in 10 CFR 2.101(a)(5). The timing of submitting a construction permit application has no relation to security issues. Therefore, the common defense and security is not impacted by this exemption.

4.0 Conclusion

Accordingly, the Commission has determined that, pursuant to 10 CFR 50.12, the exemption is authorized by law, will not present an undue risk to the public health and safety, and is consistent with the common defense and security. Also, special circumstances are present. Therefore, pursuant to 10 CFR 50.12, the Commission hereby grants NWMI an exemption from the 10 CFR 2.101(a)(5) requirement that limits the regulation's applicability to licensing and regulatory actions requiring environmental impact statements, as described in the provisions of 10 CFR 51.20(b). The exemption granted allows NWMI to submit the construction permit application for its medical radioisotope production facility in two parts, in accordance with the remainder of the provisions of 10 CFR 2.101(a)(5).

Pursuant to 10 CFR 51.32, the Commission has determined that the granting of this exemption will not have a significant effect on the quality of the human environment as it is procedural in nature. Furthermore, the Commission has determined that this exemption request meets the criteria in 10 CFR 51.22(c)(25) for a licensing action that is categorically excluded from the requirement to prepare an environmental assessment because the granting of this exemption: (1) Does not involve a significant increase in the probability or consequences of an accident previously evaluated, does not create the possibility of a new or different kind of accident from that previously evaluated, and does not involve a significant reduction in the margin of safety and, thus there is no significant hazards consideration; (2) does not authorize the release of effluents, thus there is no significant change in the types or significant increase in the amounts of any effluents that may be released offsite; (3) neither authorizes new radiological hazards nor increases existing radiological hazards, thus there is no significant increase in individual or cumulative public or occupational radiation exposure; (4) does not authorize construction, thus there is no significant construction impact; (5) does not authorize any placement of radiological components at a facility or create any new accident precursors, thus there is no significant increase in the potential for or consequences from radiological accidents; and (6) allows the submission of a construction permit application in two parts, and thus involves a scheduling requirement in accordance with 10 CFR 51.22(c)(25)(vi)(G). This exemption is effective upon issuance to NWMI.

Dated at Rockville, Maryland, this 7th day of October, 2013.

For the Nuclear Regulatory Commission.

Lawrence E. Kokajko,

Director, Division of Policy and Rulemaking, Office of Nuclear Reactor Regulation.

[FR Doc. 2013–24882 Filed 10–23–13; 8:45 am]

BILLING CODE 7590–01–P

[3] Risk is defined as the probability of an accident multiplied by the consequences of an accident. More information on risk as it is applies to NRC regulatory activities can be found in the Commission White Paper on Risk-Informed and Performance Based Regulation, SECY–98–144 (ADAMS Accession No. ML003753601).

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 52–027 and 52–028; NRC–2008–0441]

Virgil C. Summer Nuclear Station, Units 2 and 3; South Carolina Electric and Gas; Changes to the Primary Sampling System

AGENCY: Nuclear Regulatory Commission.

ACTION: Exemption and combined license amendment; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is granting an exemption to allow a departure from the certification information of Tier 1 of the generic design control document (DCD) and issuing License Amendment No. 8 to Combined Licenses (COL), NPF–93 and NPF–94. The COLs were issued to South Carolina Electric and Gas (SCE&G) and South Carolina Public Service Authority (Santee Cooper) (the licensee), for construction and operation of the Virgil C. Summer Nuclear Station (VCSNS), Units 2 and 3 located in Fairfield County, South Carolina. The amendment requests to modify the Primary Sampling System (PSS) design, including changes to Tier 1 information located in Tables 2.2.1–2, 2.3.13–1, and 2.3.13–3, Figures 2.2.1–1 ''Containment System'' and 2.3.13–1 ''Primary Sampling System,'' and Subsection 2.3.13, ''Primary Sampling System'' of the Updated Final Safety Analysis Report (UFSAR). The granting of the exemption allows the changes to Tier 1 information asked for in the amendment. Because the acceptability of the exemption was determined in part by the acceptability of the amendment, the exemption and amendment are being issued concurrently.

ADDRESSES: Please refer to Docket ID NRC–2008–0441 when contacting the NRC about the availability of information regarding this document. You may access publicly-available information related to this action by the following methods:

- Federal Rulemaking Web site: Go to *http://www.regulations.gov* and search for Docket ID NRC–2008–0441. Address questions about NRC dockets to Carol Gallagher; telephone: 301–287–3422; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- NRC's Agencywide Documents Access and Management System (ADAMS): You may access publicly

available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*ADAMS Public Documents*'' and then select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced in this document (if that document is available in ADAMS) is provided the first time that a document is referenced. The request for the amendment and exemption were submitted by letter dated February 7, 2013 (ADAMS Accession No. ML13042A004). The licensee supplemented this request on July 11, 2013 (ADAMS Accession No. ML13197A431).

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

FOR FURTHER INFORMATION CONTACT: Denise McGovern, Office of New Reactors, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–0681; email: *Denise.McGovern@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The NRC is granting an exemption from Paragraph B of Section III, ''Scope and Contents,'' of Appendix D, ''Design Certification Rule for the AP1000,'' to Part 52 of Title 10 of the *Code of Federal Regulations* (10 CFR), and issuing License Amendment No. 8 to COLs, NPF–93 and NPF–94, to the licensee. The exemption is required by paragraph A.4 of Section VIII, ''Processes for Changes and Departures,'' Appendix D to 10 CFR Part 52 to allow the licensee to depart from Tier 1 information. With the requested amendment, the licensee sought to modify the design of the PSS. As part of this request, the licensee needed to change Tier 1 information located in Tables 2.2.1–2, 2.3.13–1, and 2.3.13–3, Figures 2.2.1–1 ''Containment System'' and 2.3.13–1 ''Primary Sampling System,'' and Subsection 2.3.13, ''Primary Sampling System'' of the UFSAR. These changes were necessary as part of a design modification which changes the type of valve used as the air return check valve from a check valve to a solenoid-operated valve (SOV); redesigns the PSS inside-containment header; and adds a PSS containment penetration.

Part of the justification for granting the exemption was provided by the review of the amendment. Because the exemption is necessary in order to issue the requested license amendment, the NRC granted the exemption and issued the amendment concurrently, rather than in sequence. This included issuing a combined safety evaluation containing the NRC staff's review of both the exemption request and the license amendment. The exemption met all applicable regulatory criteria set forth in 10 CFR 50.12, 10 CFR 52.7, and Section VIII.A.4. of Appendix D to 10 CFR Part 52. The license amendment was found to be acceptable as well. The combined safety evaluation is available in ADAMS under Accession No. ML13212A242.

Identical exemption documents (except for referenced unit numbers and license numbers) were issued to the licensee for VCSNS Units 2 and 3 (COLs NPF–93 and NPF–94). These documents can be found in ADAMS under Accession Nos. ML13212A226 and ML13212A228. The exemption is reproduced (with the exception of abbreviated titles and additional citations) in Section II of this document. The amendment documents for COLs NPF–93 and NPF–94 are available in ADAMS under Accession Nos. ML13212A208 and ML13212A211. A summary of the amendment documents is provided in Section III of this document.

II. Exemption

Reproduced below is the exemption document issued to VCSNS Units 2 and 3. It makes reference to the combined safety evaluation that provides the reasoning for the findings made by the NRC (and listed under Item 1) in order to grant the exemption:

1. In a letter dated February 7, 2013, and supplemented by a letter dated July 11, 2013, the licensee requested from the Commission an exemption from the provisions of 10 CFR Part 52, Appendix D, Section III.B, ''Design Certification Rule for the AP1000 Design, Scope, and Contents,'' as part of license amendment request 13–06, ''Changes to the Primary Sampling System.''

For the reasons set forth in Section 3.1, ''Evaluation of Exemption,'' of the NRC staff's Safety Evaluation, which can be found in ADAMS under Accession No. ML13212A242, the Commission finds that:

A. The exemption is authorized by law;

B. the exemption presents no undue risk to public health and safety;

C. the exemption is consistent with the common defense and security;

D. special circumstances are present in that the application of the rule in this circumstance is not necessary to serve the underlying purpose of the rule;

E. the special circumstances outweigh any decrease in safety that may result from the reduction in standardization caused by the exemption; and

F. the exemption will not result in a significant decrease in the level of safety otherwise provided by the design.

2. Accordingly, the licensee is granted an exemption to the provisions of 10 CFR Part 52, Appendix D, Section III.B, to allow deviations from the certified DCD Tier 1 Section 2.3.13, Tables 2.2.1–2, 2.3.13–1, and 2.3.13–3, and Figures 2.2.1–1 and 2.3.13–1, as described in the licensee's request dated February 7, 2013, and as supplemented on July 11, 2013. This exemption is related to, and necessary for the granting of License Amendment No. 8, which is being issued concurrently with this exemption.

3. As explained in Section 5.0, ''Environmental Consideration,'' of the NRC staff Safety Evaluation (ADAMS Accession No. ML13212A242), this exemption meets the eligibility criteria for categorical exclusion set forth in 10 CFR 51.22(c)(9). Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment needs to be prepared in connection with the issuance of the exemption.

4. This exemption is effective as of August 22, 2013.

III. License Amendment Request

By letter dated February 7, 2013, the licensee requested that the NRC amend the COLs for VCSNS Units 2 and 3, COLs NPF–93 and NPF–94. The licensee supplemented this application on July 11, 2013. The proposed amendment would depart from Tier 2 Material previously incorporated into the UFSAR. Additionally, these Tier 2 changes involve changes to Tier 1 Information in the UFSAR, and the proposed amendment would also revise the associated material that has been included in Appendix C of each of the VCSNS, Units 2 and 3 COLs. The requested amendment will revise the Tier 2 UFSAR information pertaining to the PSS air return valve, and various Tier 2 tables and sections regarding the PSS design. These Tier 2 changes require modifications to particular Tier 1 information located in Tables 2.2.1–2, 2.3.13–1, and 2.3.13–3, Figures 2.2.1–1 ''Containment System'' and 2.3.13–1 ''Primary Sampling System,'' and Subsection 2.3.13, ''Primary Sampling System'' of the UFSAR, as well as the corresponding information in Appendix C. These changes were necessary as part of a design modification which changes

the type of valve used as the air return check valve from a check valve to a SOV; redesigns the PSS inside-containment header; and adds a PSS containment penetration.

The Commission has determined for these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

A notice of consideration of issuance of amendment to facility operating license or combined license, as applicable, proposed no significant hazards consideration determination, and opportunity for a hearing in connection with these actions, was published in the **Federal Register** on March 4, 2013 (78 FR 14126). No comments were received during the 60-day comment period.

The Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments.

IV. Conclusion

Using the reasons set forth in the combined safety evaluation, the staff granted the exemption and issued the amendment that the licensee requested on February 7, 2013, and supplemented by letter dated July 11, 2013. The exemption and amendment were issued on August 22, 2013 as part of a combined package to the licensee. (ADAMS Accession No. ML13212A108).

Dated at Rockville, Maryland, this 7th day of October 2013.

For the Nuclear Regulatory Commission.

Denise McGovern,

Senior Project Manager, Licensing Branch 4, Division of New Reactor Licensing, Office of New Reactors.

[FR Doc. 2013–24886 Filed 10–23–13; 8:45 am]

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NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–277 and 50–278; NRC–2013–0232]

Exelon Generation Company, LLC; Peach Bottom Atomic Power Station, Units 2 and 3; Proposed License Amendment To Increase the Maximum Reactor Power Level

AGENCY: Nuclear Regulatory Commission.

ACTION: Draft environmental assessment and draft finding of no significant Impact; opportunity to comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of amendments to Renewed Facility Operating License Nos. DPR–44 and DPR–56, issued to Exelon Generation Company, LLC (Exelon, the licensee), for operation of the Peach Bottom Atomic Power Station (PBAPS), Units 2 and 3, located in York and Lancaster Counties, Pennsylvania. The proposed amendments would authorize an increase in the maximum reactor power level from 3514 megawatts thermal (MWt) to 3951 MWt.

DATES: Comments must be filed by November 25, 2013. Any potential party as defined in Section 2.4 of Title 10 of the *Code of Federal Regulations* (10 CFR), who believe access to Sensitive Unclassified Non-Safeguards Information (SUNSI) is necessary to respond to this notice must request document access by November 4, 2013.

ADDRESSES: You may submit comment 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–2013–0232. Address questions about NRC dockets to Carol Gallagher; telephone: 301–287–3422; email: *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, 06–44M, 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: Richard B. Ennis, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555; telephone: 301–415–1420; email: *Rick.Ennis@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Accessing Information and Submitting Comments

A. Accessing Information

Please refer to Docket ID NRC–2013–0232 when contacting the NRC about the availability of information regarding this document. You may access publicly-available information related to this action by the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2013–0232.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly-available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*ADAMS Public Documents*'' and then select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced in this notice (if that document is available in ADAMS) is provided the first time that a document is referenced. The application for amendment is dated September 28, 2012, and is supplemented by letters dated February 15, 2013, May 7, 2013, May 24, 2013, June 4, 2013, June 27, 2013, July 30, 2013, July 31, 2013, August 5, 2013, August 22, 2013, August 29, 2013, and September 13, 2013 (ADAMS Accession Nos. ML122860201, ML13051A032, ML13129A143, ML13149A145, ML13156A368, ML13182A025, ML13211A457, ML13213A285, ML13217A431, ML13240A002, ML13241A418, and ML13260A076, respectively). The application and some of the supplements contain SUNSI (proprietary information) and, accordingly, the proprietary information has been withheld from public disclosure. Redacted versions of the documents containing proprietary information have been made publicly available and can be accessed via the applicable ADAMS accession numbers listed above.
- *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–2013–0232 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 posts all comment submissions at *http://www.regulations.gov* as well as entering 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. Introduction

The NRC has prepared this draft Environmental Assessment (EA), in accordance with 10 CFR 51.21, and this draft Finding of No Significant Impact (FONSI), in accordance with 10 CFR 51.33, for the proposed license amendments. The draft EA and draft FONSI are being published in the **Federal Register** with a 30-day public comment period ending November 25, 2013. Publishing these documents as draft for comment, with a 30-day comment period, is in accordance with the NRC guidance for this type of license amendment, RS–001, ''Review Standard for Extended Power Uprates,'' dated December 2003 (ADAMS Accession No. ML033640024).

III. Draft Environmental Assessment

Plant Site and Environs

PBAPS consists of Units 1, 2, and 3 located on approximately 620 acres of land in Peach Bottom Township, York County, Pennsylvania on the west bank of the Susquehanna River. The site is approximately 38 miles north of Baltimore, Maryland; 19 miles southwest of Lancaster, Pennsylvania; and 30 miles southeast of York, Pennsylvania. The area within 6 miles of the site includes parts of York and Lancaster Counties in Pennsylvania and parts of Harford and Cecil Counties in Maryland. The property around the site is predominantly rural, characterized by farmland and woods.

Units 2 and 3 are General Electric Type 4, Mark I boiling-water reactors. In addition to Units 2 and 3, the site contains turbine buildings, intake and discharge canals, auxiliary buildings, switchyards, an interim spent fuel storage installation, a training center, a public boat ramp, a picnic area, and the retired Unit 1 reactor. Unit 1 is located adjacent to Units 2 and 3. It was a prototype, high-temperature, gas-cooled reactor which operated from 1966 to 1974. Unit 1 is permanently shut down, defueled, and is maintained in a safe storage, surveillance, security, and maintenance condition. It is not part of this application and will be decommissioned in the future.

Units 2 and 3 at PBAPS have a common once-through heat dissipation system that draws water from and discharges to the Conowingo Pond. The Conowingo Pond is a reservoir on the Susquehanna River formed by the Conowingo Dam (located approximately 8.5 miles downstream of the PBAPS site) and the Holtwood Dam (located approximately 6 miles upstream of the PBAPS site). The Conowingo and Holtwood Dams each provide hydroelectric generation.

The Conowingo Pond has a surface area of approximately 9,000 acres with 35 miles of shoreline. It has a width that varies from 0.5 to 1.3 miles and a maximum depth of 98 feet (ft). In addition to providing cooling water for PBAPS, Conowingo Pond is used as a fish and wildlife resource, for recreation, and as a source of public water.

Units 2 and 3 use six circulating water pumps (three per unit), each rated at 250,000 gallons per minute (gpm), which draw water from Conowingo Pond at a rate of 1.5 million gpm when all six pumps are running. Water drawn from Conowingo Pond passes through a series of intake structures before it is circulated through two main condensers. From these condensers, water passes through a series of discharge structures and then flows to Conowingo Pond where the heat is dissipated to the environment. Exelon also maintains three mechanical draft helper cooling towers that have the capacity to handle approximately 60 percent of the cooling water circulating through Units 2 and 3. Water drawn from Conowingo Pond flows into a 487 ft long outer intake structure along the west bank of Conowingo Pond. Trash racks protect 32 outer intake openings and prevent large floating debris and ice floes from reaching 24 traveling screens. This cooling water intake structure is designed to reduce impingement by preventing fish and small debris from entering the system. The intake structure allows fish to avoid the screens by having a low approach velocity. The screens are made of 3/8-inch square mesh and are placed approximately 40 ft behind the outer trash racks in the outer intake structure. From the outer intake structure, water enters two, 700 ft-long and 200 ft-wide, intake basins. The cooling water for the condensers is drawn from these two intake basins.

Cooling water discharges from the condensers into a 700 ft-long and 400 ft-wide discharge basin where the heated cooling water then flows through a 4700 ft-long discharge canal. Three adjustable discharge gates at the end of the discharge canal control the flow to Conowingo Pond and maintain a discharge velocity between 5 and 8 ft/second.

Identification of the Proposed Action

The proposed action is the issuance of amendments to the licenses PBAPS, Units 2 and 3, which would increase the maximum licensed thermal power level, for each reactor, from 3,514 MWt to 3,951 MWt. This change, referred to as an extended power uprate (EPU), represents an increase of approximately 12.4 percent above the current licensed thermal power level. This change is considered an EPU by the NRC because it exceeds the typical 7 percent power increase that can be accommodated with only minor plant changes. An EPU usually requires significant modifications to major plant equipment. The proposed EPU for PBAPS, Units 2 and 3, will require significant modifications as discussed in Attachment 9 to the licensee's application dated September 28, 2012 (ADAMS Accession No. ML12286A011).

If approved, these amendments would allow the heat output of each reactor to increase, which would increase the flow of steam to the turbines. This would increase the production of electricity, increase the amount of waste heat delivered to the condensers, and slightly raise the temperature of the water discharged into Conowingo Pond.

Plant modifications to implement the EPU are expected to occur during normal refueling outages that occur for each reactor once every 24 months and typically last for 30 to 40 days. If the EPU is approved, Unit 2 and 3 are expected to begin operating at the EPU core power level of 3,951 MWt in 2014 and 2015, respectively.

The Need for the Proposed Action

The current licenses for PBAPS, Units 2 and 3, contain a maximum authorized thermal power level for each reactor. The licensee desires to increase this power level in order to increase the electrical output of the plant without the need to site and construct new facilities. To allow this to occur, the NRC must amend the licenses for each unit to authorize the proposed new maximum thermal power level.

Environmental Impacts of the Proposed Action

At the time of issuance of the operating license for PBAPS, Units 2 and 3, the NRC staff noted that any activity authorized by the license would be encompassed by the overall action evaluated in the Final Environmental Impact Statement (FEIS) for the operation of the PBAPS reactors. This FEIS was issued in 1973, by the U.S. Atomic Energy Commission (predecessor agency to the NRC). The NRC revisited and updated the FEIS in January 2003, when the NRC published Supplement 10 to NUREG–1437, ''Generic Environmental Impact Statement for the License Renewal of Nuclear Power Plants,'' that addressed the license renewal of PBAPS, Units 2 and 3 (ADAMS Accession No. ML030270059).

The radiological and non-radiological impacts on the environment that may result from the proposed EPU are summarized below.

Non-Radiological Impacts

Land Use and Aesthetic Impacts

Potential land use and aesthetic impacts for the proposed action include impacts from construction and plant modifications. All plant modifications will be implemented within existing buildings. No new construction will occur outside of existing plant areas, and no expansion of buildings, roads, parking lots, equipment lay-down areas, or storage areas will be required to support the proposed EPU. Exelon will use existing parking lots, road access, equipment lay-down areas, offices, workshops, warehouses, and restrooms during plant modifications. Therefore, land use conditions and visual aesthetics would not change significantly at PBAPS from EPU plant modifications. The EPU plant modifications are discussed in Attachment 9 to the licensee's application dated September 28, 2012 (ADAMS Accession No. ML12286A011).

The plant cooling towers are not ''routinely used'' (see ''Aquatic Resource Impacts'') and are not planned to be ''routinely used'' during and after implementation of the EPU. Therefore, consistent with the discussion in NUREG–1437, Supplement 10, Section 2.2.8.4, ''Visual Aesthetics and Noise,'' there should not be any significant impacts from the EPU, such as icing, fogging, plume, or noise impacts from the operation of cooling towers. No significant impacts should occur to land use and aesthetic resources in the vicinity of PBAPS from EPU plant modifications.

Non-Radioactive Waste Impacts

As described in NUREG–1437, Supplement 10, Section 2.1.5, ''Nonradioactive Waste Systems,'' the principal non-radioactive effluents from PBAPS, Units 2 and 3, consists of hazardous (chemical) wastes, lubrication oil wastes, and sanitary wastes. The PBAPS site is a small quantity hazardous material generator. Lubrication oils are normally injected into the auxiliary boiler fuel feed with a small quantity sent offsite for disposal. Spent batteries and discarded fluorescent lights are recycled. Sanitary waste is sent to the onsite sewage treatment plant. Implementation of the EPU will likely result in a short-term temporary increase in construction related solid waste and sanitary waste. The proposed EPU is not expected to cause a significant impact from the generation of nonradioactive waste.

Air Quality Impacts

Major air pollution emission sources at the PBAPS site are regulated by the Pennsylvania Department of Environmental Protection (PADEP). Nonradioactive emission sources at PBAPS result primarily from diesel generators that are routinely tested and used when needed to supply backup power. The other major source is from boilers used for space heating and to help with unit startups. Emissions from these sources are regulated by Pennsylvania's Permit Operating Program under Title V State permit number 67–05020. There will be no changes to the emissions from these sources as a result of the EPU. However, some minor and short duration air quality impacts would occur during implementation of the EPU. The main source of air emissions would come from the vehicles driven by outage workers needed to implement the EPU. This source will be short-term and temporary. Therefore, the proposed EPU is not expected to cause a significant impact on air quality.

Water Use Impacts

The facility is authorized by the Susquehanna River Basin Commission to draw up to 2,363.62 million gallons/day of water from Conowingo Pond and to consume up to 49 million gallons/day. Consumptive water use at PBAPS consists of two key components: Evaporation and drift in the helper cooling towers when the towers are in operation; and in-stream evaporation from Conowingo Pond due to the additional thermal loading from the plant. The PADEP National Pollutant Discharge Elimination System (NPDES) permit issued to PBAPS (PA 0009733) requires that cooling towers must be available to prevent unwanted discharges of high-temperature water. If the three helper cooling towers are operated, water would be lost by evaporation at an approximate rate 5.5 to 22 ft^3/sec. This evaporative loss represents less than 2 percent of the minimum monthly average river flow. Once the EPU has been implemented, water consumption for plant cooling will not significantly change from pre-EPU operation.

The PBAPS site also uses Conowingo Pond as a source of potable water for the PBAPS site. During the planned outages and modifications, the consumption of potable water will increase to support the temporary workforce. After the EPU has been implemented, there should not be any significant increase in the consumption of potable water. Since groundwater is not used as a source of water, there should not be any consumptive use of groundwater as a result of the EPU.

The proposed EPU would not significantly increase water consumption. Therefore, the proposed EPU is not expected to cause a significant impact on water use.

Water Quality Impacts

Since plant modifications will take place inside of existing buildings, construction activities should not result in groundwater or surface water pollution. The intake of water from Conowingo Pond for cooling will not increase as a result of the proposed EPU. Therefore, the discharge rates to Conowingo Pond should not increase. In turn, there should not be any changes to Conowingo Pond from increased turbidity, scouring, erosion, or sedimentation as a result of cooling water discharge. All plant wastewaters are managed in accordance with the NPDES permit issued by the PADEP. Plant wastewaters include discharges from the water treatment wastewater settling basin, auxiliary boiler

blowdown, dredging/rehandling basin, and sewage treatment plant. The volume of discharge from the sewage treatment plant may temporarily increase during construction, but will remain within permitted levels. Implementation of the proposed EPU will not alter the quality or quantity of plant waste water discharges. The proposed EPU would not increase the impacts to Conowingo Pond water quality. Therefore, the proposed EPU is not expected to cause a significant impact to water quality.

Aquatic Resource Impacts

The potential impacts to aquatic resources from the proposed action could include impingement of aquatic life on barrier nets, trash racks, and traveling screens; entrainment of aquatic life through the cooling water intake structures and into the cooling water systems; and effects from the discharge of chemicals and heated water. However, the proposed EPU would not affect aquatic resources in a manner or to a degree that exceeds the analysis of effects in NUREG–1437, Supplement 10.

The NRC staff concluded in NUREG–1437, Supplement 10, Section 4.1.3, ''Impingement of Fish and Shellfish,'' that, during the continued operation of PBAPS, the potential impacts caused by the impingement of fish and shellfish on the debris screens of the cooling water intake system would be small (i.e., not detectable or so minor that they will neither destabilize nor noticeably alter any important attribute of the resource) and that impingement losses would not be great enough to adversely affect Susquehanna River aquatic populations. The NRC staff also concluded in NUREG–1437, Supplement 10, Section 4.1.3, that, in the early life stages in the cooling water system, the potential impacts of entrainment of fish and shellfish would be small, and that there are no demonstrated, significant effects to the aquatic environment related to entrainment. Regarding the potential impacts of thermal discharges, in NUREG–1437, Supplement 10, Section 4.1.4, ''Heat Shock,'' the NRC staff concluded that the impacts are small and that the heated water discharged to Conowingo Pond does not change the temperature enough to adversely impact balanced, indigenous populations of fish and wildlife. Additionally, the NRC has generically determined that the effects from discharge of chlorine or other biocides, as well as accumulation of contaminants in sediments or biota, would be small for continued operations during a renewed license period at all plants as discussed in Section 4.5.1.1, ''Surface Water Resources, Discharge of Biocides, Sanitary Wastes, and Minor Chemical Spills,'' of the ''Generic Environmental Impact Statement for License Renewal of Nuclear Plants,'' NUREG–1437, Volume 1, Revision 1, dated June 2013 (ADAMS Accession No. ML13106A241).

The proposed EPU would not increase the volume or rate of water that is drawn from Conowingo Pond, and water withdrawals and consumptive use would continue to be regulated by the Susquehanna River Basin Commission with no changes to the current withdrawal authorizations. PBAPS's cooling water intake structure (described previously under ''Plant Site and Environs'') is designed to reduce impingement and entrainment of aquatic organisms, and the proposed EPU would not require any modifications to the current cooling system design. Thus, NRC staff concludes that compared to current operations, the proposed EPU would not change the impingement or entrainment rate of fish, shellfish, or other aquatic organisms.

Chemical effluents discharged from PBAPS would not change in type or quantity under EPU conditions, and effluent discharges to Conowingo Pond will continue to be regulated by PADEP under the site's NPDES permit. Thus, NRC staff concludes that compared to current operations, the proposed EPU would not change the type or concentration of chemical effluents that could impact aquatic resources.

The proposed EPU would increase the temperature of discharged water. Under current operating conditions, cooling water passing through the condensers can increase by as much as 22 °F. Under the proposed EPU conditions, Exelon estimates that cooling water temperatures would increase by approximately 3 °F, which would result in an increase of up to 25 °F as water passes through the condensers. The NPDES permit for PBAPS limits the instantaneous maximum effluent temperature in the discharge canal (Outfall 001) to 110 °F. Heated effluent water released into the discharge canal travels 4,700 ft south to a spillway, at which point it enters Conowingo Pond. A thermal study at PBAPS, conducted from June through October of 1999 under zero cooling tower operation conditions, reported the daily average water temperatures at the discharge canal outfall ranged from 66.7 °F to 106.5 °F.

Prior to the current NPDES permit (effective January 1, 2011), helper cooling towers at PBAPS were used only during extreme low flow and high temperature conditions in Conowingo Pond. The current NPDES permit requires PBAPS to operate one to three of its cooling towers from June 15 to September 15 as part of the permit's thermal and biological sampling requirements. Exelon began the required sampling in 2010 and will continue the sampling through 2013. The study will, among other things, evaluate the changes in the thermal plume during helper cooling tower operation and create a model of these changes that takes into account proposed EPU conditions and other environmental influences to Conowingo Pond.

In NUREG–1437, Supplement 10, Section 4.1.4, ''Heat Shock,'' the NRC staff concluded that for the continued operation of Units 2 and 3, the impacts from thermal effluents would be small. However, this conclusion was made assuming station conditions under the previous NPDES permit. As discussed on page 4 of Attachment 1 to the licensee's letter dated February 17, 2011, which transmitted the current NPDES permit and an evaluation of the modifications to the permit to the NRC (ADAMS Accession No. ML110490533), the previous permit did not require an instantaneous maximum effluent temperature action level. However, the current technical specifications in the NRC operating licenses for PBAPS, Units 2 and 3, require that plants be shut down when the instantaneous intake temperature exceeds 92 °F. As discussed in Attachment 1 to the licensee's letter, in this circumstance, and based on the condenser maximum temperature rise of 21.66 °F, the discharge canal should not exceed a maximum of 113.66 °F. Thus, the current NPDES permit, which stipulates an instantaneous maximum effluent temperature action level of 110 °F, is inherently more protective of the environment. The previous NPDES permit did not require the operation of helper cooling towers. Use of helper cooling towers in the summer months has likely reduced this already small impact. Once completed, the thermal and biological studies will determine to what degree the helper cooling towers mitigate effluent temperatures and the character of the thermal plume. After the study is completed and based on the study results, Exelon will submit to PADEP an application to modify the NPDES permit. These modifications may include actions to manage the thermal discharge under EPU conditions. For any such future modifications, the PADEP must, in accordance with Section 316(a) of the Clean Water Act, ensure thermal effluent limitations assure the protection and propagation of a

balanced, indigenous community of shellfish, fish, and wildlife in and on Conowingo Pond.

In NUREG–1437, Supplement 10, Section 4.1.5, ''Microbiological Organisms (Public Health),'' the NRC staff concluded that the potential effects of microbiological organisms on human health from the operation of the plant's cooling water discharge to the aquatic environment on or in the vicinity of the site are small. As discussed in NUREG–1437, Supplement 10, Section 4.1.5, discharge temperatures from Units 2 and 3 do not exceed 110 °F in late summer. This is below the temperatures known to be conducive to growth and survival of thermophilic pathogens. The ongoing disinfection of the sewage effluent from PBAPS reduces the likelihood that a seed source or inoculants would be introduced to the station's heated discharge or to Conowingo Pond. As previously discussed, the current NPDES permit will continue to assure that there will not be any significant impacts on human health from microbiological organisms.

The current NPDES permit includes thermal limitations and operating conditions that are more protective than the previous NPDES permit (considered in Section 4.1.4. ''Heat Shock,'' of NUREG–1437, Supplement 10). The PADEP will continue to regulate and enforce PBAPS thermal discharges in a manner that will assure the protection and propagation of a balanced, indigenous community of shellfish, fish, and wildlife in and on Conowingo Pond. Therefore, the increase in thermal effluent under proposed EPU conditions would not result in a significant impact to aquatic resources.

Terrestrial Resource Impacts

During EPU-related upgrades and plant modifications, impacts that could potentially affect terrestrial resources could come from noise, lighting, and other disturbances to wildlife. However, noise and lighting would not impact terrestrial species beyond what would be experienced during normal operations. This is because EPU-related upgrades and plant modifications would take place during normally planned outage periods, which are already periods of heightened activity. Habitat loss or fragmentation would not occur, because the proposed EPU would not involve any new construction outside of the existing facility footprint (discussed previously under ''Land Use and Aesthetic Impacts'') and would not require transmission system upgrades or modifications. No changes in transmission line maintenance and vegetation removal are anticipated. The EPU will increase electric current flowing through the transmission system. This will increase the strength of the electromagnetic field around the transmission lines. However, as discussed on pages 4–21 and 4–24 of Supplement 10 NUREG–1437, the NRC has determined that a scientific consensus has not been reached on the chronic effects of the electromagnetic field on humans, and that significant impacts to the terrestrial biota have not been identified. Sediment transport and erosion is not a concern because EPU-related activities would only take place on previously developed land. Therefore, the proposed EPU is not expected to cause a significant impact on terrestrial resources.

Threatened and Endangered Species Impacts

Under Section 7 of the Endangered Species Act of 1973, as amended (ESA), Federal agencies, in consultation with the U.S. Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (as appropriate), must ensure that actions the agency authorizes, funds, or carries out are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat.

The NRC staff has identified two federally listed species that occur in York County, Pennsylvania: The bog turtle (*Glyptemys muhlenbergii*) and the Indiana bat (*Myotis sodalis*), which are discussed below. The NRC staff also considered the possibility of the shortnose (*Acipenser brevirostrum*) and Atlantic (*Acipenser oxyrinchus oxyrinchus*) sturgeons to occur above Conowingo Dam in Conowingo Pond because, historically, sturgeon likely inhabited the Susquehanna River upstream of the location of the Conowingo Dam prior to its construction. Currently, sturgeons are known to occur in the lower Susquehanna River and the Maryland Department of Natural Resources has noted the occurrence of sturgeon at Conowingo Dam. However, given the size of the dam and the fact that shortnose and Atlantic sturgeon typically do not use fish lifts that were designed for other species (Conowingo Dam's fish lift was designed for the passage of American shad (*Alosa sapidissima*)), the NRC reasonably concludes that neither the shortnose nor Atlantic sturgeon occur in Conowingo Pond.

The FWS listed the northern population of the bog turtle as threatened under the ESA in 1997 (62 FR 59605). The FWS has not designated critical habitat for this species. Bog turtles inhabit early to mid-successional wetlands fed by groundwater or associated with the headwaters of streams and dominated by emergent vegetation. Pennsylvania counties identified by the FWS as containing extant bog turtle populations occur in the southeastern part of the state, and many occur within the Delaware River and Susquehanna River watersheds. In 2000, Exelon commissioned bog turtle habitat (Phase 1) surveys in the vicinity of PBAPS, but no areas of suitable habitat were identified during the surveys. The potential for adverse effects at the PBAPS site and along transmission line corridors to bog turtles was evaluated in Section 2.2.6, ''Terrestrial Resources,'' of NUREG–1437, Supplement 10. The NRC staff concluded in Section 4.6.2, ''Terrestrial Species,'' that continued operations during the license renewal term would have no effect on bog turtles due to the lack of suitable habitat. The NRC staff requested the FWS's concurrence with this determination in a letter, dated January 17, 2002 (ADAMS Accession No. ML020180445). The FWS concurred with this determination in a letter, dated April 17, 2002 (ADAMS Accession No. ML021510200). The PBAPS site continues to lack suitable habitat for bog turtles, and the proposed EPU would not involve any habitat loss or fragmentation or any other significant impacts to the terrestrial environment. Therefore, the proposed EPU would have no effect on the bog turtle.

The FWS listed the Indiana bat as endangered wherever found in 1967 under the ESA's predecessor, the Endangered Species Preservation Act of 1966 (32 FR 4001). The FWS has not designated critical habitat for the species in Pennsylvania (41 FR 41914). Areas of the PBAPS site that could serve as potential Indiana bat habitat include forested areas, forest edges, and riparian areas. The Pennsylvania Game Commission (PGC) reports that Indiana bats use habitat within York County during the summer. However, no hibernation or maternity sites occur in the county. The Supplemental Environmental Impact Statement did not consider the effects of continued operation of PBAPS during the license renewal term on Indiana bats. The proposed EPU would not disturb or alter any natural habitats on the PBAPS site or along any transmission line corridors, and other impacts such as noise and lighting during EPU-related upgrades. Furthermore, plant modifications would not result in a significant impact on the

terrestrial environment. Therefore, the proposed EPU would have no effect on the Indiana bat.

The NRC did not identify any designated critical habitat that could be affected by the proposed EPU, nor has the FWS proposed the listing or designation of any new species or critical habitat that could be affected by the proposed EPU. Therefore, the proposed EPU would have no effect on designated critical habitat, proposed species, or proposed critical habitat.

Essential Fish Habitat

Section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) includes requirements for Federal agencies to consider the impact of Federal actions on essential fish habitat (EFH) and to consult with the National Marine Fisheries Service (NMFS) if any activities may adversely affect EFH. According to the EFH Mapper and the NMFS's ''Guide to Essential Fish Habitat Designations in the Northeastern United States,'' NMFS has not designated any EFH under the MSA within the affected water bodies. Thus, the proposed EPU would have no effect on designated essential fish habitat.

Species Protected by the Commonwealth of Pennsylvania

Within the Commonwealth of Pennsylvania, the PGC, the Pennsylvania Fish and Boat Commission (PFBC), and the Pennsylvania Department of Conservation and Natural Resources (PDCNR) oversee the protection of Commonwealth-listed species under the Pennsylvania Endangered Species Program. The PGC, PFBC, and PDCNR manage the recovery efforts for wild birds and mammals (34 Pa. Code 133); fish, amphibians, reptiles, and aquatic organisms (30 Pa. Code 75); and native plants (17 Pa. Code 45), respectively.

As part of preparing its EPU application, Exelon performed a Pennsylvania Natural Diversity Inventory (PNDI) Environmental Review through the Pennsylvania Natural Heritage Program's Web site. The survey results indicated no known impacts to species of concern within the oversight of the PGC and FWS. No further review by these two agencies was required. Exelon also directly contacted some of the Pennsylvania agencies listed above to determine potential impacts to Commonwealth-listed species that could result from the proposed EPU. Exelon's PNDI Environmental Review indicated that there would be no impact to species under the PDCNR's jurisdiction and that no further project review from this agency was required. The PNDI Environmental Review indicated three terrestrial plant species under the PDCNR's purview could occur in the vicinity of PBAPS: The lobed spleenwort (*Asplenia pinnatifidum*), the harbinger-of-spring (*Erigenia bulbosa*), and the American holly (*Ilex opaca*). The PNDI Environmental Review also included recommended conservation measures from the PDCNR, which included practices that could avoid the introduction of invasive species. Exelon contacted the PDCNR directly via a letter dated January 23, 2012, requesting that the PDCNR confirm Exelon's conclusion that the proposed EPU would not adversely affect any Commonwealth-listed threatened or endangered species. In their response, dated February 21, 2012, the PDCNR indicated that the proposed EPU would not result in impacts to species under its jurisdiction. For species under the PFBC's purview, the PNDI Environmental Review indicated that further review was required to determine potential impacts. Exelon contacted the PFBC in a letter, dated January 23, 2012. Subsequently, the PFBC indicated in a letter, dated February 24, 2012, that no adverse impacts are expected to species under its jurisdiction from the proposed EPU. Each of the letters referenced in this paragraph are included in Exelon's supplemental environmental report, which was submitted as Attachment 8 to the EPU application.

The NRC staff reviewed the information discussed above in Exelon's EPU application concerning Commonwealth-listed species. The appropriate Pennsylvania agencies have confirmed the proposed EPU would not affect any species under their purview and NRC staff has not identified any impacts to the terrestrial or aquatic environment beyond those previously considered by each Pennsylvania agency in their reviews. Therefore, the proposed EPU would have no significant impacts to Commonwealth-listed species.

Socioeconomics

Currently, approximately 900 permanent workers and 200 contract workers are employed at PBAPS. Exelon EPU-related plant modifications would occur during normally scheduled refueling outages and are estimated to last between 30 to 40 days for each reactor. During normal refueling outages, approximately 800 temporary workers are added to the normal workforce of 1,100 permanent and contract workers. The first phase of EPU modifications is planned to be implemented during the 2014 outage. During that outage, approximately 1,300 additional temporary workers will be added to the normal outage workforce, with the total workforce at PBAPS peaking at approximately 3,200 workers over the modification period. Once EPU-related plant modifications have been completed, the size of workforce at PBAPS would return to normal levels. The PBAPS workforce will remain similar to pre-EPU levels, as will the temporary workforce needed for future refueling outages. The size of the workforce will be unaffected by implementation of the proposed EPU.

The NRC expects most outage and EPU plant modification workers to relocate temporarily to communities in Lancaster or York County, resulting in short-term increases in the local population along with increased demands for public services and housing. As modification work would be temporary, most workers would likely stay in rental homes, apartments, mobile homes, and camper-trailers. The 2011 American Community Survey 1-year estimate for vacant housing units reported 11,509 units in Lancaster County and 12,192 units in York County that could potentially ease the demand for local rental housing. Therefore, while a short duration temporary increase in plant employment would occur, this increase would have little or no noticeable effect on the availability of housing in the region.

The additional number of workers, truck material, and equipment deliveries needed to support EPU-related plant modifications would likely cause short-term level of service impacts (restricted traffic flow and higher incident rates) on secondary roads in the immediate vicinity of PBAPS. Increased traffic volumes would be necessary to support implementation of EPU-related modifications during the refueling outage. As EPU-related plant modifications would occur during a normal refueling outage, there could be noticeable short-term (during certain hours of the day), level-of-service traffic impacts beyond what is experienced during normal outages. During periods of high traffic volume (i.e., morning and afternoon shift changes), work schedules could be staggered and employees and/or local police officials could be used to direct traffic entering and leaving PBAPS to minimize level-of-service impacts.

PBAPS currently pays property taxes and payments in lieu of property taxes to York County, Peach Bottom Township, and the South Eastern School District. The amount of future

property taxes and payments in lieu of property taxes paid by PBAPS could be affected by the increased value of PBAPS as a result of the EPU and increased power generation. Due to the short duration of EPU-related plant modification activities, there would be little or no noticeable effect on local tax revenues generated by temporary workers residing in Lancaster and York counties.

Therefore, based on the information presented above, no significant socioeconomic impacts are expected from EPU-related plant modifications and operations under EPU conditions in the vicinity of PBAPS.

Environmental Justice Impacts

An environmental justice impact analysis evaluates the potential for disproportionately high and adverse human health and environmental effects on minority and low-income populations that could result from activities associated with the proposed EPU at PBAPS. Such effects may include biological, cultural, economic, or social impacts. Minority and low-income populations are subsets of the general public residing in the vicinity of PBAPS, and all are exposed to the same health and environmental effects generated from activities at PBPAS.

The NRC considered the demographic composition of the area within a 50-mile radius of PBAPS to determine whether minority populations may be affected by the proposed action. The NRC examined the distribution of minority populations within 50 miles of PBAPS using the U.S. Census Bureau (USCB) data for 2010.

According to the 2010 Census data, approximately 5 million people live within a 50-mile radius of PBPAS. Minority populations within 50 miles compose 35.6 percent (approximately 1.8 million persons) of the total population. The largest minority group was Black or African-American (approximately, 1.2 million persons or 23.1 percent), followed by Hispanic or Latino (of any race) (approximately 315,000 persons or 6.3 percent). According to 2011 American Community Survey 1-Year Estimates, minority populations within Lancaster County comprise 10.2 percent of the total population with the largest minority group being Hispanic or Latino (of any race) at 8.9 percent. Minority populations within York County comprise 12.2 percent of the total population with the largest minority group being Black or African-American at 6 percent.

According to 2011 American Community Survey 1-Year Estimates census data for Lancaster and York counties, approximately 10.9 percent of the population residing within Lancaster County and 11.0 percent of the population residing in York County were determined to be living below the 2011 federal poverty threshold. In addition, approximately 7.9 percent of families residing within Lancaster County and 8.2 percent of the families in York County were determined to be living below the Federal poverty threshold. The 2011 federal poverty threshold was $22,350 for a family of four and $10,890 for an individual. The median household income for Lancaster County was approximately $64,566 and for York County was approximately $66,053. Lancaster County median household income is 28.5 percent higher than the median household income (approximately $50,228) for Pennsylvania, while York County is 31 percent higher.

Potential impacts to minority and low-income populations would mostly consist of human health, environmental, and socioeconomic effects (e.g., noise, dust, traffic, employment, and housing impacts). Radiation doses from plant operations after the EPU are expected to continue to remain well below regulatory limits.

Noise and dust impacts would be temporary and limited to onsite activities. Minority and low-income populations residing along site access roads could experience increased commuter vehicle traffic during outage shift changes. Increased demand for inexpensive rental housing during the EPU-related plant modifications could disproportionately affect low-income populations; however, due to the availability of housing, impacts would be of short duration (approximately 30 to 40 days) and limited. Furthermore, according to the 2011 American Community Survey 1-year estimate, there were 11,509 vacant housing units in Lancaster County and 12,192 vacant housing units in York County available to help alleviate any short-term increased demand.

Based on this information and the analysis of human health and environmental impacts presented in this environmental assessment, the proposed EPU would not have disproportionately high and adverse human health and environmental effects on minority and low-income populations residing in the PBAPS vicinity.

Historic and Cultural Resources Impacts

There are no records of historic and cultural resources being found on PBAPS property. However, there is the potential to find historic and cultural resources at the PBAPS site as the majority of recorded archaeological sites in the region are found within the first terraces above the Susquehanna River. The likelihood of these resources being present at PBAPS has diminished as the terraces near PBAPS were flooded by the formation of Conowingo Pond. Nevertheless, there are nine historic properties listed on the National Register of Historic Places within 6 miles of PBAPS.

As previously discussed, all EPU-related plant modifications would take place within existing buildings and facilities at PBAPS, including replacing two electrical transformers on an existing pad. Since no ground disturbance or construction-related activities would occur outside of previously disturbed areas and existing electrical transmission facilities, there would be no significant impact from EPU-related plant modifications on historic and archaeological resources, should they be found on or in the vicinity of PBAPS.

Non-Radiological Cumulative Impacts

The NRC staff considered potential cumulative impacts on the environment resulting from the incremental impact of the proposed EPU when added to other past, present, and reasonably foreseeable future actions in the vicinity of PBAPS. For the purposes of this analysis, past actions are related to the construction and licensing of PBAPS, present actions are related to current operations, and future actions are those that are reasonably foreseeable through the end of station operations including operations under the EPU.

There will not be significant cumulative impacts to the resource areas of air quality, groundwater, threatened and endangered species, or historic and cultural resources in the vicinity of PBAPS, because the contributory effect of ongoing actions within a region are regulated and monitored through a permitting process under State or Federal authority (e.g. NPDES and 401/404 permits under the Clean Water Act). In these cases, impacts are managed as long as these actions are in compliance with their respective permits and conditions of certification.

Surface water and aquatic resources were examined for potential cumulative impacts. The geographic boundary for potential cumulative impacts is the area of the post-EPU thermal mixing zone in Conowingo Pond. If the proposed EPU is approved and is implemented, PBAPS is predicted to have a slightly larger and hotter mixing zone than pre-uprate conditions during full flow and capacity. The NRC staff anticipates that

PBAPS will continue to operate post-EPU in full compliance with the requirements of the PADEP. The PADEP would evaluate PBAPS compliance with its individual wastewater facility permit.

Land use, and aesthetics impacts from the EPU are not expected to contribute to cumulative impacts as there will be no construction of new transmission facilities on site, transmission maintenance and vegetation practices will not change, and all plant modifications will be implemented within existing buildings.

As discussed in the aquatic biology section, the abundance of aquatic organisms as a source of food for terrestrial organisms should not change. During the construction of the EPU, only minor temporary changes in air emissions from additional workers and construction equipment are expected. No changes to air emission from implementation of the EPU are expected. There will not be any increases to surface water or air that would increase the impact to terrestrial biota as a result of the EPU. Therefore, the NRC staff concludes that impacts to terrestrial biota are not expected to contribute to cumulative impacts to terrestrial resources as a result of the proposed action.

The greatest socioeconomic impacts from the proposed EPU and continued operation of PBAPS would occur during the 2014 outage. The increase in EPU-related construction workforces would have a temporary effect on socioeconomic conditions in local communities from the increased demand for temporary housing, public services (e.g., public schools), and increased traffic, but would not contribute to cumulative impacts. No significant cumulative impacts are expected as a result of the proposed EPU.

Non-Radiological Impacts Summary

As discussed above, the proposed EPU would not result in any significant non-radiological impacts. Table 1 summarizes the non-radiological environmental impacts of the proposed EPU at PBAPS.

TABLE 1—SUMMARY OF NON-RADIOLOGICAL ENVIRONMENTAL IMPACTS

Land Use and Aesthetic	The proposed EPU is not expected to cause a significant impact on land use conditions and aesthetic resources.
Non-Radioactive Waste	The proposed EPU is not expected to cause a significant impact from the generation of non-radioactive waste.
Air Quality	The proposed EPU is not expected to cause a significant impact on air quality.
Water Use	The proposed EPU is not expected to cause a significant impact on water use.
Water Quality	The proposed EPU is not expected to cause a significant impact on water quality.
Aquatic Resources	The proposed EPU is not expected to cause a significant impact on aquatic resources.
Terrestrial Resources	The proposed EPU is not expected to cause a significant impact on terrestrial resources.
Threatened and Endangered Species	The proposed EPU would have no effect on any species or habitats protected under the Endangered Species Act or on designated essential fish habitat protected under the Magnuson-Stevens Fishery Conservation and Management Act. Additionally, the proposed EPU would have no significant impacts on any Pennsylvania-listed species.
Socioeconomics	No significant socioeconomic impacts are expected as a result of the proposed EPU.
Environmental Justice	The proposed EPU is not expected to cause any disproportionately high and adverse human health and environmental effects on minority and low-income populations residing in the PBAPS vicinity.
Historic and Cultural Resources	The proposed EPU is not expected to cause any significant impact to historic and cultural resources.
Non-Radiological Cumulative	No significant non-radiological cumulative impacts are expected as a result of the proposed EPU.

Radiological Impacts

Radioactive Gaseous, Liquid Effluents and Solid Waste

Units 2 and 3 use waste treatment systems to collect, process, recycle, and dispose of gaseous, liquid, and solid wastes that contain radioactive material in a safe and controlled manner within NRC and Environmental Protection Agency (EPA) radiation safety standards. The licensee's evaluation of plant operation at the proposed EPU conditions shows that no physical changes would be needed to the radioactive gaseous, liquid, or solid waste systems.

Radioactive Gaseous Effluents

The gaseous waste management system manages radioactive gases generated during the nuclear fission process. Radioactive gaseous wastes are composed of activation gases and radioactive noble gases from the reactor coolant system, gases from the charcoal treatment system, and gases collected during venting of plant piping. The licensee's evaluation determined that implementation of the proposed EPU would not significantly increase the volume of gases processed in the gaseous waste management system, since plant system functions are not changing and the volume of gases from the plant systems are not expected to change. The analysis also showed the proposed increase in power level would increase the total amount of radioactivity in the gaseous waste management system. However, the licensee's evaluation concluded that the increased radioactivity would not require any changes to the gaseous waste management system. The system would continue to safely control and process the waste in accordance with plant procedures to maintain radioactive gaseous releases within the dose limits of 10 CFR 20.1301 and the as low as is reasonably achievable (ALARA) dose objectives in appendix I to 10 CFR part 50 and EPA's 40 CFR part 190.

Radioactive Liquid Effluents

The liquid waste management system collects, processes, and prepares radioactive liquid waste for disposal. Radioactive liquid wastes include liquids from plant systems containing reactor coolant and liquids that became contaminated from contact with plant systems containing radioactive liquids. The licensee's evaluation shows that the proposed EPU would not significantly increase the inventory of liquid normally processed by the liquid waste management system. This is because the system functions are not changing and the volume inputs remain approximately the same. The licensee's evaluation showed the proposed EPU would increase the total amount of radioactivity in the liquid waste

management system. However, since the composition of the radioactive material in the waste and the volume of radioactive material processed through the system are not expected to significantly change, the licensee's evaluation concluded that no changes are needed to the system's design or operation. The existing equipment and plant procedures will continue to control radioactive liquid releases to the environment within the NRC's dose limits in 10 CFR 20.1301 and ALARA dose standards in appendix I to 10 CFR part 50 and EPA's 40 CFR part 190.

Public Radiation Doses at EPU Conditions

The primary sources of offsite dose to members of the public from Units 2 and 3 are radioactive gaseous and liquid effluents. As discussed in the radioactive gaseous and liquid effluent sections above, operation at the proposed EPU conditions will not change the radioactive gaseous and liquid waste management systems' abilities to perform its intended functions to safely control and process the waste. There would be no change to the radiation monitoring system and procedures used to control the release of radioactive effluents in accordance with NRC radiation protection standards for the public in 10 CFR 20.1301 and appendix I to 10 CFR part 50 and EPA's 40 CFR part 190.

The licensee evaluated the projected dose to members of the public from radioactive effluents at the proposed EPU by using actual dose data reported for the period from 2005 through 2008 and recalculated the dose based on the proposed EPU. The following bullets summarize the projected maximum dose to a member of the public located outside the PBAPS site boundary from radioactive gaseous and liquid effluents from the proposed EPU:

- The maximum whole body dose to an offsite member of the public from the combined radioactive liquid effluents from Units 2 and 3 is 1.52×10^{-2} millirem (mrem)/year, which is well below the 6 mrem/year dose criterion in appendix I to 10 CFR art 50 for two reactor units.
- The maximum organ dose to an offsite member of the public from the combined radioactive liquid effluents from Units 2 and 3 is 1.98×10^{-2} mrem/year, which is well below the 20 mrem/year dose criterion in appendix I to 10 CFR part 50 for two reactor units.
- The maximum air dose at the site boundary from gamma radiation from the combined gaseous effluents from Units 2 and 3 is 7.27×10^{-1} millirad (mrad)/year, which is well below the 20 mrad/year dose criterion in appendix I to 10 CFR part 50 for two reactor Units.
- The maximum air dose at the site boundary from beta radiation in the combined gaseous effluents from Units 2 and 3 is 1.42×10^{-1} mrad/year, which is well below the 40 mrad/year dose criterion in appendix I to 10 CFR part 50 for two reactor units.
- The maximum organ (thyroid) dose to an offsite member of the public from radioactive iodine and radioactive material in particulate form from Units 2 and 3 is 5.12 mrem/year, which is well below the 30 mrem/year dose criterion in appendix I to 10 CFR part 50 for two reactor units.
- Based on the projected annual EPU doses from radioactive gaseous and liquid effluents from Units 2 and 3 being well within the dose criteria in appendix I to 10 CFR part 50 and the projected negligible direct shine dose contribution from components within the facilities, including the independent spent fuel storage installation, the total dose will be well within the 40 CFR 190 annual whole body dose standard of 25 mrem/year.

Based on the above, the projected radiation doses to members of the public from the proposed EPU are expected to be within Federal regulatory limits and therefore, would not be significant.

Occupational Radiation Doses at EPU Conditions

The licensee's evaluation determined that the radioactivity levels in plant systems are expected to increase with the proposed EPU. Permanent shielding to reduce radiation levels is used throughout the two reactor units to protect workers. The licensee's evaluation of the current shielding design determined that it is adequate to continue to protect the workers from the projected increased radiation levels. In addition to the permanent shielding, the licensee's radiation protection program, through the use of training, protective clothing and equipment, temporary shielding, monitoring radiation levels, and direct oversight by radiation protection personnel at individual job sites, will ensure that radiation exposures to workers will be ALARA, as required by 10 CFR 20.1101. Based on the above information, the NRC staff concludes that the proposed EPU is not expected to significantly affect radiation levels within the plant and would not be a significant radiological impact to the workers.

Radioactive Solid Wastes

Radioactive solid wastes include solids recovered from the reactor coolant systems, solids that come into contact with the radioactive liquids or gases, and solids used in the reactor coolant process system. The licensee evaluated the potential effects of the proposed EPU on the solid waste management system. The results of the evaluation indicate that the proposed EPU will increase the volume and activity of radioactive solid waste by approximately 14 percent. The largest volume of radioactive solid waste generated at Units 2 and 3 is low-level radioactive waste which includes used resins, filters, dry compressible waste, irradiated components, and waste oil and ash.

As stated by the licensee, the proposed EPU would not have a significant effect on the radioactive solid waste system. The proposed EPU would not generate a new type of waste or create a new waste stream. No changes are needed to the system to accommodate the projected additional volume and activity. The equipment used to process the solid waste is designed and operated to ensure that hazards to the workers and the environment are minimized. Waste processing areas are monitored for radiation as part of the radiation protection program to ensure that radiation exposure to workers is maintained within NRC dose limits in 10 CFR 20.1201.

Based on the above, the licensee is expected to continue to safely control and process radioactive solid waste from the proposed EPU in accordance with NRC requirements. Therefore, the impacts from solid waste would not be significant.

Spent Nuclear Fuel

Spent fuel from Units 2 and 3 is stored in the plant's spent fuel pool and in dry casks in the independent spent fuel storage installation (ISFSI). Spent fuel generated after implementation of the proposed EPU will also be stored in the spent fuel pool and the ISFSI. Units 2 and 3 are licensed to use uranium-dioxide fuel up to a maximum enrichment of 5 percent by weight uranium-235. The typical average enrichment is approximately 4.2 percent by weight of uranium-235. The average fuel assembly discharge burnup for the proposed EPU is expected to be approximately 51,000 megawatt days per metric ton uranium (MWd/MTU) with no fuel pins exceeding the maximum fuel rod burnup limit of 62,000 MWd/MTU. The licensee will maintain these fuel characteristics during the proposed EPU. There will be no change to the fuel design or the current 24-month refueling cycle. The

fuel characteristics for enrichment and burnup presented above, will ensure that environmental impacts associated with the spent fuel will remain within the impact values contained in: (1) 10 CFR 51.51, Table S–3, ''Table of Uranium Fuel Cycle Environmental Data''; (2) 10 CFR 51.52, Table S–4, ''Environmental Impact of Transportation of Fuel and Waste to and from One Light-Water-Cooled Nuclear Power Reactor''; as supplemented by (3) NUREG–1437, Volume 1, Addendum 1, ''Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Main Report, Section 6.3—Transportation, Table 9.1, Summary of findings on NEPA [National Environmental Policy Act] issues for license renewal of nuclear power plants'' (ADAMS Accession No. ML040690720).

Therefore, there would be no significant impacts resulting from spent nuclear fuel.

Design-Basis Accidents

Design-basis accidents (DBAs) are evaluated by both the licensee and the NRC staff to ensure that Units 2 and 3 can withstand a spectrum of postulated accidents without undue hazard to the health and safety of the public.

Separate from the NRC staff's environmental assessment in this document, the NRC staff is evaluating the licensee's DBA analyses of the potential radiological consequences that may result from the proposed EPU. The results of the NRC staff's safety evaluation and conclusion will be documented in a Safety Evaluation (SE) that will be made publically available. If the NRC staff concludes in the SE that the radiological consequences of DBAs at the proposed EPU power levels are within NRC requirements, then the proposed EPU will not have a significant impact with respect to the radiological consequences of DBAs.

Radiological Cumulative Impacts

The radiological dose limits for protection of the public and plant workers have been developed by the NRC and EPA to address the cumulative impact of acute and long-term exposure to radiation and radioactive material. These dose limits are codified in 10 CFR part 20 and 40 CFR part 190.

The cumulative radiation doses are required to be within the limits set forth in the regulations cited above. The public dose limit of 25 mrem/year in 40 CFR part 190 applies to all reactors that may be on a site and also includes any other nearby nuclear facilities. Currently, there are no other operating nuclear power reactors located near Units 2 and 3. As discussed in the public radiation dose section, the NRC staff reviewed the licensee's projected post-EPU radiation dose data and concluded that the projected dose to members of the public would be well within the limits of 10 CFR part 20 and 40 CFR part 190. The NRC staff expects continued compliance with NRC's and EPA's public dose limits during operation at the proposed EPU power level. Therefore, the NRC staff concludes that there would not be a significant cumulative radiological impact to members of the public from radioactive effluents from Units 2 and 3 at the proposed EPU operation.

As previously discussed, the licensee has a radiation protection program that maintains worker doses within the dose limits in 10 CFR 20.1201. The NRC staff expects continued compliance with NRC's occupational dose limits during operation at the proposed EPU power level.

Radiological Impacts Summary

Based on the radiological evaluations discussed above, with the exception of the impacts associated with DBAs which the NRC staff is evaluating separately from this EA, the proposed EPU would not result in any significant radiological impacts. If the NRC staff concludes in its SE that the DBAs associated with the proposed EPU meet NRC requirements, then the environmental impacts will not be significant. Table 2 summarizes the radiological environmental impacts of the proposed EPU at the PBNP.

TABLE 2—SUMMARY OF RADIOLOGICAL ENVIRONMENTAL IMPACTS

Radioactive Gaseous Effluents	Radioactive gaseous effluents are expected to be adequately handled by the existing radwaste system.
Radioactive Liquid Effluents	Radioactive liquid effluents are expected to be adequately handled by the existing radwaste system.
Public Radiation Doses at EPU Conditions.	Radiation doses to members of the public from radioactive effluents are expected to remain below NRC (10 CFR 20.1301 and appendix I) and EPA radiation protection standards (40 CFR part 190).
Occupational Radiation Doses at EPU Conditions.	Radiation doses to workers are expected to remain within NRC dose limits (10 CFR 20.1201).
Radioactive Solid Wastes	Radioactive solid waste is expected to be adequately handled by the existing radwaste system.
Spent Nuclear Fuel	The spent fuel characteristics will remain within the bounding criteria used in the impact analysis in 10 CFR part 51, Table S–3.
Design-Basis Accidents	If the NRC staff concludes in the SE that the radiological consequences of DBAs at the proposed EPU power levels are within NRC requirements, then DBAs will not have a significant radiological consequence.
Radiological Cumulative Impacts	Radiation doses to the public and plant workers would remain below NRC (10 CFR part 20) and EPA (40 CFR part 190) radiation protection standards.

Environmental Impacts of the Alternatives to the Proposed Action

As an alternative to the proposed action, the NRC staff considered denial of the proposed EPU (i.e., the ''no-action'' alternative) for PBAPS, Units 2 and 3. Denial of the application would result in no change in the current environmental impacts. However, if the EPU were not approved, other agencies and electric power organizations might be required to pursue other means of providing electric generation capacity, such as fossil fuel or alternative fuel power generation, to offset future demand. Construction and operation of such a fossil-fueled or alternative-fueled plant may create impacts in air quality, land use, and waste management significantly greater than those identified for the proposed EPU.

Alternative Use of Resources

This action does not involve the use of any different resources (water, air, land, nuclear fuel) not previously considered in NUREG–1437, Supplement 10.

Agencies and Persons Consulted

In accordance with its stated policy, on September 6, 2013, the staff consulted with the Pennsylvania State

official, Mr. Brad Fuller of the Pennsylvania Department of Environmental Protection, regarding the environmental impact of the proposed action. The State official had no comments.

IV. Draft Finding of No Significant Impact

The NRC is proposing to amend Renewed Facility Operating License Nos. DPR–44 and DPR–56 for PBAPS, Units 2 and 3. The proposed amendments would authorize an increase in the maximum reactor power level from 3514 MWt to 3951 MWt.

The NRC has determined not to prepare an Environmental Impact Statement for the proposed action. The proposed action will not have a significant effect on the quality of the human environment because, amending the licenses with the higher maximum reactor power level, will not result in any significant radiological or non-radiological impacts. Accordingly, the NRC has determined that a draft Finding of No Significant Impact (FONSI) is appropriate. The NRC's draft Environmental Assessment (EA), included in Section III above, is incorporated by reference into this finding.

The NRC's draft FONSI and the related environmental documents listed below are available for public inspection and may be inspected online through the NRC's Agencywide Documents Access and Management System (ADAMS) at *http://www.nrc.gov/reading-rm/adams.html.* You may also inspect these documents at the NRC's Public Document Room as discussed in Section I, ''Accessing Information and Submitting Comments,'' above.

The NRC's draft FONSI and the associated draft EA are available in ADAMS at Accession No. ML13202A081. Related environmental documents supporting the NRC's draft FONSI are as follows: (1) Attachment 8, ''Supplemental Environmental Report,'' to Exelon's EPU amendment request dated September 28, 2012 (ADAMS Accession No. ML12286A011); (2) NUREG–1437, Volume 1, Addendum 1, ''Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Main Report, Section 6.3—Transportation, Table 9.1, Summary of findings on NEPA issues for license renewal of nuclear power plants,'' dated August 1999 (ADAMS Accession No. ML040690720); (3) Supplement 10 to NUREG–1437, ''Generic Environmental Impact Statement for the License Renewal of Nuclear Power Plants, Regarding Peach Bottom Atomic Power Station, Units 2 and 3,'' dated January 2003 (ADAMS Accession No. ML030270059); and (4) ''Generic Environmental Impact Statement for License Renewal of Nuclear Plants,'' NUREG–1437, Volume 1, Revision 1, dated June 2013 (ADAMS Accession No. ML13106A241).

Dated at Rockville, Maryland, this 1st day of October 2013.

For the Nuclear Regulatory Commission.

Veronica Rodriguez,

Acting Chief, Plant Licensing Branch I–2, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2013–24902 Filed 10–23–13; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2012–0134]

Initial Test Program of Emergency Core Cooling Systems for New Boiling-Water Reactors

AGENCY: Nuclear Regulatory Commission.

ACTION: Regulatory guide; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing a new regulatory guide (RG), 1.79.1, ''Initial Test Program of Emergency Core Cooling Systems for New Boiling-Water Reactors.'' This RG describes testing methods the NRC staff considers acceptable for demonstrating the operability of emergency core cooling systems (ECCSs) for boiling-water reactors (BWRs) whose licenses are issued after the date of issuance of this RG (new BWRs).

ADDRESSES: Please refer to Docket ID NRC–2012–0134 when contacting the NRC about the availability of information regarding this document. You may access publicly-available information related to this action by the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0134. Address questions about NRC dockets to Carol Gallagher; telephone: 301–287–3422; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''ADAMS Public Documents'' and then select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced in this notice (if that document is available in ADAMS) is provided the first time that a document is referenced. Revision 0 of Regulatory Guide 1.79.1, is available in ADAMS under Accession No. ML12300A329. The regulatory analysis for Draft Regulatory Guide (DG)–1277 may be found in ADAMS under Accession No. ML12300A328.
- *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.

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FOR FURTHER INFORMATION CONTACT: Frank X. Talbot, Office of New Reactors; telephone: 301–415–4146, email: *Frank.Talbot@nrc.gov,* or Mark P. Orr, Office of Nuclear Regulatory Research; telephone: 301–251–7495, email: *Mark.Orr@nrc.gov*, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

I. Introduction

The NRC is issuing a new guide in the NRC's ''Regulatory Guide'' series. This series was developed to describe and make available to the public information such as methods that are acceptable to the NRC staff for implementing specific parts of the agency's regulations, techniques that the staff uses in evaluating specific problems or postulated accidents, and data that the staff needs in its review of applications for permits and licenses.

This new guide describes methods that the staff of the NRC considers acceptable for demonstrating compliance with the NRC regulations as they relate to preoperational, low power, and power ascension testing features of the ECCS for new BWRs. This RG also describes methods that the NRC staff finds acceptable for initial plant testing of ECCS structures, systems, and components (SSCs). Additionally, this RG describes methods the NRC staff finds acceptable for testing of the Isolation Condenser System (ICS) and the Reactor Core Isolation Cooling (RCIC) System, which support functions for alternate water injection during station blackout.

II. Additional Information

Regulatory Guide 1.79.1 was issued with a temporary identification as Draft Regulatory Guide (DG)–1277, ''Initial Test Program of Emergency Core Cooling Systems for Boiling-Water Reactors.'' DG–1277, was published in the **Federal Register** on June 15, 2012 (77 FR 36014), for a 60-day public comment period. The public comment period closed on August 15, 2012. Forty-five public comments were received during this period. The NRC staff's responses to the public comments on DG–1277 are available in ADAMS under Accession No. ML12300A330.

III. Congressional Review Act

This regulatory guide is a rule as defined in the Congressional Review Act (5 U.S.C. 801–808). However, the Office of Management and Budget has not found it to be a major rule as defined in the Congressional Review Act.

IV. Backfitting Analysis

Issuance of this revised RG does not constitute backfitting as defined in 10 CFR 50.109 (the Backfit Rule) and is not otherwise inconsistent with the issue finality provisions in 10 CFR part 52. As discussed in the ''Implementation'' section of this RG, the NRC has no current intention to impose this RG on holders of current operating licenses, early site permits or combined licenses. The NRC may apply this RG to applications for operating licenses, early site permits and combined licenses docketed by the NRC as of the date of issuance of the final RG, as well as to future applications for operating licenses, early site permits, and combined licenses submitted after the issuance of the RG. Such action does not constitute backfitting as defined in 10 CFR 50.109(a)(1) and is not otherwise inconsistent with the applicable issue finality provision in 10 CFR part 52, inasmuch as such applicants or potential applicants are not within the scope of entities protected by the Backfit Rule or the relevant issue finality provisions in part 52.

Dated at Rockville, Maryland, this 4th day of October, 2013.

For the Nuclear Regulatory Commission.

Thomas H. Boyce,

Chief, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. 2013–24888 Filed 10–23–13; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2012–0231]

Control of Ferrite Content in Stainless Steel Weld Metal

AGENCY: Nuclear Regulatory Commission.

ACTION: Regulatory guide; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing a revision to Regulatory Guide (RG) 1.31, ''Control of Ferrite Content in Stainless Steel Weld Metal.'' This guide (Revision 4) describes a method that the NRC staff considers acceptable for controlling ferrite content in stainless steel weld metal. It updates the guide to remove references to outdated standards and to remove an appendix that has been incorporated into relevant specifications.

ADDRESSES: Please refer to Docket ID NRC–2012–0231 when contacting the NRC about the availability of information regarding this document. You may access publicly-available information related to this action by the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0231. Address questions about NRC dockets to Carol Gallagher; telephone: 301–287–3422; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual(s) listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''ADAMS Public Documents'' and then select ''*Begin Web-based ADAMS Search*.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced in this notice (if that document is available in ADAMS) is provided the first time that a document is referenced. Revision 4 of Regulatory Guide 1.31 is available in ADAMS under Accession No. ML13211A485. The regulatory analysis may be found in ADAMS under Accession No. ML13211A490.
- *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.

Regulatory guides are not copyrighted, and NRC approval is not required to reproduce them.

FOR FURTHER INFORMATION CONTACT: Michael Benson, telephone: 301–251–7492; email: *Michael.Benson@nrc.gov;* or Harriet Karagiannis, telephone: 301–251–7477; email: *Harriet.Karagiannis@nrc.gov.* Both of Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

I. Introduction

The NRC is issuing a revision to an existing guide in the NRC's ''Regulatory Guide'' series. This series was developed to describe and make available to the public information such as methods that are acceptable to the NRC staff for implementing specific parts of the agency's regulations, techniques that the staff uses in evaluating specific problems or postulated accidents, and data that the staff needs in its review of applications for permits and licenses. Revision 4 of RG 1.31 was issued with a temporary identification as Draft Regulatory Guide DG–1279 and it describes a method that the staff of the NRC considers acceptable for complying with the Commission's regulations concerning establishing and implementing a procedure for the control of ferrite content in stainless steel weld metal. This guide provides methods that the NRC's staff considers acceptable to implement certain requirements in part 50 of Title 10 of the *Code of Federal Regulations* (10 CFR), ''Domestic Licensing of Production and Utilization Facilities.'' Since microfissures in austenitic welds may have an adverse effect on the integrity of components, the control of weld deposits to ensure the presence of delta ferrite in these welds is advisable.

Reason for Revision

To achieve control of ferrite content in stainless steel welds, the original version of this guide, Safety Guide 31, ''Control of Stainless Steel Welding,'' issued August 1972, provided guidance to test production welds. This guidance was retained in Revision 1 of the Safety Guide, which was issued June 1973 as Regulatory Guide 1.31, ''Control of Ferrite Content in Stainless Steel Weld Metal.'' Revision 2 (issued May 1977) and Revision 3 (issued April 1978) to this guide were based on recommendations of an NRC/industry study group. Revision 2 of this guide replaced the guidance for testing production welds in Revision 1 with

guidance for process control through testing weld test pads. These changes considerably reduced the testing effort needed to control delta ferrite in welds.

This revision (Revision 4) references the latest consensus standards. It supplements the American Society of Mechanical Engineers (ASME) Code requirements to ensure control of delta ferrite in welds in austenitic stainless steel core support structures, reactor internals, and Class 1, 2, and 3 components. Also, the appendix of the previous version has been removed and incorporated into the relevant specifications that are referenced in the guide.

II. Additional Information

The NRC published DG–1279 in the **Federal Register** on October 3, 2012 (77 FR 60479), for a 60-day public comment period. The public comment period closed on December 2, 2012. Public comments on DG–1279 and the NRC staff's responses to the public comments are available in ADAMS under Accession No. ML13211A483.

III. Congressional Review Act

This regulatory guide is a rule as defined in the Congressional Review Act (5 U.S.C. 801–808). However, the Office of Management and Budget has not found it to be a major rule as defined in the Congressional Review Act.

IV. Backfitting and Issue Finality

Issuance of this final regulatory guide does not constitute backfitting as defined in 10 CFR 50.109 (the Backfit Rule) and is not otherwise inconsistent with the issue finality provisions in 10 CFR part 52, ''Licenses, Certifications, and Approvals for Nuclear Power Plants.'' Revision 4 of this regulatory guide provides guidance on methods for meeting NRC's regulatory requirements concerning establishing and implementing a procedure for the control of ferrite content in stainless steel weld metal. Licensees may voluntarily use the guidance in this document to demonstrate compliance with the underlying NRC regulations. The NRC staff does not expect any existing licensee to use or commit to using the guidance in this regulatory guide, unless the licensee seeks a voluntary change to its licensing basis.

Further information on the staff's use of Revision 4 of this regulatory guide is contained in the regulatory guide under section D. Implementation.

Dated at Rockville, Maryland, this 3rd day of September, 2013.

For the Nuclear Regulatory Commission.

Thomas H. Boyce,

Chief, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. 2013–24893 Filed 10–23–13; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 70–3103; NRC–2010–0264]

Uranium Enrichment Fuel Cycle Inspection Reports Regarding Louisiana Energy Services, National Enrichment Facility, Eunice, New Mexico, Prior to the Commencement of Operations

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of availability.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) staff has conducted inspections of the Louisiana Energy Services (LES), LLC, National Enrichment Facility in Eunice, New Mexico, and has authorized the introduction of uranium hexafluoride (UF_6) into cascades numbered 3.10, 3.11, 3.12, 4.1, 4.2, 4.3 and 4.5. In addition, the NRC verified that the systems, structures, and components designed to support safe operation of Autoclave #2 of the facility have been constructed in accordance with the requirements of the approved license.

ADDRESSES: Please refer to Docket ID NRC–2010–0264 when contacting the NRC about the availability of information regarding this document. You may access publicly-available information related to this action by the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2010–0264. Address questions about NRC dockets to Carol Gallagher; telephone: 301–287–3422; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual(s) listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*ADAMS Public Documents*'' and then select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced in this document (if that document is available in ADAMS) is provided the first time that a document is referenced. In addition, for the convenience of the reader, the ADAMS accession numbers are provided in a table in the section of this document entitled, II. Availability of Documents.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Michael Raddatz, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–287–9124; email: *Michael.Raddatz@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Further Information

The NRC staff has prepared inspection reports documenting its findings in accordance with the requirements of the NRC's Inspection Manual, and these reports are available for review as specified in Section II of this notice. The publication of this notice satisfies the requirements of Section 70.32(k) of Title 10 of the *Code of Federal Regulations* (10 CFR), and section 193(c) of the Atomic Energy Act of 1954, as amended.

The introduction of UF_6 into any module of the National Enrichment Facility is not permitted until the NRC completes an operational readiness and management measures verification review to verify that management measures that ensure compliance with the performance requirements of 10 CFR 70.61 have been implemented and confirms that the facility has been constructed in accordance with the license and will be operated safely. Subsequent operational readiness and management measures verification reviews will continue throughout the various phases of plant construction and, upon completion of these subsequent phases, additional notices of the operation approval letters will be published in the **Federal Register** in accordance with 10 CFR 70.32(k).

II. Availability of Documents

Documents related to this action, including the application for amendment and supporting documentation, are available online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* From this site, you can access the NRC's Agencywide Document Access and Management

System (ADAMS), which provides text and image files of NRC's public documents. Inspection reports associated with the approval letters are referenced in the letters and are also available electronically in ADAMS. Accession numbers for the approval letters are being noticed here as follows:

NRC CASCADES AUTHORIZATION LETTERS

Authorization letters	Date	ADAMS accession No.
Cascade numbered 3.10	April 01, 2013	ML13092A072
Cascade numbered 3.11	June 07, 2013	ML13161A091
Cascade numbered 3.12	May 23, 2013	ML13144A094
Cascade numbered 4.1	June 24, 2013	ML13175A032
Cascade numbered 4.2	July 18, 2013	ML13205A143
Cascade numbered 4.3	August 13, 2013	ML13226A038
Cascade numbered 4.5	September 20, 2013	ML13263A052

NRC AUTHORIZATION LETTER RELATED TO THE AUTOCLAVE #2

Authorization letter	Date	ADAMS accession No.
LES Autoclave #2	June 13, 2013	ML13165A019

NRC AUTHORIZATION LETTER RELATED TO THE CYLINDER RECEIPT AND DISPATCH BUILDING (CRDB)

Authorization letter	Date	ADAMS accession No.
Liquid Effluent Collection and Transfer System and Small Component Decontamination Train Authorization.	August 13, 2013	ML13225A542

NRC INSPECTION REPORTS

Inspection report Nos.	Date	ADAMS accession No.
IR 07003103/2013–201	May 16, 2013	ML13127A181
IR 07003103/2013–001	March 19, 2013	ML13078A028
IR 07003103/2013–002	April 26, 2013	ML13116A175
IR 07003103/2013–003	July 29, 2013	ML13210A291
IR 07003103/2013–006	August 2, 2013	ML13214A141

If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737 or by email to *pdr.resource@nrc.gov.*

These documents may also be viewed electronically on the public computers located at the NRC's PDR, O 1 F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. The PDR reproduction contractor will copy documents for a fee.

Dated at Rockville, Maryland, this 4th day of October, 2013.

For the U.S. Nuclear Regulatory Commission.

Brian W. Smith,

Chief, Uranium Enrichment Branch, Division of Fuel Cycle Safety and Safeguards, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2013–24891 Filed 10–23–13; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2014–1 and CP2014–1; Order No. 1849]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recently-filed Postal Service request to add Parcel Select & Parcel Return Service Contract 5 to the competitive product list. This notice addresses procedural steps associated with this filing.

DATES: *Comments are due:* October 25, 2013.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, *stephen.sharfman@prc.gov* or 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

In accordance with 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.,* the Postal Service filed a formal request and associated supporting information to add Parcel Select & Parcel Return Service Contract 5 to the competitive product list.[1] The Postal Service asserts that Parcel Select & Parcel Return Service Contract 5 is a ''competitive product not of general applicability

[1] Request of the United States Postal Service to Add Parcel Select and Parcel Return Service Contract 5 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data, October 17, 2013 (Request).

within the meaning of 39 U.S.C. 3632(b)(3).'' *Id.* at 1. The Request has been assigned Docket No. MC2014–1.

The Postal Service contemporaneously filed a redacted contract related to the proposed new product. *Id.* Attachment B. The instant contract has been assigned Docket No. CP2014–1.

Request. To support its Request, the Postal Service filed the following six attachments:

- Attachment A—a redacted version of Governors' Decision No. 11–6 and accompanying analysis. An explanation and justification is provided in the Governors' Decision and analysis filed in the unredacted version under seal;
- Attachment B—a redacted version of the instant contract;
- Attachment C—the proposed change in the Mail Classification Schedule;
- Attachment D—a Statement of Supporting Justification as required by 39 CFR 3020.32;
- Attachment E—a certification of compliance with 39 U.S.C. 3633(a)(1), (2), and (3); and
- Attachment F—an Application for Non-public Treatment of the material filed under seal. The materials filed under seal are the unredacted version of the instant contract and the required cost and revenue data.

In the Statement of Supporting Justification, Dennis R. Nicoski, Manager, Field Sales Strategy and Contracts, asserts that the instant contract will cover its attributable costs, make a positive contribution to cover institutional costs, and increase contribution toward the requisite 5.5 percent of the Postal Service's institutional costs. *Id.* Attachment D at 1. Mr. Nicoski contends that there will be no issue of subsidization of market dominant products by competitive products as a result of the instant contract. *Id.*

Instant contract. The Postal Service included a redacted version of the instant contract with the Request. *Id.* Attachment B. The instant contract is the successor to Parcel Select Contract 3, approved in Docket Nos. MC2013–32 and CP2012–40. Request at 1. It is scheduled to become effective one business day following the date on which the Commission issues all necessary regulatory approvals. *Id.* Attachment B at 13. The contract will expire 5 years from the effective date unless, among other things, either party terminates the agreement with 30 days' written notice to the other party. *Id.* The Postal Service represents that the instant contract is consistent with 39 U.S.C. 3633. *Id.* Attachment E.

The Postal Service filed much of its supporting materials, including the unredacted version of the instant contract, under seal. *Id.,* Attachment F. It maintains that the unredacted Governors' Decision, the unredacted version of the instant contract, and supporting documents establishing compliance with 39 U.S.C. 3633 and 39 CFR 3015.5 should remain confidential. *Id.* at 1. The Postal Service asks the Commission to protect customer-identifying information from public disclosure indefinitely. *Id.*

II. Notice of Filings

The Commission establishes Docket Nos. MC2014–1 and CP2014–1 to consider the Request and the instant contract, respectively.

Interested persons may submit comments on whether the Postal Service's filings in these dockets are consistent with the policies of 39 U.S.C. 3632, 3633, and 3642, 39 CFR 3015.5, and 39 CFR part 3020, subpart B. Comments are due no later than October 25, 2013. The public portions of these filings can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints Kenneth R. Moeller to serve as Public Representative in these dockets.

III. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket Nos. MC2014–1 and CP2014–1 to consider the matters raised in each docket.

2. Pursuant to 39 U.S.C. 505, Kenneth R. Moeller is appointed to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in these proceedings.

3. Comments by interested persons in these proceedings are due no later than October 25, 2013.

4. The Secretary shall arrange for publication of this Order in the **Federal Register.**

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2013–24895 Filed 10–23–13; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2013–64 and CP2013–84; Order No. 1850]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing recent Postal Service filings requesting the addition of Global Reseller Expedited Package Contracts 3 product to the competitive product list and the inclusion of a related agreement within the new product. This notice informs the public of the filings, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* October 25, 2013.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

On September 30, 2013, the Postal Service filed a formal request pursuant to 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.* to add Global Reseller Expedited Package (GREP) Contracts 3 to the competitive product list.[1] The Postal Service contemporaneously filed a related Agreement. *Id.* Attachment 4.

Product history. Customers for GREP contracts are sales agents (also known as resellers) who market Global Express Guaranteed, Priority Mail Express International, Priority Mail International, and/or First-Class Package International Service to their customers in return for a rebate on the sales of those products. Request at 5.

Governors' Decision No. 10–1 established pricing formulas and classifications ''not of general applicability'' for the GREP Contracts 1 product. The Commission added GREP Contracts 1 and GREP Contracts 2 to the competitive product list by operation of Order Nos. 445 and 1746, respectively.[2] *Id.* at 1–2. The instant dockets address a new GREP Contracts

[1] Request of the United States Postal Service to Add Global Reseller Expedited Package Contracts 3 to the Competitive Products List and Notice of Filing a Global Reseller Expedited Package 3 Negotiated Service Agreement, September 30, 2013 (Request).

[2] *See respectively* Docket Nos. MC2010–21 and CP2010–36 and Docket Nos. MC2013–51 and CP2013–64.

3 product and a new baseline agreement. *Id.* at 2. The Postal Service states the proposed classification change adding GREP Contracts 3 to the Mail Classification Schedule (MCS) is consistent with the requirements of 39 U.S.C. 3642, and proposes conforming revisions to MCS section 2510.7, which covers GREP Contracts. *Id.* at 7; Attachment 2B.

II. Contents of Filing

In support of its Request, the Postal Service filed the following six attachments:

- Attachment 1—an application for non-public treatment of materials filed under seal;
- Attachment 2A—a redacted copy of Governors' Decision No. 11–6, which authorizes Postal Service management to prepare any necessary product description of nonpublished competitive services, including text for inclusion in the MCS, and to present such matter for review by the Commission;
- Attachment 2B—draft MCS language;
- Attachment 2C—a redacted version of the certified statement attesting to the accuracy of supporting data and addressing compliance with 39 U.S.C. 3633(a)(1) and (3), as required by 39 CFR 3015.5(c)(2);
- Attachment 3—a Statement of Supporting Justification addressing statutory policies and criteria and other matters, as required by 39 CFR 3020.32; and
- Attachment 4—a redacted copy of the Agreement.

The Postal Service also filed supporting financial documents for the Agreement as separate Excel files. The Postal Service filed unredacted versions of the Agreement, Governors' Decision No. 11–6, and the certified statement. Request at 4.

Effective date; term. The Postal Service will notify the customer of the effective date within 90 days of receipt of all necessary regulatory approvals. Request at 5, Attachment 4 at 5. The Agreement is scheduled to expire 12 months from the effective date. *Id.*

III. Commission Action

The Commission establishes Docket Nos. MC2013–64 and CP2013–84 for consideration of matters raised in the Request.[3] Interested persons may submit comments on whether the Postal Service's filings in the captioned dockets are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642, 39 CFR part 3015, and 39 CFR 3020 subpart B. Comments are due no later than October 25, 2013. The public portions of these filings can be accessed via the Commission's Web site (*http://www.prc.gov*). Information on how to obtain access to non-public material appears at 39 CFR part 3007.

The Commission appoints James F. Callow to serve as Public Representative in these dockets.

IV. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket Nos. MC2013–64 and CP2013–84 for consideration of matters raised by the Postal Service's Request.

2. Comments by interested persons in these proceedings are due no later than October 25, 2013.

3. Pursuant to 39 U.S.C. 505, James F. Callow is appointed to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in these proceedings.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2013–24897 Filed 10–23–13; 8:45 am]

BILLING CODE 7710–FW–P

[3] The request to add GREP Contracts 3 to the MCS has been assigned Docket No. MC2013–64. The Agreement has been assigned Docket No. CP2013–84.

POSTAL SERVICE

Product Change—Parcel Select & Parcel Return Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* October 24, 2013.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on October 17, 2013, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Parcel Select & Parcel Return Service Contract 5 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2014–1, CP2014–1.

Stanley F. Mires,

Attorney, Legal Policy & Legislative Advice.

[FR Doc. 2013–24930 Filed 10–23–13; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension:

Regulations 13D and 13G; Schedules 13D and 13G. OMB Control No. 3235–0145, SEC File No. 270–137.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Schedules 13D and 13G are filed pursuant to Sections 13(d) and 13(g) of the Securities Exchange Act and Regulations 13D and 13G thereunder to report beneficial ownership of equity securities registered under Section 12 of the Exchange Act. Regulations 13D and 13G provide investors, the subject issuers, and market participants with information about the accumulation of equity securities that may have the potential to change or influence control of an issuer. Schedules 13D and 13G are filed by persons, including small entities, to report their ownership of more than 5% of a class of equity securities registered under Section 12. We estimate that it takes approximately 14.5 burden hours to prepare a Schedule 13D and that it is filed by approximately 1,777 respondents. In addition, we estimate that 25% of the burden hours is carried internally by the respondent for a total annual reporting burden of 6,442 hours.

We estimate that it takes approximately 12.4 burden hours to prepare Schedule 13G and that it is filed by approximately 6,882 respondents. We estimate that 25% of the burden hours is carried internally by the respondent for a total annual reporting burden of 21,334 hours.

Written comments are invited on: (a) Whether this 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 burden of the collection of information; (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 respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

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 control number.

Please direct your written comments to Thomas Bayer, Director/Chief Information Officer, Office of Information Technology, Securities and Exchange Commission, 100 F Street NE., Washington DC. 20549.

Dated: October 18, 2013.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24849 Filed 10–23–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 30747; 812–14175]

Syntax Analytics, LLC and Syntax ETF Trust; Notice of Application

October 18, 2013.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 (''Act'') for an exemption from sections 2(a)(32), 5(a)(1), 22(d) and 22(e) of the Act and rule 22c–1 under the Act, under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and (a)(2) of the Act, and under section 12(d)(1)(J) of the Act for an exemption from sections 12(d)(1)(A) and (B) of the Act.

APPLICANTS: Syntax Analytics, LLC (''Syntax'') and Syntax ETF Trust (''Trust'').

SUMMARY OF APPLICATION: Applicants request an order that permits: (a) Actively-managed series of certain open-end management investment companies to issue shares (''Shares'') redeemable in large aggregations only (''Creation Units''); (b) secondary market transactions in Shares to occur at negotiated market prices; (c) certain series to pay redemption proceeds, under certain circumstances, more than seven days from the tender of Shares for redemption; (d) certain affiliated persons of the series to deposit securities into, and receive securities from, the series in connection with the purchase and redemption of Creation Units; and (e) certain registered management investment companies and unit investment trusts outside of the same group of investment companies as the series to acquire Shares.

DATES: *Filing Dates:* The application was filed on July 9, 2013 and amended on October 2, 2013.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on November 12, 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: Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090. Applicants, 110 East 59th Street, 33rd Floor, New York, NY 10022.

FOR FURTHER INFORMATION CONTACT: Jill Ehrlich, Senior Counsel, at (202) 551–6819 or David P. Bartels, 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 for 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 will be registered as an open-end management investment company under the Act and is a statutory trust organized under the laws of Delaware. The Trust initially will offer a newly created series (the ''Initial Fund''), which applicants state will seek long-term capital appreciation by investing in U.S. equity securities.

2. Applicants state that Syntax, a Delaware limited liability company, will be registered as an investment adviser under the Investment Advisers Act of 1940 (''Advisers Act'') and will serve as investment adviser to the Initial Fund. The Adviser (as defined below) may retain investment advisers as sub-advisers (each, a ''Sub-Adviser'') in connection with the Funds (as defined below). Any Adviser will be registered under the Advisers Act, and any Sub-Adviser will be registered or not subject to registration under the Advisers Act. The principal underwriter and distributor (''Distributor'') for each of the Funds will be a registered broker-dealer (''Broker'') under the Securities Exchange Act of 1934 (''Exchange Act'').

3. Applicants request that the order apply to the Initial Fund as well as to future series of the Trust and any future open-end management investment companies or series thereof that would operate as actively-managed exchange-traded funds (''Future Funds''). Any Future Fund will (a) be advised by Syntax or an entity controlling, controlled by, or under common control with Syntax (the ''Adviser'') and (b) comply with the terms and conditions of the application.[1] The Initial Fund and Future Funds together are the ''Funds.''[2] Each Fund will operate as an actively managed exchange-traded fund (''ETF'').

4. Applicants state that the Funds may invest in equity securities (''Equity Funds'') and/or fixed income securities (''Fixed Income Funds'') traded in the U.S. or non-U.S. markets or a combination of equity and fixed income securities. Funds that invest in foreign equity and/or fixed income securities are ''Foreign Funds.'' Foreign Funds may also include Funds that invest in a combination of foreign and domestic equity and/or fixed income securities. The Equity Funds and Fixed Income Funds that invest in domestic equity and/or fixed income securities together are ''Domestic Funds.'' Applicants state that the Funds may also invest in a

[1] All entities that currently intend to rely on the order are named as applicants. Any other entity that relies on the order in the future will comply with the terms and conditions of the application.

[2] Applicants further request that the order apply to any future Distributor, which would be a Broker and would comply with the terms and conditions of the application. Applicants state that a Distributor may be an affiliated person of the Adviser.

broad variety of other instruments [3] and that a Foreign Fund may invest a significant portion of its assets in depositary receipts representing foreign securities in which they seek to invest (''Depositary Receipts'').[4] Applicants further state that, in order to implement each Fund's investment strategy, the Adviser and/or Sub-Advisers of a Fund may review and change the securities, other assets and other positions held by the Fund (''Portfolio Instruments'') daily.

5. With respect to section 12(d)(1), Applicants are requesting relief (''Fund of Funds Relief'') to permit management investment companies and unit investment trusts (''UITs'') registered under the Act that are not part of the same ''group of investment companies,'' within the meaning of section 12(d)(1)(G)(ii) of the Act, as the Funds (such registered management investment companies are referred to as ''Investing Management Companies,'' such UITs are referred to as ''Investing Trusts,'' and Investing Management Companies and Investing Trusts are collectively referred to as ''Funds of Funds''), to acquire Shares beyond the limitations in section 12(d)(1)(A) and to permit the Funds, and any principal underwriter for the Funds, and any Broker, to sell Shares beyond the limitations in section 12(d)(1)(B) to Funds of Funds. Applicants request that any exemption under section 12(d)(1)(J) from sections 12(d)(1)(A) and (B) apply to: (1) Each Fund that is currently or subsequently part of the same ''group of investment companies'' as the Initial Fund within the meaning of section 12(d)(1)(G)(ii) of the Act, as well as any principal underwriter for the Funds and any Brokers selling Shares of a Fund to Funds of Funds; and (2) each Fund of Funds that enters into a participation agreement (''FOF Participation Agreement'') with a Fund. ''Funds of Funds'' do not include the Funds. Each Investing Management Company's investment adviser within the meaning of section 2(a)(20)(A) of the Act is the ''Fund of Funds Adviser.'' Similarly, each Investing Trust's sponsor is the ''Sponsor.'' Applicants represent that each Fund of Funds Adviser will be registered as an investment adviser under the Advisers Act and that no Fund of Funds Adviser or Sponsor will control, be controlled by, or be under common control with the Adviser.[5]

6. Each Fund will issue, on a continuous offering basis, its Shares in one or more groups of a fixed number of Shares (e.g., at least 25,000 Shares). Applicants believe that a conventional trading range will be between $20–$100 per Share. All orders to purchase Creation Units must be placed with the Distributor by or through a party that has entered into a participant agreement with the Distributor and the transfer agent of the Fund (''Authorized Participant'') with respect to the creation and redemption of Creation Units. An Authorized Participant is either: (a) A Broker or other participant in the Continuous Net Settlement System of the National Securities Clearing Corporation (''NSCC''), a clearing agency registered with the Commission or (b) a participant in the Depository Trust Company, New York, New York (''DTC,'' and such participant, ''DTC Participant'').

7. In order to keep costs low and permit each Fund to be as fully invested as possible, Shares will be purchased and redeemed in Creation Units and generally on an in-kind basis. Except where the purchase or redemption will include cash under the limited circumstances specified below, purchasers will be required to purchase Creation Units by making an in-kind deposit of specified instruments (''Deposit Instruments''), and shareholders redeeming their Shares will receive an in-kind transfer of specified instruments (''Redemption Instruments'').[6] On any given Business Day [7] the names and quantities of the instruments that constitute the Deposit Instruments and the names and quantities of the instruments that constitute the Redemption Instruments will be identical, and these instruments may be referred to, in the case of either a purchase or redemption, as the ''Creation Basket.'' In addition, the Creation Basket will correspond pro rata to the positions in a Fund's portfolio (including cash positions),[8] except: (a) In the case of bonds, for minor differences when it is impossible to break up bonds beyond certain minimum sizes needed for transfer and settlement; (b) for minor differences when rounding is necessary to eliminate fractional shares or lots that are not tradeable round lots; [9] or (c) TBA Transactions,[10] short positions and other positions that cannot be transferred in kind [11] will be excluded from the Creation Basket.[12] If there is a difference between NAV attributable to a Creation Unit and the aggregate market value of the Creation Basket exchanged for the Creation Unit, the party conveying instruments with the lower value will also pay to the other an amount in cash equal to that difference (the ''Balancing Amount'').

8. Purchases and redemptions of Creation Units may be made in whole or in part on a cash basis, rather than in kind, solely under the following circumstances: (a) To the extent there is a Balancing Amount, as described above; (b) if, on a given Business Day, a Fund announces before the open of trading that all purchases, all redemptions or all purchases and redemptions on that day will be made entirely in cash; (c) if, upon receiving a purchase or redemption order from an Authorized Participant, a Fund determines to require the purchase or redemption, as applicable, to be made entirely in cash; (d) if, on a given Business Day, a Fund requires all Authorized Participants purchasing or redeeming Shares on that day to deposit or receive (as applicable) cash in lieu of some or all of the Deposit Instruments or Redemption Instruments,

[3] If a Fund invests in derivatives, then (a) the board of trustees (''Board'') of the Fund will periodically review and approve the Fund's use of derivatives and how the Adviser assesses and manages risk with respect to the Fund's use of derivatives and (b) the Fund's disclosure of its use of derivatives in its offering documents and periodic reports will be consistent with relevant Commission and staff guidance.

[4] Depositary Receipts are typically issued by a financial institution, a ''depositary,'' and evidence ownership in a security or pool of securities that have been deposited with the depositary. A Fund will not invest in any Depositary Receipts that the Adviser or Sub-Adviser deems to be illiquid or for which pricing information is not readily available. No affiliated persons of applicants or any Sub-Adviser will serve as the depositary bank for any Depositary Receipts held by a Fund.

[5] A Fund of Funds may rely on the order only to invest in Funds and not in any other registered investment company.

[6] The Funds must comply with the federal securities laws in accepting Deposit Instruments and satisfying redemptions with Redemption Instruments, including that the Deposit Instruments and Redemption Instruments are sold in transactions that would be exempt from registration under the Securities Act of 1933 (''Securities Act''). In accepting Deposit Instruments and satisfying redemptions with Redemption Instruments that are restricted securities eligible for resale pursuant to rule 144A under the Securities Act, the Funds will comply with the conditions of rule 144A.

[7] Each Fund will sell and redeem Creation Units on any day the Trust is open, including as required by section 22(e) of the Act (each, a ''Business Day'').

[8] The portfolio used for this purpose will be the same portfolio used to calculate the Fund's net asset value (''NAV'') for that Business Day.

[9] A tradeable round lot for a security will be the standard unit of trading in that particular type of security in its primary market.

[10] A TBA Transaction is a method of trading mortgage-backed securities. In a TBA Transaction, the buyer and seller agree on general trade parameters such as agency, settlement date, par amount and price.

[11] This includes instruments that can be transferred in kind only with the consent of the original counterparty to the extent the Fund does not intend to seek such consents.

[12] Because these instruments will be excluded from the Creation Basket, their value will be reflected in the determination of the Balancing Amount (as defined below).

respectively, solely because: (i) Such instruments are not eligible for transfer through either the NSCC or DTC; or (ii) in the case of Foreign Funds, such instruments are not eligible for trading due to local trading restrictions, local restrictions on securities transfers or other similar circumstances; or (e) if a Fund permits an Authorized Participant to deposit or receive (as applicable) cash in lieu of some or all of the Deposit Instruments or Redemption Instruments, respectively, solely because: (i) Such instruments are, in the case of the purchase of a Creation Unit, not available in sufficient quantity; (ii) such instruments are not eligible for trading by an Authorized Participant or the investor on whose behalf the Authorized Participant is acting; or (iii) a holder of Shares of a Foreign Fund would be subject to unfavorable income tax treatment if the holder receives redemption proceeds in kind.[13]

9. Each Business Day, before the open of trading on a national securities exchange, as defined in section 2(a)(26) of the Act (''Exchange''), on which Shares are listed, each Fund will cause to be published through the NSCC the names and quantities of the instruments comprising the Creation Basket, as well as the estimated Balancing Amount (if any), for that day. The published Creation Basket will apply until a new Creation Basket is announced on the following Business Day, and there will be no intra-day changes to the Creation Basket except to correct errors in the published Creation Basket. The Exchange will disseminate every 15 seconds throughout the trading day an amount representing, on a per Share basis, the sum of the current value of the Portfolio Instruments that were publicly disclosed prior to the commencement of trading in Shares on the Exchange.

10. Transaction expenses, including operational processing and brokerage costs, may be incurred by a Fund when investors purchase or redeem Creation Units ''in-kind'' and such costs have the potential to dilute the interests of the Fund's existing Beneficial Owners. Accordingly, applicants state that each Fund may impose purchase or redemption transaction fees (''Transaction Fees'') in connection with effecting such purchases or redemptions. Applicants further state that, because the Transaction Fees are intended to defray the transaction expenses, as well as to prevent possible shareholder dilution resulting from the purchase or redemption of Creation Units, the Transaction Fees will be borne only by purchasers or redeemers of Creation Units and will be limited to amounts that have been determined appropriate by the Fund.[14] The Distributor will be responsible for delivering a Fund's current prospectus (''Prospectus'') or Summary Prospectus, if applicable, to purchasers of Shares in Creation Units and for maintaining records of both the orders placed with it and the confirmations of acceptance furnished by it.

11. Shares will be listed and traded at negotiated prices on an Exchange and traded in the secondary market. When NYSE Arca, Inc. is the principal secondary market on which the Shares are listed and traded (the ''Primary Listing Exchange''), it is expected that one or more Exchange member firms will be designated by the Exchange to act as a market maker (a ''Market Maker'').[15] The price of Shares trading on the Exchange will be based on a current bid/offer in the secondary market. Transactions involving the purchases and sales of Shares on the Exchange will be subject to customary brokerage commissions and charges.

12. Applicants expect that purchasers of Creation Units will include institutional investors and arbitrageurs. Market Makers, acting in their role to provide a fair and orderly secondary market for Shares, also may purchase Creation Units for use in their own market making activities. Applicants expect that secondary market purchasers of Shares will include both institutional and retail investors.[16] Applicants expect that arbitrage opportunities created by the ability to continually purchase or redeem Creation Units should ensure that the Shares will not trade at a material discount or premium in relation to their NAV.

13. Shares will not be individually redeemable, and only Shares combined into Creation Units of a specified size will be redeemable. Redemption requests must be placed by or through an Authorized Participant.

14. Neither the Trust nor any Fund will be marketed or otherwise held out as a ''mutual fund.'' Instead, each Fund will be marketed as an ''actively-managed exchange-traded fund.'' In any advertising material where features of obtaining, buying or selling Shares traded on the Exchange are described there will be an appropriate statement to the effect that Shares are not individually redeemable.

15. On each Business Day, before the commencement of trading in Shares on the Fund's Primary Listing Exchange, the Fund will disclose on the Trust's Web site (''Web site'') the identities and quantities of the Portfolio Instruments that will form the basis of the Fund's calculation of NAV at the end of the Business Day, the Fund's per Share NAV and the market closing price or the midpoint of the bid/ask spread at the time of the calculation of such NAV (''Bid/Ask Price''), and a calculation of the premium or discount of the market closing price or Bid/Ask Price against such NAV, all as of the prior Business Day.[17]

Applicants' Legal Analysis

1. Applicants request an order under section 6(c) of the Act for an exemption from sections 2(a)(32), 5(a)(1), 22(d) and 22(e) of the Act and rule 22c–1 under the Act, under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act, and under section 12(d)(1)(J) of the Act for an exemption from sections 12(d)(1)(A) and (B) of the Act.

2. Section 6(c) of the Act provides that the Commission may exempt any person, security or transaction, or any class of persons, securities or

[13] A ''custom order'' is any purchase or redemption of Shares made in whole or in part on a cash basis in reliance on clause (e)(i) or (e)(ii).

[14] In those instances in which a Fund permits an ''in-kind'' purchaser to substitute cash in lieu of depositing one or more of the requisite Deposit Instruments or Redemption Securities, the purchaser or seller may be assessed a higher Transaction Fee on the ''cash in lieu'' portion of its investment to cover the cost of purchasing the necessary securities, including operational processing and brokerage costs, and part or all of the spread between the expected bid and offer side of the market relating to such Deposit Instruments or Redemption Instruments. In all cases, such Transaction Fees will be limited in accordance with requirements of the Commission applicable to management investment companies offering redeemable securities.

[15] If Shares are listed on The NASDAQ Stock Market LLC (''Nasdaq'') or a similar electronic Exchange (including NYSE Arca, Inc.), one or more member firms of that Exchange will act as Market Maker and maintain a market for Shares trading on that Exchange. On Nasdaq, no particular Market Maker would be contractually obligated to make a market in Shares. However, the listing requirements on Nasdaq, for example, stipulate that at least two Market Makers must be registered in Shares to maintain a listing. In addition, on Nasdaq and NYSE Arca, Inc., registered Market Makers are required to make a continuous two-sided market or subject themselves to regulatory sanctions. No Market Maker will be an affiliated person, or a second-tier affiliate, of the Funds, except within section 2(a)(3)(A) or (C) of the Act due solely to ownership of Shares as discussed below.

[16] Shares will be registered in book-entry form only. DTC or its nominee will be the record or registered owner of all outstanding Shares. Beneficial ownership of Shares will be shown on the records of DTC or DTC Participants.

[17] Under accounting procedures followed by the Funds, trades made on the prior Business Day (''T'') will be booked and reflected in NAV on the current Business Day (''T+1''). Accordingly, the Funds will be able to disclose at the beginning of the Business Day the portfolio that will form the basis for the NAV calculation at the end of the Business Day.

transactions, from any provisions of the Act, 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. Section 17(b) of the Act authorizes the Commission to exempt a proposed transaction from section 17(a) of the Act if evidence establishes that the terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, and the proposed transaction is consistent with the policies of the registered investment company and the general provisions of the Act. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provision of section 12(d)(1) if the exemption is consistent with the public interest and the protection of investors.

Sections 5(a)(1) and 2(a)(32) of the Act

3. Section 5(a)(1) of the Act defines an ''open-end company'' as a management investment company that is offering for sale or has outstanding any redeemable security of which it is the issuer. Section 2(a)(32) of the Act defines a redeemable security as any security, other than short-term paper, under the terms of which the holder, upon its presentation to the issuer, is entitled to receive approximately a proportionate share of the issuer's current net assets, or the cash equivalent. Because Shares will not be individually redeemable, applicants request an order that would to permit the Trust to register as an open-end management investment company and issue Shares that are redeemable in Creation Units only. Applicants state that investors may purchase Shares in Creation Units from each Fund and redeem Creation Units from each Fund. Applicants further state that, because of the arbitrage possibilities created by the redeemability of Creation Units, they expect that the market price of individual Shares will not deviate materially from NAV.

Section 22(d) of the Act and Rule 22c–1 Under the Act

4. Section 22(d) of the Act, among other things, prohibits a dealer from selling a redeemable security that is currently being offered to the public by or through a principal underwriter, except at a current public offering price described in the prospectus. Rule 22c–1 under the Act generally requires that a dealer selling, redeeming, or repurchasing a redeemable security do so only at a price based on its NAV. Applicants state that secondary market trading in Shares will take place at negotiated prices, not at a current offering price described in the Prospectus, and not at a price based on NAV. Thus, purchases and sales of Shares in the secondary market will not comply with section 22(d) of the Act and rule 22c–1 under the Act. Applicants request an exemption under section 6(c) from these provisions.

5. Applicants state that, while there is little legislative history regarding section 22(d), its provisions, as well as those of rule 22c–1, appear to have been designed to (a) to prevent dilution caused by certain riskless-trading schemes by principal underwriters and contract dealers, (b) to prevent unjust discrimination or preferential treatment among buyers and (c) to ensure an orderly distribution system of shares by contract dealers by eliminating price competition from non-contract dealers who could offer investors shares at less than the published sales price and who could pay investors a little more than the published redemption price.

6. Applicants assert that the protections intended to be afforded by section 22(d) and rule 22c–1 are adequately addressed by the proposed methods for creating, redeeming and pricing Creation Units and pricing and trading Shares. Applicants state that (a) secondary market trading in Shares does not involve the Funds as parties and cannot result in dilution of an investment in Shares and (b) to the extent different prices exist during a given trading day, or from day to day, such variances occur as a result of third-party market forces but do not occur as a result of unjust or discriminatory manipulation. Finally, applicants assert that competitive forces in the marketplace should ensure that the margin between NAV and the price for the Shares in the secondary market remains narrow.

Section 22(e) of the Act

7. Section 22(e) of the Act generally prohibits a registered investment company from suspending the right of redemption or postponing the date of payment of redemption proceeds for more than seven days after the tender of a security for redemption. Applicants observe that settlement of redemptions for Foreign Funds is contingent not only on the settlement cycle of the U.S. securities markets but also on the delivery cycles present in foreign markets in which those Funds invest. Applicants have been advised that the delivery cycles for transferring Redemption Instruments to redeeming investors, coupled with local market holiday schedules, will require a delivery process longer than seven calendar days. Applicants therefore request relief from the requirement imposed by section 22(e) to provide payment or satisfaction of redemptions within seven (7) calendar days following the tender of a Creation Unit of such Funds.[18]

8. Applicants state that section 22(e) was designed to prevent unreasonable, undisclosed and unforeseen delays in the actual payment of redemption proceeds. Applicants assert that the protections intended to be afforded by Section 22(e) are adequately addressed by the proposed method and securities delivery cycles for redeeming Creation Units. Applicants state that allowing redemption payments for Creation Units of a Fund to be made within a maximum of 14 calendar days would not be inconsistent with the spirit and intent of section 22(e). Applicants represent that each Fund's prospectus and/or statement of additional information will identify those instances in a given year where, due to local holidays, more than seven calendar days, up to a maximum of fourteen (14) calendar days, will be needed to deliver redemption proceeds and will list such holidays. Applicants are not seeking relief from section 22(e) with respect to Foreign Funds that do not effect redemptions in-kind.

Section 12(d)(1) of the Act

9. Section 12(d)(1)(A) of the Act prohibits a registered investment company from acquiring shares of an investment company if the securities represent more than 3% of the total outstanding voting stock of the acquired company, more than 5% of the total assets of the acquiring company, or, together with the securities of any other investment companies, more than 10% of the total assets of the acquiring company. Section 12(d)(1)(B) of the Act prohibits a registered open-end investment company, its principal underwriter, or any other broker or dealer from selling its shares to another investment company if the sale will cause the acquiring company to own more than 3% of the acquired company's voting stock, or if the sale will cause more than 10% of the acquired company's voting stock to be

[18] Applicants acknowledge that no relief obtained from the requirements of section 22(e) will affect any obligations that it may otherwise have under rule 15c6–1 under the Exchange Act. Rule 15c6–1 requires that most securities transactions be settled within three business days of the trade date.

owned by investment companies generally.

10. Applicants request relief to permit Funds of Funds to acquire Shares in excess of the limits in section 12(d)(1)(A) of the Act and to permit the Funds, their principal underwriters and any Broker to sell Shares to Funds of Funds in excess of the limits in section 12(d)(l)(B) of the Act. Applicants submit that the proposed conditions to the requested relief address the concerns underlying the limits in section 12(d)(1), which include concerns about undue influence, excessive layering of fees and overly complex structures.

11. Applicants submit that certain of their proposed conditions address concerns about potential for undue influence. To limit the control that a Fund of Funds may have over a Fund, applicants propose a condition prohibiting the Fund of Funds Adviser, Sponsor, any person controlling, controlled by, or under common control with the Fund of Funds Adviser or Sponsor, and any investment company or issuer that would be an investment company but for sections 3(c)(1) or 3(c)(7) of the Act that is advised or sponsored by the Fund of Funds Adviser, the Sponsor, or any person controlling, controlled by, or under common control with the Fund of Funds Adviser or Sponsor (''Fund of Funds Advisory Group'') from controlling (individually or in the aggregate) a Fund within the meaning of section 2(a)(9) of the Act. The same prohibition would apply to any sub-adviser to an Investing Management Company (''Fund of Funds Sub-Adviser''), any person controlling, controlled by or under common control with the Fund of Funds Sub-Adviser, and any investment company or issuer that would be an investment company but for sections 3(c)(1) or 3(c)(7) of the Act (or portion of such investment company or issuer) advised or sponsored by the Fund of Funds Sub-Adviser or any person controlling, controlled by or under common control with the Fund of Funds Sub-Adviser (''Fund of Funds Sub-Advisory Group'').

12. Applicants propose a condition to ensure that no Fund of Funds or Fund of Funds Affiliate [19] (except to the extent it is acting in its capacity as an investment adviser to a Fund) will cause a Fund to purchase a security in an offering of securities during the existence of an underwriting or selling syndicate of which a principal underwriter is an Underwriting Affiliate (''Affiliated Underwriting'').[20]

13. Applicants propose several conditions to address the potential for layering of fees. Applicants note that the board of directors or trustees of any Investing Management Company, including a majority of the directors or trustees who are not ''interested persons'' within the meaning of section 2(a)(19) of the Act (''independent Board members''), will be required to find that the advisory fees charged under the contract are based on services provided that will be in addition to, rather than duplicative of, services provided under the advisory contract of any Fund in which the Investing Management Company may invest. Applicants also state that any sales charges and/or service fees charged with respect to shares of a Fund of Funds will not exceed the limits applicable to a fund of funds as set forth in NASD Conduct Rule 2830.[21]

14. In order to address concerns about complexity, Applicants propose condition B.12, which will prohibit Funds from acquiring securities of any investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, except to the extent permitted by exemptive relief from the Commission permitting a Fund to purchase shares of other investment companies for short-term cash management purposes.

15. Finally, each Fund of Funds must enter into an FOF Participation Agreement with the respective Funds, which will include an acknowledgement from the Fund of Funds that it may rely on the order only to invest in a Fund and not in any other investment company.

Sections 17(a)(1) and (2) of the Act

16. Section 17(a) of the Act generally prohibits an affiliated person of a registered investment company, or an affiliated person of such a person (''second tier affiliate''), from selling any security to or purchasing any security from the company. Section 2(a)(3) of the Act defines ''affiliated person'' to include any person directly or indirectly owning, controlling, or holding with power to vote, 5% or more of the outstanding voting securities of the other person and any person directly or indirectly controlling, controlled by, or under common control with, the other person. Section 2(a)(9) of the Act defines ''control'' as the power to exercise a controlling influence over the management or policies of a company and provides that a control relationship will be presumed where one person owns more than 25% of another person's voting securities. Each Fund may be deemed to be controlled by the Adviser and hence affiliated persons of each other. In addition, the Funds may be deemed to be under common control with any other registered investment company (or series thereof) advised by the Adviser (an ''Affiliated Fund'').

17. Applicants request an exemption under sections 6(c) and 17(b) of the Act from sections 17(a)(1) and 17(a)(2) of the Act to permit in-kind purchases and redemptions of Creation Units by persons that are affiliated persons or second tier affiliates of the Funds solely by virtue of one or more of the following: (a) Holding 5% or more, or in excess of 25% of the outstanding Shares of one or more Funds; (b) having an affiliation with a person with an ownership interest described in (a); or (c) holding 5% or more, or more than 25% of the Shares of one or more Affiliated Funds.[22] Applicants also request an exemption in order to permit a Fund to sell its Shares to and redeem its Shares from, and engage in the in-kind transactions that would accompany such sales and redemptions with, certain Funds of Funds of which the Funds are affiliated persons or second-tier affiliates.[23]

18. Applicants assert that no useful purpose would be served by prohibiting such affiliated persons from making in-kind purchases or in-kind redemptions

[19] A ''Fund of Funds Affiliate'' is any Fund of Funds Adviser, Fund of Funds Sub-Adviser, Sponsor, promoter or principal underwriter of a Fund of Funds, and any person controlling, controlled by or under common control with any of these entities. A ''Fund Affiliate'' is the Adviser, Sub-Adviser, promoter, or principal underwriter of a Fund or any person controlling, controlled by or under common control with any of these entities.

[20] An ''Underwriting Affiliate'' is a principal underwriter in any underwriting or selling syndicate that is an officer, director, member of an advisory board, Fund of Funds Adviser, Fund of Funds Sub-Adviser, employee or Sponsor of the Fund of Funds, or a person of which any such officer, director, member of an advisory board, Fund of Funds Adviser, Fund of Funds Sub-Adviser, employee or Sponsor is an affiliated person (except any person whose relationship to the Fund is covered by section 10(f) of the Act is not an Underwriting Affiliate).

[21] Any reference to NASD Conduct Rule 2830 includes any successor or replacement rule that may be adopted by the Financial Industry Regulatory Authority.

[22] Applicants are not seeking relief from section 17(a) for, and the requested relief will not apply to, transactions where a Fund could be deemed an affiliated person, or an affiliated person of an affiliated person, of a Fund of Funds because the Adviser, or an entity controlling, controlled by or under common control with the Adviser is also an investment adviser to the Fund of Funds.

[23] To the extent that purchases and sales of Shares occur in the secondary market (and not through principal transactions directly between a Fund of Funds and a Fund), relief from section 17(a) would not be necessary. The requested relief is intended to cover, however, transactions directly between Funds and Funds of Funds.

of Shares of a Fund in Creation Units. The deposit procedures for in-kind purchases of Creation Units and the redemption procedures for in-kind redemptions will be the same for all purchases and redemptions. Deposit Instruments and Redemption Instruments will be valued in the same manner as those Portfolio Instruments currently held by the relevant Funds, and the valuation of the Deposit Instruments and Redemption Instruments will be made in the same manner and on the same terms for all, regardless of the identity of the purchaser or redeemer. Applicants do not believe that in-kind purchases and redemptions will result in abusive self-dealing or overreaching of the Fund.

19. Applicants also submit that the sale of Shares to and redemption of Shares from a Fund of Funds meets the standards for relief under sections 17(b) and 6(c) of the Act. Applicants note that any consideration paid for the purchase or redemption of Shares directly from a Fund will be based on the NAV of the Fund in accordance with policies and procedures set forth in the Fund's registration statement.[24] The FOF Participation Agreement will require any Fund of Funds that purchases Creation Units directly from a Fund to represent that the purchase of Creation Units from a Fund by a Fund of Funds will be accomplished in compliance with the investment restrictions of the Fund of Funds and will be consistent with the investment policies set forth in the Fund of Fund's registration statement. Applicants also state that the relief requested 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 of the Commission granting the requested relief will be subject to the following conditions:

A. ETF Relief

1. The requested relief to permit ETF operations will expire on the effective date of any Commission rule under the Act that provides relief permitting the operation of actively-managed ETFs.

2. As long as a Fund operates in reliance on the requested order, the Shares of the Fund will be listed on an Exchange.

3. Neither the Trust nor any Fund will be advertised or marketed as an open-end investment company or a mutual fund. Any advertising material that describes the purchase or sale of Creation Units or refers to redeemability will prominently disclose that the Shares are not individually redeemable and that owners of the Shares may acquire Shares from the Fund and tender Shares for redemption to the Fund in Creation Units only.

4. The Web site, which is and will be publicly accessible at no charge, will contain, on a per Share basis for the Fund, the prior Business Day's NAV and the market closing price or Bid/Ask Price, and a calculation of the premium or discount of the market closing price or Bid/Ask Price against such NAV.

5. No Adviser or Sub-Adviser, directly or indirectly, will cause any Authorized Participant (or any investor on whose behalf an Authorized Participant may transact with the Fund) to acquire any Deposit Instrument for the Fund through a transaction in which the Fund could not engage directly.

6. On each Business Day, before the commencement of trading in Shares on the Fund's Primary Listing Exchange, the Fund will disclose on the Web site the identities and quantities of the Portfolio Instruments that will form the basis of the Fund's calculation of NAV at the end of the Business Day.

B. Section 12(d)(1) Relief

1. The members of the Fund of Funds Advisory Group will not control (individually or in the aggregate) a Fund within the meaning of section 2(a)(9) of the Act. The members of the Fund of Funds Sub-Advisory Group will not control (individually or in the aggregate) a Fund within the meaning of section 2(a)(9) of the Act. If, as a result of a decrease in the outstanding voting securities of a Fund, the Fund of Funds Advisory Group or the Fund of Funds Sub-Advisory Group, each in the aggregate, becomes a holder of more than 25 percent of the outstanding voting securities of a Fund, it will vote its Shares of the Fund in the same proportion as the vote of all other holders of the Fund's Shares. This condition does not apply to the Fund of Funds Sub-Advisory Group with respect to a Fund for which the Fund of Funds Sub-Adviser or a person controlling, controlled by or under common control with the Fund of Funds Sub-Adviser acts as the investment adviser within the meaning of section 2(a)(20)(A) of the Act.

2. No Fund of Funds or Fund of Funds Affiliate will cause any existing or potential investment by the Fund of Funds in a Fund to influence the terms of any services or transactions between the Fund of Funds or a Fund of Funds Affiliate and the Fund or a Fund Affiliate.

3. The board of directors or trustees of an Investing Management Company, including a majority of the independent directors or trustees, will adopt procedures reasonably designed to ensure that the Fund of Funds Adviser and any Fund of Funds Sub-Adviser are conducting the investment program of the Investing Management Company without taking into account any consideration received by the Investing Management Company or a Fund of Funds Affiliate from a Fund or a Fund Affiliate in connection with any services or transactions.

4. Once an investment by a Fund of Funds in the Shares of a Fund exceeds the limit in section 12(d)(1)(A)(i) of the Act, the Board, including a majority of the independent Board members, will determine that any consideration paid by the Fund to the Fund of Funds or a Fund of Funds Affiliate in connection with any services or transactions: (i) Is fair and reasonable in relation to the nature and quality of the services and benefits received by the Fund; (ii) is within the range of consideration that the Fund would be required to pay to another unaffiliated entity in connection with the same services or transactions; and (iii) does not involve overreaching on the part of any person concerned. This condition does not apply with respect to any services or transactions between a Fund and its investment adviser(s), or any person controlling, controlled by or under common control with such investment adviser(s).

5. The Fund of Funds Adviser, or trustee or Sponsor of an Investing Trust, as applicable, will waive fees otherwise payable to it by the Fund of Funds in an amount at least equal to any compensation (including fees received pursuant to any plan adopted by a Fund pursuant to rule 12b–1 under the Act) received from a Fund by the Fund of Funds' Adviser, or trustee or Sponsor of the Investing Trust, or an affiliated person of the Fund of Funds' Adviser, or trustee or Sponsor of the Investing Trust, other than any advisory fees paid to the Fund of Funds' Adviser, or trustee, or Sponsor of an Investing Trust, or its affiliated person by the Fund, in connection with the investment by the Fund of Funds in the Fund. Any Fund of Funds Sub-Adviser

[24] Applicants acknowledge that the receipt of compensation by (a) an affiliated person of a Fund of Funds, or an affiliated person of such person, for the purchase by the Fund of Funds of Shares of the Fund or (b) an affiliated person of a Fund, or an affiliated person of such person, for the sale by the Fund of its Shares to a Fund of Funds, may be prohibited by section 17(e)(1) of the Act. The FOF Participation Agreement also will include this acknowledgment.

will waive fees otherwise payable to the Fund of Funds Sub-Adviser, directly or indirectly, by the Investing Management Company in an amount at least equal to any compensation received from a Fund by the Fund of Funds Sub-Adviser, or an affiliated person of the Fund of Funds Sub-Adviser, other than any advisory fees paid to the Fund of Funds Sub-Adviser or its affiliated person by the Fund, in connection with the investment by the Investing Management Company in the Fund made at the direction of the Fund of Funds Sub-Adviser. In the event that the Fund of Funds Sub-Adviser waives fees, the benefit of the waiver will be passed through to the Investing Management Company.

6. No Fund of Funds or Fund of Funds Affiliate (except to the extent it is acting in its capacity as an investment adviser to a Fund) will cause a Fund to purchase a security in an Affiliated Underwriting.

7. The Board, including a majority of the independent Board members, will adopt procedures reasonably designed to monitor any purchases of securities by the Fund in an Affiliated Underwriting, once an investment by a Fund of Funds in the securities of the Fund exceeds the limit of section 12(d)(1)(A)(i) of the Act, including any purchases made directly from an Underwriting Affiliate. The Board will review these purchases periodically, but no less frequently than annually, to determine whether the purchases were influenced by the investment by the Fund of Funds in the Fund. The Board will consider, among other things: (i) Whether the purchases were consistent with the investment objectives and policies of the Fund; (ii) how the performance of securities purchased in an Affiliated Underwriting compares to the performance of comparable securities purchased during a comparable period of time in underwritings other than Affiliated Underwritings or to a benchmark such as a comparable market index; and (iii) whether the amount of securities purchased by the Fund in Affiliated Underwritings and the amount purchased directly from an Underwriting Affiliate have changed significantly from prior years. The Board will take any appropriate actions based on its review, including, if appropriate, the institution of procedures designed to ensure that purchases of securities in Affiliated Underwritings are in the best interest of beneficial owners of the Fund.

8. Each Fund will maintain and preserve permanently in an easily accessible place a written copy of the procedures described in the preceding condition, and any modifications to such procedures, and will maintain and preserve for a period of not less than six years from the end of the fiscal year in which any purchase in an Affiliated Underwriting occurred, the first two years in an easily accessible place, a written record of each purchase of securities in Affiliated Underwritings once an investment by a Fund of Funds in the securities of the Fund exceeds the limit of section 12(d)(1)(A)(i) of the Act, setting forth from whom the securities were acquired, the identity of the underwriting syndicate's members, the terms of the purchase, and the information or materials upon which the Board's determinations were made.

9. Before investing in a Fund in excess of the limits in section 12(d)(1)(A), a Fund of Funds will execute a FOF Participation Agreement with the Fund stating that their respective boards of directors or trustees and their investment advisers, or trustee and Sponsor, as applicable, understand the terms and conditions of the order, and agree to fulfill their responsibilities under the order. At the time of its investment in Shares of a Fund in excess of the limit in section 12(d)(1)(A)(i), a Fund of Funds will notify the Fund of the investment. At such time, the Fund of Funds will also transmit to the Fund a list of the names of each Fund of Funds Affiliate and Underwriting Affiliate. The Fund of Funds will notify the Fund of any changes to the list as soon as reasonably practicable after a change occurs. The Fund and the Fund of Funds will maintain and preserve a copy of the order, the FOF Participation Agreement, and the list with any updated information for the duration of the investment and for a period of not less than six years thereafter, the first two years in an easily accessible place.

10. Before approving any advisory contract under section 15 of the Act, the board of directors or trustees of each Investing Management Company, including a majority of the independent directors or trustees, will find that the advisory fees charged under such contract are based on services provided that will be in addition to, rather than duplicative of, the services provided under the advisory contract(s) of any Fund in which the Investing Management Company may invest. These findings and their basis will be recorded fully in the minute books of the appropriate Investing Management Company.

11. Any sales charges and/or service fees charged with respect to shares of a Fund of Funds will not exceed the limits applicable to a fund of funds as set forth in NASD Conduct Rule 2830.

12. No Fund will acquire securities of an investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, except to the extent permitted by exemptive relief from the Commission permitting a Fund to purchase shares of other investment companies for short-term cash management purposes.

For the Commission, by the Division of Investment Management, under delegated authority.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24919 Filed 10–23–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold an Open Meeting on Wednesday, October 23, 2013 at 10:00 a.m., in the Auditorium, Room L–002.

The subject matter of the Open Meeting will be:

- The Commission will consider whether to propose rules and forms related to the offer and sale of securities through crowdfunding pursuant to Section 4(a)(6) of the Securities Act of 1933, as mandated by Title III of the Jumpstart Our Business Startups Act.

The duty officer has determined that no earlier notice was possible.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: The Office of the Secretary at (202) 551–5400.

Dated: October 21, 2013.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2013–25121 Filed 10–22–13; 11:15 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70711; File No. SR–NYSE–2013–70]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Replace Certain References to ''Member'' With References to ''Member Organization'' in the Rule 9000 Series

October 18, 2013.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that on October 17, 2013, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I 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 replace certain references to ''member'' with references to ''member organization'' in the Rule 9000 Series. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to replace certain references to ''member'' with references to ''member organization'' in the Rule 9000 Series.

The Exchange recently adopted disciplinary rules that are modeled on the rules of the Financial Industry Regulatory Authority (''FINRA'').[4] In that filing, the Exchange proposed certain technical changes to the FINRA rule text, including replacing references to ''member'' with references to ''member organization.'' [5] However, certain disciplinary rules (Rules 9310, 9522, 9555, 9557, and 9558) inadvertently have references to ''member.'' The Exchange proposes to correct these references by replacing them with references to ''member organization.''

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[6] in general, and furthers the objectives of Section 6(b)(5) of the Act,[7] in particular, because it is designed 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. Specifically, the Exchange believes that the proposal removes impediments to and perfects the mechanism of a free and open market by ensuring that member organizations, regulators, and the public can more easily understand and navigate the Exchange's rules by implementing consistent terminology throughout the Exchange's rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not intended to address competitive issues but rather would implement consistent terminology throughout the Exchange's rules, thereby reducing confusion, and making the Exchange's rules easier to understand and navigate.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6) thereunder.[8]

The Exchange has requested that the Commission waive the 30-day operative delay so that the proposed rule change 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. Doing so will allow the Exchange to immediately correct certain references in its rule text and to implement consistent terminology in its rules. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[9]

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 under Section 19(b)(2)(B) [10] of the Act 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

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release Nos. 68678 (January 16, 2013), 78 FR 5213 (January 24, 2013) (SR–NYSE–2013–02) (''Notice''), and 69045 (March 5, 2013), 78 FR 15394 (March 11, 2013).

[5] *See* Notice, 78 FR at 5219.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[9] 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).

[10] 15 U.S.C. 78s(b)(2)(B).

arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2013–70 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2013–70. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2013–70 and should be submitted on or before November 14, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24850 Filed 10–23–13; 8:45 am]

BILLING CODE 8011–01–P

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70720; File No. SR–NYSE–2013–07]

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Granting Approval to Proposed Rule Change Amending NYSE Rules 451 and 465, and the Related Provisions of Section 402.10 of the NYSE Listed Company Manual, Which Provide a Schedule for the Reimbursement of Expenses by Issuers to NYSE Member Organizations for the Processing of Proxy Materials and Other Issuer Communications Provided to Investors Holding Securities in Street Name, and To Establish a Five-Year Fee for the Development of an Enhanced Brokers Internet Platform

October 18, 2013.

I. Introduction

On February 1, 2013, New York Stock Exchange LLC (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend the fees set forth in NYSE Rules 451 and 465, and the related provisions of Section 402.10 of the NYSE Listed Company Manual, for the reimbursement of expenses by issuers to NYSE member organizations for the processing of proxy materials and other issuer communications provided to investors holding securities in street name, and to establish a five-year fee for the development of an enhanced brokers internet platform. The proposed rule change was published for comment in the **Federal Register** on February 22, 2013.[3] The Commission initially received twenty-four comment letters on the proposed rule change.[4] On April 3, 2013, the Commission extended the time period for Commission action to May 23, 2013.[5] The Commission thereafter received four more comment letters.[6]

On May 17, 2013, NYSE submitted a response to the comment letters.[7]

On May 23, 2013, the Commission initiated proceedings to determine whether to disapprove the proposed rule change.[8] In response to the Order

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 68936 (February 15, 2013), 78 FR 12381 (''Notice'').

[4] *See* letters to Elizabeth M. Murphy, Secretary, Commission from: Charles V. Rossi, President, The Securities Transfer Association, dated February 20, 2013 (''STA Letter'') and March 4, 2013 (''STA Letter II''); Karen V. Danielson, President, Shareholder Services Association, dated March 4, 2013 (''SSA Letter''); Jeanne M. Shafer, dated March 6, 2013 (''Schafer Letter''); David W. Lovatt, dated March 6, 2013 (''Lovatt Letter''); Stephen Norman, Chair, The Independent Steering Committee of Broadridge, dated March 7, 2013 (''Steering Committee Letter''); Jeffrey D. Morgan, President & CEO, National Investor Relations Institute, dated March 7, 2013 (''NIRI Letter''); Kenneth Bertsch, President and CEO, Society of Corporate Secretaries & Governance Professionals, dated March 7, 2013 (''SCSGP Letter''); Niels Holch, Executive Director, Shareholder Communications Coalition, dated March 12, 2013 (''SCC Letter''); Geoffrey M. Dugan, General Counsel, iStar Financial Inc., dated March 13, 2013 (''iStar Letter''); Paul E. Martin, Chief Financial Officer, Perficient, Inc., dated March 13, 2013 (''Perficient Letter''); John Harrington, President, Harrington Investments, Inc., dated March 14, 2013 (''Harrington Letter''); James McRitchie, Shareowner, Corporate Governance, dated March 14, 2013 (''CG Letter''); Clare A. Kretzman, General Counsel, Gartner, Inc., dated March 15, 2013 (''Gartner Letter''); Tom Quaadman, Vice President, Center for Capital Markets Competitiveness, dated March 15, 2013 (''CCMC Letter''); Dennis E. Nixon, President, International Bancshares Corporation, dated March 15, 2013 (''IBC Letter''); Argus I. Cunningham, Chief Executive Officer, Sharegate Inc., dated March 15, 2013 (''Sharegate Letter''); Laura Berry, Executive Director, Interfaith Center on Corporate Responsibility, dated March 15, 2013 (''ICC Letter''); Dorothy M. Donohue, Deputy General Counsel—Securities Regulation, Investment Company Institute, dated March 15, 2013 (''ICI Letter''); Charles V. Callan, Senior Vice President—Regulatory Affairs, Broadridge Financial Solutions, Inc., dated March 15, 2013 (''Broadridge Letter''); Brad Philips, Treasurer, Darling International Inc., dated March 15, 2013 (''Darling Letter''); John Endean, President, American Business Conference, dated March 18, 2013 (''ABC Letter''); Tom Price, Managing Director, The Securities Industry and Financial Markets Association, dated March 18, 2013 (''SIFMA Letter''); and Michael S. O'Brien, Vice President—Corporate Governance Officer, BNY Mellon, dated March 28, 2013 (''BNY Letter'').

[5] *See* Securities Exchange Act Release No. 69286 (April 3, 2013), 78 FR 21481 (April 10, 2013).

[6] *See* letters to Elizabeth M. Murphy, Secretary, Commission from: Jeff Mahoney, General Counsel, Council of Institutional Investors, dated April 5, 2013 (''CII Letter''); Paul Torre, Executive Vice President, AST Fund Solutions, LLC, dated May 16, 2013 (''AST Letter''); and John M. Payne, Chief Executive Officer, Zumbox, Inc., dated May 20, 2013 (''Zumbox Letter''); *see also* letter to the Honorable Mary Jo White, Chair, Commission from Dieter Waizenegger, Executive Director, CtW Investment Group, dated May 17, 2013 (''CtW Letter'').

[7] *See* letter to Elizabeth M. Murphy, Secretary, Commission from Janet McGinnis, EVP & Corporate Secretary, NYSE Euronext, dated May 17, 2013 (''NYSE Letter'').

[8] *See* Securities Exchange Act Release No. 69622 (May 23, 2013), 78 FR 32510 (May 30, 2013) (''Order Instituting Proceedings''). In the Order Instituting Proceedings, the Commission, among other things, expressed its belief that questions remained as to whether the Exchange's proposal was consistent with the requirements of: (1) Section 6(b)(4) of the Act, including whether it provides for the equitable allocation of reasonable fees among its members, issuers and other persons using its facilities; (2) Section 6(b)(5) of the Act, including whether it is not designed to permit unfair discrimination, or would promote just and equitable principles of trade, or protect investors and the public interest; and (3) Section 6(b)(8) of the Act, including whether it would not impose any burden on competition that is not necessary or

Instituting Proceedings, the Commission received fourteen additional comment letters on the proposal.[9] On July 9, 2013, NYSE responded to the Order Instituting Proceedings.[10] On August 15, 2013, the Commission extended the time period for Commission action to October 20, 2013.[11] On September 9, 2013, NYSE submitted an additional letter in further support of its proposal.[12] On October 1, 2013, NYSE submitted an additional letter in response to FOLIOfn Letter and FOLIOfn Letter II.[13] This order approves the proposed rule change.

II. Background

NYSE member organizations that hold securities for beneficial owners in street name solicit proxies from, and deliver proxy and issuer communication materials to, beneficial owners on behalf of NYSE issuers.[14] For this service, issuers reimburse NYSE member organizations for out-of-pocket, reasonable clerical, postage and other expenses incurred for a particular distribution. This reimbursement structure stems from SEC Rules 14b–1 and 14b–2 under the Act,[15] which impose obligations on companies and nominees to ensure that beneficial owners receive proxy materials and are given the opportunity to vote. These rules require companies to send their proxy materials to nominees, *i.e.,* broker-dealers or banks that hold securities in street name, for forwarding to beneficial owners. Under these rules, companies must pay nominees for reasonable expenses, both direct and indirect, incurred in providing proxy information to beneficial owners. The Commission's rules do not specify the fees that nominees can charge issuers for proxy distribution; rather, they state that issuers must reimburse the nominees for ''reasonable expenses'' incurred.[16]

Currently, the Supplementary Material to NYSE Rules 451 and 465 establish the fee structure for which a NYSE member organization may be reimbursed for expenses incurred in connection with distributing proxy materials to beneficial shareholders.[17] This fee structure is also replicated in Section 402.10 of the NYSE Listed Company Manual.[18] The NYSE fee structure represents the maximum approved rates that an issuer can be billed for proxy distribution services absent prior notification to and consent of the issuer.[19] NYSE member firms may seek reimbursement for less than the approved rates;[20] however, it is the Commission's understanding that in practice most issuers are billed at the maximum approved rates.

The vast majority of nominees that distribute issuer proxy material to beneficial owners are entitled to reimbursement at the NYSE fee schedule rates because most of the brokerage firms are NYSE members or members of other exchanges that have rules similar to the NYSE's rules.[21] Over time, however, NYSE member organizations increasingly have outsourced their proxy delivery obligations to third-party proxy service providers, which are generally called ''intermediaries,'' rather than handling proxy processing internally.[22] At the present time, a single intermediary, Broadridge Financial Solutions, Inc. (''Broadridge''), handles almost all proxy processing and distribution to beneficial owners holding shares in street name in the United States.[23] In general, Broadridge enters into a contract with the NYSE member firm and acts as a billing and collection agent for that member firm.[24] As a result, it is Broadridge that, on behalf of its member firm clients, most frequently bills and collects proxy distribution fees from issuers based on the NYSE fee schedule.

The NYSE's current proxy fee structure is the product of a multi-year, multi-task force effort that began in 1995 and culminated in 2002 with the Commission's approval of an NYSE program that significantly revised the then-current NYSE reimbursement guidelines.[25] In the 2002 Approval Order, the Commission stated that, as long as the NYSE's proxy fee structure remains in place, the Commission expected the NYSE to periodically

appropriate in furtherance of the purposes of the Act.

[9] *See* letters to Elizabeth M. Murphy, Secretary, Commission from: Katie J. Sevcik, Legal and Regulatory Committee Chair, Shareholder Services Association, dated June 12, 2013 (''SSA Letter II''); Paul Torre, Executive Vice President, AST Fund Solutions, LLC, dated June 18, 2013 (''AST Letter II''); Loren Hanson, Assistant Secretary/Assistant Treasurer, Otter Tail Corporation, dated June 17, 2013 (''OTC Letter''); Michael J. Hogan, Chief Executive Officer, FOLIO*fn* Investments, Inc., dated June 18, 2013 (''FOLIOfn Letter''); Harold Westervelt, President, INVeSHARE, dated June 18, 2013 (''INVeSHARE Letter''); Dieter Waizenegger, Executive Director, Investment Group, dated June 20, 2013 (''CtW Letter II''); Dorothy M. Donohue, Deputy General Counsel—Securities Regulation, Investment Company Institute, dated June 20, 2013 (''ICI Letter II''); Lisa Lindsley, Director, Capital Strategies Program, The American Federation of State, County and Municipal Employees, dated July 3, 2013 (''AFSCME Letter''); Brandon Rees, Acting Director, American Federation of Labor and Congress of Industrial Organizations Office of Investment, dated July 5, 2013 (''AFL–CIO Letter''); Charles V. Rossi, President, The Securities Transfer Association, Inc., dated July 5, 2013 (''STA Letter III''); James J. Angel, dated July 5, 2013 (''Angel Letter''); and Michael J. Hogan, Chief Executive Officer, FOLIO*fn* Investments, Inc., dated July 12, 2013 (''FOLIOfn Letter II''); *see also* letters to the Honorable Mary Jo White, Chair, Commission from Ann Yerger, Executive Director, Council of Institutional Investors, dated May 17, 2013 (''CII Letter II''); and Charles E. Schumer, United States Senator, dated May 23, 2013 (''Schumer Letter'').

[10] *See* letter to Elizabeth M. Murphy, Secretary, Commission from Janet McGinnis, EVP & Corporate Secretary, NYSE Euronext, dated July 9, 2013 (''NYSE Letter II'').

[11] *See* Securities Exchange Act Release No. 70217 (August 15, 2013), 78 FR 51780 (August 21, 2013).

[12] *See* letter to Elizabeth M. Murphy, Secretary, Commission from Janet McGinnis, EVP & Corporate Secretary, NYSE Euronext, dated September 9, 2013 (''NYSE Letter III''). NYSE Letter III provided additional information from Broadridge about the costs involved in providing proxy and report distribution services (the ''Broadridge Material'').

[13] *See* letter to Elizabeth M. Murphy, Secretary, Commission from Janet McGinnis, EVP & Corporate Secretary, NYSE Euronext, dated October 1, 2013 (''NYSE Letter IV''). In addition, on October 15, 2013, the Chairman of NYSE's Proxy Fee Advisory Committee submitted a letter in support of NYSE's proposal. *See* letter to Elizabeth M. Murphy, Secretary, Commission from Paul F. Washington, Chairman, NYSE Proxy Fee Advisory Committee, dated October 15, 2013 (''Washington Letter''). Furthermore, on October 18, 2013, the Society of Corporate Secretaries & Governance Professionals submitted a letter in support of the statements made in NYSE Letter IV regarding (i) the elimination of the preference management fee for managed accounts with fewer than five shares and (ii) EBIPs. *See* letter to Elizabeth M. Murphy, Secretary, Commission from Darla C. Stuckey, Senior Vice President, Policy & Advocacy, Society of Corporate Secretaries & Governance Professionals, dated October 18, 2013.

[14] The ownership of shares in street name means that a shareholder, or ''beneficial owner,'' has purchased shares through a broker-dealer or bank, also known as a ''nominee.'' In contrast to direct ownership, where shares are directly registered in the name of the shareholder, shares held in street name are registered in the name of the nominee, or in the nominee name of a depository, such as the Depository Trust Company. For more detail regarding share ownership, *see* Securities Exchange Act Release No. 62495 (July 14, 2010), 75 FR 42982 (July 22, 2010) (Concept Release on the U.S. Proxy System) (''Proxy Concept Release'').

[15] 17 CFR 240.14b–1; 17 CFR 240.14b–2.

[16] In adopting the direct shareholder communications rules in the early 1980s, the Commission left the determination of reasonable costs to the self-regulatory organizations (''SROs'') because they were deemed to be in the best position to make fair evaluations and allocations of costs associated with these rules. *See* Securities Exchange Act Release No. 20021 (July 28, 1983), 48 FR 35082 (August 3, 1983); *see also* Securities Exchange Act Release No. 45644 (March 25, 2002), 67 FR 15440, 15440 n.8 (April 1, 2002) (order approving NYSE program revising reimbursement rates) (''2002 Approval Order'').

[17] *See* Rules 451 and 465.

[18] *See* Section 402.10, NYSE Listed Company Manual.

[19] *See* Rules 451.93 and 465.23.

[20] *Id.*

[21] *See* Proxy Concept Release, 75 FR 42995 n.110.

[22] *See* 2002 Approval Order, 67 FR 15540. According to the NYSE, this shift was attributable to the fact that NYSE member firms believed that proxy distribution was not a core broker-dealer business and that capital could be better used elsewhere. *Id.*

[23] *See* Proxy Concept Release, 75 FR 42988, n. 57, and at 42996, n.129; *see also* Notice, 78 FR 12382.

[24] *See* Proxy Concept Release, 75 FR 42997.

[25] *See* 2002 Approval Order; *see also* Notice, 78 FR 12383.

review the fees to ensure that they are related to the reasonable proxy expenses of the NYSE member firms, and to propose changes as appropriate.[26] Similarly, in the Proxy Concept Release, the Commission stated that ''it appears to be an appropriate time for SROs to review their existing fee schedules to determine whether they continue to be reasonably related to the actual costs of proxy solicitation.'' [27] As is also noted in the Proxy Concept Release, in 2006, a working group formed to review the NYSE proxy fee structure (''Proxy Working Group'') recommended that the NYSE engage an independent third party to analyze and make recommendations regarding the fee structure and to study the performance of the largest proxy service provider (*i.e.,* Broadridge) and the business process by which the distribution of proxies occurs.[28] The Proxy Concept Release further noted that, as of the date of the release, such review had not been done.[29]

The proposed rule change represents the most recent effort to revise the NYSE proxy fee structure. In September 2010, the Exchange formed a Proxy Fee Advisory Committee (''PFAC''), composed of representatives of issuers, broker-dealers and investors, to review the existing NYSE fee structure and make recommendations for change as the PFAC deemed appropriate.[30] The proposed rule change is an outgrowth of the PFAC's recommendations.[31]

III. Description of the Proposal

In the proposal, the Exchange has proposed to amend its schedule for the reimbursement of proxy fees by amending the Supplementary Material to NYSE Rules 451 and 465, and Section 402.10 of the NYSE Listed Company Manual.[32] The Exchange represents that the proposed changes reduce some fees and increase others.[33] Broadridge has estimated that, under the proposed changes, overall fees paid by issuers would decrease by approximately 4%.[34]

Currently, the reimbursement rates set by the Exchange for the distribution of an issuer's proxy materials include: [35]

- A base mailing or basic processing fee of $0.40 for each beneficial owner account of an issuer that is entitled to receive proxy materials when there is not an opposing proxy. When there is an opposing proxy, the base mailing or processing unit fee is $1.00 for each beneficial owner account of the issuer. While NYSE Rule 451.90(1) currently refers to this fee as being for each set of proxy material when mailed as a unit, this fee, in practice, applies regardless of whether the materials have been mailed or the mailing has been suppressed or eliminated.[36]
- As supplemental fees for intermediaries or proxy service providers that coordinate proxy distributions for multiple nominees, a fee of $20 per nominee plus an additional fee of $0.05 per beneficial owner account for issuers whose securities are held in 200,000 or more beneficial owner accounts and $0.10 per beneficial owner account for issuers whose securities are held in fewer than 200,000 beneficial owner accounts.[37]
- An incentive fee of $0.25 per beneficial owner account for issuers whose securities are held in 200,000 or more beneficial owner accounts and $0.50 per beneficial owner account for issuers whose securities are held in fewer than 200,000 beneficial owner accounts. This fee, which is in addition to the basic processing fee and supplemental intermediary fees, applies when the need to mail materials in paper format has been eliminated, for instance, by eliminating duplicative mailings to multiple accounts at the same address [38] or distributing some or all material electronically.[39]

NYSE's current fee schedule also sets forth fees that issuers must pay to brokers and their intermediaries for obtaining a list of the non-objecting beneficial owners holding the issuer's securities, commonly referred to as a ''NOBO list.'' [40] Currently, these fees are $0.065 per name of non-objecting beneficial owner provided to a requesting issuer and, where the non-objecting beneficial ownership information is furnished to the issuer by an agent designated by the member organization instead of directly by the member organization, issuers are expected to pay the reasonable expenses of the agent in providing such information.[41]

As an initial, technical matter, the Exchange has proposed to eliminate some of the duplication and obsolete language in the NYSE rules in which the fee schedule is set forth.[42] The same proxy fees are currently presented multiple times in Rule 451, Rule 465 and Section 402.10 of the Listed Company Manual.[43] To clarify matters, proposed Rules 465.20–465.25 would cross-reference proposed Rules 451.90–451.95, and proposed Section 402.10 of the Listed Company Manual would reproduce the text of proposed Rules 451.90–451.95.[44] Additionally, the proposed rule change would eliminate obsolete references to the effective dates of past changes to the fee structure as well as to the amount of a surcharge, set forth in Rule 451.91, that was temporarily applied in the mid-1980s.[45] Further, the Exchange has proposed to eliminate several references to ''mailings'' in the proposed rules, given that the processing fees apply even where physical mailings have been suppressed.[46] Lastly, the Exchange has proposed to eliminate several minor minimum fees of $5 or less as irrelevant

[26] *See* 2002 Approval Order, 67 FR 15444.

[27] *See* Proxy Concept Release, 75 FR 42997; *see also* Notice, 78 FR 12382.

[28] *See* Proxy Concept Release, 75 FR 42996.

[29] *Id.*

[30] *See* Notice, 78 FR 12382.

[31] For a more detailed description of the background and history of the proxy distribution industry, proxy fees, and events leading to the instant proposal, *see* the 2002 Approval Order, Proxy Concept Release, and Notice.

[32] The Exchange has proposed to amend Rule 451 and to delete the text of Rule 465, which duplicates Rule 451, and replace it with a general cross reference to proposed Rule 451. Proposed Section 402.10 of the NYSE Listed Company Manual would reproduce proposed Rule 451 as amended. *See* notes 43 and 44 and accompanying text, *infra.*

[33] *See* Notice, 78 FR 12384.

[34] *Id.*

[35] *See* NYSE Rules 451.90–451.95, 465.20–465.25, and Section 402.10 of the NYSE Listed Company Manual; *see also* Proxy Concept Release, 75 FR 42995–96. For an example of the application of the current reimbursement rates, *see* Proxy Concept Release, 75 FR 42996 n.120.

[36] *See* NYSE Rules 451.90, 465.20, and Section 402.10(A) of the NYSE Listed Company Manual; *see also* Proxy Concept Release, 75 FR 42996.

[37] *Id.*

[38] *Id.* The elimination of duplicative mailings to multiple accounts at the same address is referred to as ''householding.'' *See* Proxy Concept Release, 75 FR 42983 n.5; *see also* NYSE Rule 451.95. Specifically, the incentive fee may be collected for such ''householding'' when NYSE member firms ''eliminate multiple transmissions of reports, statements or other materials to beneficial owners having the same address, provided they comply with applicable SEC rules with respect thereto. . . .'' NYSE Rule 451.95.

[39] Proxy materials can be provided electronically to shareholders that have affirmatively consented to electronic delivery. *See* Proxy Concept Release, 75 FR 42986 n.32. Such affirmative consent also is required before the notice of internet availability of proxy materials—a component of the notice and access method of proxy distribution, which is an additional alternative to paper mailing of proxy materials, as discussed below—can be sent to shareholders electronically. *Id.* Without such consent, the notice must be mailed to shareholders in paper format. *Id.* If the notice is sent in paper format, the incentive fee would not be applied.

[40] *See, e.g.,* NYSE Rule 451.92.

[41] *Id.*

[42] *See* Notice, 78 FR 12390.

[43] *Id.*

[44] *Id.* Where the proposed Rules are cited below, for the sake of simplicity, such citations will include only Rules 451.90–451.95 and not the corresponding provisions of proposed Section 402.10 of the NYSE Listed Company Manual.

[45] *See* Notice, 78 FR 12390.

[46] *Id.*

to the overall fees imposed or collected.[47]

Substantively, the Exchange has proposed to revise certain aspects of the existing fee schedule and add new fees.[48] These revisions, described in turn below, include: (a) Amending the base mailing/basic processing fees; (b) amending the supplemental fees for intermediaries that coordinate proxy mailings for multiple nominees; (c) amending the incentive/preference management fees, including the manner in which such fees are applied to managed accounts; (d) adding fees for proxy materials distributed by what is known as the notice and access method; (e) adding fees for enhanced brokers' internet platforms; and (f) amending the fees for providing beneficial ownership information.[49] In addition, notwithstanding any other provision of proposed Rule 451.90, the Exchange has proposed that no fee be incurred by an issuer for any nominee account that contains only a fractional share—*i.e.* less than one share or unit—of the issuer's securities or for any nominee account that is a managed account and contains five or fewer shares or units of the issuer's securities.[50]

A. Base Mailing/Basic Processing Fees

As set forth above, there is currently a fee of $0.40 for each beneficial owner account of an issuer that is entitled to receive proxy materials when there is not an opposing proxy.[51] This fee is commonly referred to as the base mailing or basic processing fee.[52] The Exchange has proposed to replace this flat $0.40 fee with a tiered fee structure for each set of proxy material processed as a unit, which the Exchange has proposed to call a ''Processing Unit Fee.'' [53] The tiers would be based on the number of nominee accounts through which an issuer's securities are beneficially owned:

- $0.50 for each account up to 10,000 accounts;
- $0.47 for each account above 10,000 accounts, up to 100,000 accounts;
- $0.39 for each account above 100,000 accounts, up to 300,000 accounts;
- $0.34 for each account above 300,000 accounts, up to 500,000 accounts;
- $0.32 for each account above 500,000 accounts.[54]

Under this tiered schedule, every issuer would pay the first tier rate—$0.50—for the first 10,000 accounts, or portion thereof, with decreasing rates applicable only to the incremental additional accounts in the additional tiers.[55]

In addition, the Exchange has proposed to clarify that references in proposed Rule 451 to the ''number of accounts'' have a different meaning for a nominee that distributes proxy materials without the services of an intermediary as compared to a nominee that is served by an intermediary. For a nominee that distributes proxy materials without the services of an intermediary, references to number of accounts in proposed Rule 451 mean the number of accounts holding securities of the issuer at the nominee.[56] For a nominee that is served by an intermediary, such references mean the aggregate number of nominee accounts with beneficial ownership in the issuer served by the intermediary.[57] As the Exchange has noted in the proposal, this means that, for a particular issuer, the fee charged by an intermediary or a nominee that self-distributes (and therefore does not use an intermediary) within the different tiers will depend on the number of accounts holding shares in that issuer that are served by the intermediary or held by the particular nominee.[58] Accordingly, for an issuer with a large number of beneficial accounts, intermediaries or self-distributing nominees serving a small portion of the issuer's accounts would bill the issuer at the higher tier-one rates whereas an intermediary serving a large number of the issuer's accounts would bill the issuer at rates that reflect the progressive decrease in rates across the tiers as the number of accounts served increases.[59]

The Exchange has also proposed to specify that, in the case of a meeting for which an opposition proxy has been furnished to security holders, the proposed Processing Unit Fee shall be $1.00 per account, in lieu of the tiered fee schedule set forth above.[60] This would, therefore, be no departure from the current $1.00 fee that is assessed when an opposition proxy has been furnished.

B. Supplemental Intermediary Fees

As stated above, the Exchange's fee schedule currently provides for supplemental fees for intermediaries or proxy service providers that coordinate proxy distributions for multiple nominees of $20 per nominee, plus an additional fee of $0.05 per beneficial owner account for issuers whose securities are held in 200,000 or more beneficial owner accounts and $0.10 per beneficial owner account for issuers whose securities are held in fewer than 200,000 beneficial owner accounts.[61] The Exchange has proposed to replace the $20 per-nominee fee with a $22 fee for each nominee served by the intermediary that has at least one account beneficially owning shares in the issuer.[62] The Exchange also has proposed to replace the $0.05 and $0.10 fees, which are determined based on whether or not the issuer's securities are held in at least 200,000 beneficial owner accounts, with a tiered fee structure called the ''Intermediary Unit Fee,'' which would be based on the number of nominee accounts through which the issuer's securities are beneficially owned:

- $0.14 for each account up to 10,000 accounts;
- $0.13 for each account above 10,000 accounts, up to 100,000 accounts;

[47] *Id.* Proposed Rule 451.90(3), which would set forth the fee for interim reports and other material, is an example of the proposed technical amendments. As proposed, the pre-existing $0.15 fee in current Rule 451.90 would not change, but the $2.00 minimum for all sets mailed would be eliminated, and the language of the rule would be amended to eliminate the reference to the effective date of the pre-existing rule and to replace the word ''mailed'' with ''processed.'' *See* proposed Rule 451.90(3).

[48] The Exchange has also proposed to codify definitions of the terms ''nominee'' and ''intermediary.'' Under proposed Rule 451.90(1)(a), the term ''nominee'' would be defined to mean a broker or bank subject to SEC Rule 14b–1 or 14b–2, respectively, and the term ''intermediary'' would be defined to mean a proxy service provider that coordinates the distribution of proxy or other materials for multiple nominees.

[49] *See* proposed Rule 451.90.

[50] *See* proposed Rule 451.90(6).

[51] *See* Rule 451.90; *see also* Proxy Concept Release, 75 FR 42996.

[52] *See* Notice, 78 FR 12385; *see also* Proxy Concept Release, 75 FR 42996.

[53] *See* proposed Rule 451.90(1)(b)(i). The Exchange has not proposed to replace the current $0.40 flat fee for proxy follow-up materials with a tiered structure. The Exchange has proposed to keep a flat Processing Unit Fee of $0.40 per account for each set of follow-up material, but for those relating to an issuer's annual meeting for the election of directors, the Exchange has proposed to reduce the fee by half, to $0.20 per account. *See* proposed Rule 451.90(2). The Exchange notes that issuers have a choice whether or not to use reminder mailings, and that the reduced fee may induce more issuers to use reminder mailings, which could increase investor participation, particularly among retail investors. *See* Notice, 78 FR 12390.

[54] *See* proposed Rule 451.90(1)(b)(i).

[55] *Id.*

[56] *Id.*

[57] *Id.* While the definition of the term nominee in NYSE's proposal includes both brokers and banks for purposes of determining which tiers apply, the Commission notes that the scope of the rule being approved here today applies to reasonable rates of reimbursement of NYSE member firms. *See also* note 48, *supra.*

[58] *See* Notice, 78 FR 12385 n.20.

[59] *Id.*

[60] *See* proposed Rule 451.90(1)(b)(ii).

[61] *See* Rule 451.90; *see also* Proxy Concept Release, 75 FR 42996.

[62] *See* proposed Rule 451.90(1)(c)(i).

• $0.11 for each account above 100,000 accounts, up to 300,000 accounts;
• $0.09 for each account above 300,000 accounts, up to 500,000 accounts;
• $0.07 for each account above 500,000 accounts.[63]

Under this tiered schedule, every issuer would pay the first tier rate—$0.14—for the first 10,000 accounts, or portion thereof, with decreasing rates applicable only to the incremental additional accounts in the additional tiers.[64]

Additionally, the Exchange has proposed the following tiered fee schedule for special meetings that would apply in lieu of the schedule set forth immediately above:

• $0.19 for each account up to 10,000 accounts;
• $0.18 for each account above 10,000 accounts, up to 100,000 accounts;
• $0.16 for each account above 100,000 accounts, up to 300,000 accounts;
• $0.14 for each account above 300,000 accounts, up to 500,000 accounts;
• $0.12 for each account above 500,000 accounts.[65]

Under this tiered schedule, every issuer would pay the first tier rate—$0.19—for the first 10,000 accounts, or portion thereof, with decreasing rates applicable only to the incremental additional accounts in the additional tiers.[66] The Exchange has proposed that, for purposes of proposed Rule 451.90(1)(c)(iii), a special meeting is a meeting other than the issuer's meeting for the election of directors.[67]

The Exchange has also proposed that, in the case of a meeting for which an opposition proxy has been furnished to security holders, the proposed Intermediary Unit Fee shall be $0.25 per account, with a minimum fee of $5,000.00 per soliciting entity, in lieu of the tiered fee schedules set forth in proposed Rules 451.90(1)(c)(ii) and (iii).[68] Where there are separate solicitations by management and an opponent, the Exchange has proposed that the opponent would be separately billed for the costs of its solicitation.[69]

The Exchange estimates that the proposed tiered fee structures discussed above—for the Intermediary Unit Fee as well as the proposed Processing Unit Fee—entail fee increases that are estimated to add approximately $9–10 million to overall proxy distribution fees.[70] The Exchange states that the PFAC took note of the fact that since the fees were last revised in 2002, there has been an effective decline in the fees of approximately 20% due to the impact of inflation.[71] The Exchange also states that the PFAC believed that economies of scale exist when handling distributions for more widely held issuers, which is why the per-account fees decrease as the number of accounts increases.[72] Further, the Exchange believes that its proposed tiered structures would approximate the sliding impact of such economies of scale better than the current processing and intermediary fee structures.[73]

C. Incentive/Preference Management Fees

As stated above, the Exchange's fee schedule currently provides for an incentive fee of $0.25 per beneficial owner account for issuers whose securities are held in 200,000 or more beneficial owner accounts and $0.50 per beneficial owner account for issuers whose securities are held in fewer than 200,000 beneficial owner accounts.[74] The Exchange has proposed to refer to this fee as the ''Preference Management Fee'' and to amend it to be: (a) $0.32 for each set of proxy material described in proposed Rule 451.90(1)(b) (proxy statement, form of proxy and annual report when processed as a unit), unless the account is a Managed Account (as defined in proposed Rule 451.90(6), discussed below), in which case the fee would be $0.16;[75] and (b) $0.10 for each set of material described in proposed Rule 451.90(2) (proxy follow-up material) or proposed Rule 451.90(3) (interim reports and other material).[76] The Preference Management Fee would apply to each beneficial owner account for which the nominee has eliminated the need to send materials in paper format through the mails (or by courier service), and would be in addition to, and not in lieu of, the other proposed fees.[77]

The Preference Management Fee would apply not only in the year when paper delivery is first eliminated, but also in each year thereafter.[78] The Exchange represents that the PFAC was persuaded that there was significant processing work involved in keeping track of the shareholders' election, especially given that the shareholder is entitled to change that election from time to time.[79] According to the Exchange, although few shareholders do in fact change their election, data processing has to look at each account position relative to each shareholder meeting or proxy distribution event to determine whether paper mailing has been eliminated.[80]

1. Managed Accounts

For purposes of proposed Rule 451.90, the Exchange has proposed to define the term ''Managed Account'' as:

[A]n account at a nominee which is invested in a portfolio of securities selected by a professional advisor, and for which the account holder is charged a separate asset-based fee for a range of services which may include ongoing advice, custody and execution services. The advisor can be either employed by or affiliated with the nominee, or a separate investment advisor contracted for the purpose of selecting investment portfolios for the managed account. Requiring that investments or changes to the account be approved by the client would not preclude an account from being a ''managed account'' for this purpose, nor would the fact that commissions or transaction-based charges are imposed in addition to the asset-based fee.[81]

As noted above, the Exchange has proposed that the Preference Management Fee applied to Managed Accounts be half that applied to non-managed accounts.[82] In the proposal, the Exchange notes that, with Managed Accounts, the investor has elected to delegate the voting of its shares to a broker or investment manager who chooses to manage this process

[63] *See* proposed Rule 451.90(1)(c)(ii).
[64] *Id.*
[65] *See* proposed Rule 451.90(1)(c)(iii).
[66] *Id.*
[67] *Id.*
[68] *See* proposed Rule 451.90(1)(b)(iv).
[69] *Id.*
[70] *See* Notice, 78 FR 12385.
[71] *Id.* at 12384.
[72] *Id.* at 12385.
[73] *Id.*
[74] *See* Rule 451.90.
[75] *See* proposed Rule 451.90(4)(a). The $0.16 Preference Management Fee for Managed Accounts would apply only to Managed Accounts holding more than five shares or units of an issuer's securities, as the Exchange has proposed that there be no proxy processing fees charged to an issuer for Managed Accounts holding five or fewer shares or units of the issuer's securities. *See* note 50 and accompanying text, *supra,* and discussion of Managed Accounts, *infra.*
[76] *See* proposed Rule 451.90(4)(b); *see also* notes 47 and 53, *supra,* which discuss proposed Rules 451.90(2) and 451.90(3).
[77] *See* proposed Rule 451.90(4). The need for paper mailings can be eliminated through householding and affirmative consent to electronic delivery. *See* notes 38 and 39, *supra.*
[78] *See* Notice, 78 FR 12386.
[79] *Id.*
[80] *Id.*
[81] *See* Proposed Rule 451.90(6); *see also* Notice, 78 FR 12388.
[82] *See* Proposed Rule 451.90(4)(a). The Exchange represents that its proposal that the Preference Management Fee applied to Managed Accounts be half that applied to non-managed accounts would result in an estimated $15 million reduction in fees. *See* Notice, 78 FR 12385.

electronically rather than by receiving multiple paper copies of proxy statements and voting instructions.[83] According to the Exchange, however, tracking the beneficial owner's voting and distribution election is as necessary with Managed Accounts as it is with any other proxy distribution election eliminating the need for paper mailing, such as consent to e-delivery.[84] But the Exchange states that the PFAC concluded that making some distinctions between Managed Accounts and non-managed accounts for fee purposes was appropriate.[85] Among other things, the Exchange states that the popularity of Managed Accounts demonstrates that they offer advantages to investors and brokerage firms.[86] The Exchange states that issuers also reap benefits from inclusion in Managed Account portfolios, including the added investment in the company's stock and a higher rate of voting due to the fact that almost all Managed Account investors delegate voting to the investment manager.[87] Since both issuers and brokers benefit from Managed Accounts, the Exchange represents that the PFAC determined that issuers and brokers should share the cost of tracking the voting and distribution elections of beneficial owners of the stock positions in Managed Accounts, and therefore recommended that the Exchange propose a Preference Management Fee for Managed Accounts at a rate that is half that for other accounts.[88]

Additionally, in recognition of what the Exchange notes is a proliferation of Managed Accounts containing a very small number of an issuer's shares, the Exchange, as noted above, has proposed not to impose any proxy processing fees, including the Preference Management Fee, on an issuer for a Managed Account holding five or fewer shares or units of the issuer's securities.[89] The Exchange states that in certain situations in which Managed Accounts hold very small numbers of shares of an issuer, the benefits of increased stock ownership and increased voting participation were practically nonexistent for the issuer, while the added expense on a relative basis was extraordinary.[90] According to the Exchange, because one of the PFAC's goals was to avoid severe impacts on proxy distribution in the United States, the PFAC drew the line at five shares based on certain information supplied by Broadridge, including information from the 2011 proxy season depicting what the financial impact on proxy revenue would have been of setting the fee proscription for Managed Accounts at different levels.[91] According to the Exchange, setting the proscription at five shares or less in the 2011 proxy season would have created an overall decrease in proxy revenue of approximately $4.2 million.[92] The Exchange states that the PFAC determined that five shares or less was the appropriate level to draw the line and that the PFAC ''was comfortable that, given the relative benefit/burden on issuers and brokerage firms, it is not reasonable to make issuers reimburse the cost of proxy distribution to managed accounts holding five shares or less.'' [93]

Lastly, the Exchange states that no fee distinction would be based on whether or not a Managed Account is referred to as a ''wrap account.'' [94] As described by the Exchange, a wrap account is a managed account product with a relatively low minimum investment that tends to have many very small, even fractional, share positions, which led Broadridge to process such wrap accounts without any charge—either for basic processing or incentive fees.[95] Broadridge relied on its client firms to specify whether or not an account should be treated as a wrap account for this purpose, and positions in small minimum investment managed accounts which were not marketed with that appellation were subjected to ordinary fees, including incentive fees.[96] Under the Exchange's proposal, accounts identified as wrap accounts would no longer be treated as distinct from Managed Accounts not identified as such, and would therefore be subject to the same proxy fees as Managed Accounts.

D. Notice and Access Fees

The Commission has adopted a notice and access model that permits issuers to send shareholders what is called a ''Notice of Internet Availability of Proxy Materials'' in lieu of the traditional paper mailing of proxy materials.[97] Currently, the NYSE proxy fee structure does not include maximum fees that member firms—or, in practice, third-party proxy service providers—can charge issuers for deliveries of proxy materials using the notice and access method.[98] Broadridge currently imposes fees on issuers for use of the notice and access method, in addition to the other fees permitted to be charged under NYSE Rule 451.90.[99] In the proposal, the Exchange has proposed to codify the notice and access fees currently charged by Broadridge, with one adjustment.[100]

Specifically, for issuers that elect to utilize the notice and access method of proxy distribution, the Exchange has proposed an incremental fee based on all nominee accounts through which the issuer's securities are beneficially owned, as follows:

- $0.25 for each account up to 10,000 accounts;
- $0.20 for each account over 10,000 accounts, up to 100,000 accounts;
- $0.15 for each account over 100,000 accounts, up to 200,000 accounts;
- $0.10 for each account over 200,000 accounts, up to 500,000 accounts;
- $0.05 for each account over 500,000 accounts.[101]

The Exchange has also proposed to clarify that, under this schedule, every

[83] *See* Notice, 78 FR 12387.

[84] *Id.* In support of this the Exchange states that Commission rules require each beneficial owner holding shares in a Managed Account to be treated as the individual owner of those shares for purposes of having the ability to elect to vote those shares and receive proxy materials. *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *See* proposed Rule 451.90(6); *see also* Notice, 78 FR 12388.

[90] *See* Notice, 78 FR 12388.

[91] *Id.* The Exchange represents that, based on the Broadridge-supplied information, the overall impact varied from approximately $2.6 million at the fractional (less than one) share level, up to approximately $16 million if the proscription applied to accounts holding 25 shares or less. *Id.*

[92] *Id.* The Commission understands that this figure does not account for the inclusion of wrap accounts in the proposed fee structure for Managed Accounts.

[93] *Id.*

[94] *Id.* The Commission understands a wrap account to be a certain type of account that is managed by an outside investment adviser. *See* Proxy Concept Release, 75 FR 42998 n.140.

[95] *See* Notice, 78 FR 12387.

[96] *Id.* at 12387–88.

[97] *See* Proxy Concept Release, 75 FR 42986 n.32. The notice and access model works in tandem with electronic delivery—although an issuer electing to send a notice in lieu of a full proxy package would be required to send a paper copy of that notice, it may send that notice electronically to a shareholder who has provided an affirmative consent to electronic delivery. *Id.* These concepts are distinct because the issuer elects whether to use the notice-only option of the notice and access model on the one hand, while affirmative consents to electronic delivery are a matter between a broker and its customer.

[98] *Id.* at 42996.

[99] *See* Notice, 78 FR 12389. As of the date of the Proxy Concept Release, Broadridge charged issuers that elected the notice and access method of proxy delivery a fee ranging from $0.05 to $0.25 per account for positions in excess of 6,000, in addition to the other fees permitted to be charged under NYSE Rule 451. *See* Proxy Concept Release, 75 FR 42996–97.

[100] *See* Notice, 78 FR 12389. The Exchange has proposed to exclude from its proposed notice and access fee schedule the $1,500 minimum fee that Broadridge currently charges issuers that are held by 10,000 accounts or less and elect notice and access. The Exchange states that, in its view, such a minimal charge could be unfairly high on a small issuer billed by several intermediaries. *Id.*

[101] *See* proposed Rule 451.90(5).

issuer would pay the tier one rate for the first 10,000 accounts, or portion thereof, with decreasing rates applicable only to the incremental additional accounts in the additional tiers.[102] The Exchange has further proposed that follow-up notices would not incur an incremental fee for notice and access, and that no incremental fee would be imposed for fulfillment transactions (*i.e.,* a full pack of proxy materials sent to a notice recipient at the recipient's request), although out of pocket costs such as postage would be passed on as in ordinary proxy distributions.[103]

E. Enhanced Brokers' Internet Platform Fee

In the Proxy Concept Release, the Commission solicited views on whether retail investors might be encouraged to vote if they received notices of upcoming corporate votes, and had the ability to access proxy materials and vote, through their own broker's Web site—a service that the Commission referred to as enhanced brokers' internet platforms (''EBIP'').[104] According to the Exchange, Broadridge discussed with the PFAC a similar service that it offers, and maintained that while some brokerage firms have already implemented services like the EBIP, it appeared likely that some financial incentive would be necessary to achieve widespread adoption.[105]

Accordingly, the Exchange has proposed, for a five-year test period, a one-time, supplemental fee of $0.99 for each new account that elects, and each full package recipient among a brokerage firm's accounts that converts to, electronic delivery while having access to an EBIP.[106] According to the Exchange, this fee is intended to persuade firms to develop and encourage the use of EBIPs by their customers.[107] To qualify for the fee, an EBIP would have to provide notices of upcoming corporate votes, including record and meeting dates for shareholder meetings, and the ability to access proxy materials and a voting instruction form, and cast the vote, through the investor's account page on the firm's Web site without an additional log-in.[108] This fee would not apply to electronic delivery consents captured by issuers, positions held in Managed Accounts, or accounts voted by investment managers using electronic voting platforms.[109] This fee also would not be triggered by accounts that receive a notice pursuant to notice and access or accounts to which mailing is suppressed by householding.[110]

The Exchange has proposed to require NYSE member organizations with a qualifying EBIP to provide notice thereof to the Exchange, including the date such EBIP became operational, and any limitations on the availability of the EBIP to its customers.[111] The Exchange has also noted in the proposed rule that records of conversions to electronic delivery by accounts with access to an EBIP, marketing efforts to encourage account holders to use the EBIP, and the proportion of non-institutional accounts that vote proxies after being provided access to an EBIP must be maintained for the purpose of reporting such records to the NYSE when requested.[112]

The Exchange states that the EBIP fee would be available to firms that already have EBIP facilities, as even a firm that already has an EBIP can be incented to engage in marketing efforts to persuade its account holders to utilize the EBIP.[113] Further, the Exchange states that the fee would be triggered when a new account elects e-delivery immediately (and has access to an EBIP), except for accounts subject to notice and access or householding.[114] However, the Exchange represents that a firm making the EBIP available to only a limited segment of its account holders could not earn the EBIP fee from an e-delivery election by an account not within the segment having access to the EBIP.[115]

The Exchange represents that a study of the impact of the program would be conducted after three years.[116]

F. Fee for Providing Beneficial Ownership Information

As noted by the Exchange, since 1986 NYSE rules have provided for fees which issuers must pay to brokers and their intermediaries for obtaining a list of the non-objecting beneficial owners holding the issuer's stock.[117] Such a list is commonly referred to as a NOBO list, and the fees are charged per name in the NOBO list.[118] Currently, Rule 451.92 sets forth a $0.065 fee per NOBO name provided to the requesting issuer, but where the NOBO list is not furnished directly to the issuer by the member organization, and is instead furnished through an agent of the member organization, the current rule does not specify a fee—rather, it says only that the issuer will be expected to pay the reasonable expenses of the agent in providing such information.[119] The Exchange states that it understands that Broadridge, acting as such an agent, charges a $100 minimum fee per requested NOBO list, as well as a tiered per-name fee of: $0.10 per name for the first 10,000 names; $0.05 per name from 10,001 to 100,000 names, and $0.04 per each name above 100,000.[120] The Exchange has proposed to adopt and codify Broadridge's minimum and tiered per-name fees into its rules, and to delete its existing language that allows payment of the ''reasonable expenses of the agent.'' [121]

The Exchange also notes that it has been customary for brokers, through their intermediary, to require that issuers desiring a NOBO list take (and pay for) a list of all shareholders who are NOBOs, even in circumstances where an issuer would consider it more cost-effective to limit its communication to NOBOs having more than a certain number of shares, or to those that have not yet voted on a solicitation.[122] The Exchange has proposed to depart from this practice, so that when an issuer requests beneficial ownership information as of a date which is the record date for an annual or special meeting or a solicitation of written shareholder consent, the issuer may ask to eliminate names holding more or less than a specified number of shares, or names of shareholders that have already voted, and the issuer may not be charged a fee for the NOBO names so eliminated—a process commonly referred to as ''stratification.'' [123] For all other requested lists, however, the issuer would be required to take and pay for complete lists.[124]

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[102] *Id.*

[103] *Id.*

[104] *See* Notice, 78 FR 12391; *see also* Proxy Concept Release, 75 FR 43003. This is in contrast to the current situation in which, for most brokers, a beneficial owner must go to a separate Web site in order to view proxy materials and vote.

[105] *See* Notice, 78 FR 12391.

[106] *See* proposed Rule 451.90(7). As a one-time fee, NYSE member organizations could bill an issuer only once for each account covered by the rule. *Id.* Billing for the fee would be separately indicated on the issuer's invoice and would await the next proxy or consent solicitation by the issuer that follows the triggering of the fee by an eligible account's electronic delivery election. *Id.*

[107] *See* Notice, 78 FR 12393.

[108] *See* proposed Rule 451.90(7).

[109] *Id.* In addition, the Commission notes that the EBIP fee does not apply to accounts that converted to electronic delivery prior to the approval of the EBIP fee in this order.

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *See* Notice, 78 FR 12392.

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.* at 12390; *see also* Rule 451.92.

[118] *See* Notice, 78 FR 12390.

[119] *See* Rule 451.92.

[120] *See* Notice, 78 FR 12390.

[121] *See* proposed Rule 451.92; *see also* Notice, 78 FR 12391.

[122] *See* Notice, 78 FR 12390–91.

[123] *See* proposed Rule 451.92.

[124] *Id.; see also* Notice, 78 FR 12391.

IV. Summary of Comment Letters and the Exchange's Responses

As noted above, the Commission received a total of 44 comment letters concerning the Exchange's proposal,[125] as well as four supplemental submissions from the NYSE.[126] Fourteen commenters expressed general support for the proposed rule change,[127] and other commenters supported certain aspects of the proposed rule change. Generally, six commenters believed that the proposal would improve transparency of the proxy fee structure; [128] five believed that the proposal eliminates the ''cliff'' pricing schedule, in favor of a more rational tiered system; [129] two expressly supported the Exchange's approach to charges for managed accounts; [130] one stated that the elimination of fees for fractional share positions would eliminate exposure that issuers face from unanticipated increases in the number of street name accounts on a yearly basis; [131] twelve believed that the proposed EBIP fees would reduce costs, enhance efficiency and/or lead to more retail shareholder participation; [132] one believed that providing additional incentives for integration of a customer's documents in EBIPs would provide a benefit to investors; [133] and six supported the stratification of NOBO lists.[134] One commenter also believed that failure to approve the proposal would keep in place a fee structure that is less transparent and less connected to the current work and costs associated with proxy processing.[135]

Other commenters raised concerns regarding the proposal. Generally, twelve commenters expressed concern about the lack of an independent third-party review of actual costs in the proxy distribution process; [136] five expressed concern with the lack of a thorough cost/benefit analysis of the proposed rule change; [137] four believed that the processing and intermediary unit fees do not allocate fees equitably between large and small issuers; [138] seven questioned the fairness of the proposed fee schedule; [139] four believed that the structure and level of the proposed proxy fees place a burden on competition; [140] nine expressed concern about the incentive structure for developing EBIPs; [141] four raised concerns regarding the five share limit for fees for processing shares held through managed accounts; [142] three believed the stratified NOBO lists should be made available outside of a record date; [143] two expressed concern about the impact of the proposal on mutual funds in particular; [144] and one believed that the rule proposal is inconsistent with and violates Regulation 14A of the Act, including specifically Rules 14a–13, 14b–1 and 14b–2.[145] These issues, and the Exchange's response, are discussed below.[146]

A. Independent Third-Party Review of Proxy Costs

Four commenters that expressed general support for the proposal commented on the issue of whether an independent third-party audit of proxy costs should be conducted.[147] One commenter noted that while ''an independent third party may be desirable, the PFAC made a determination that 'utility rate making' which could be independently audited would not work for proxy fees.'' [148] Another commenter believed that determining the cost of proxy processing services based on utility style ''cost-of-service'' calculations would be very difficult as a practical matter.[149] Yet another commenter stated that while an independent review ''is often attractive in the abstract, the regulatory landscape is laden with examples where the costs of such reviews outweigh the benefits.'' [150] Finally, one commenter stated that an independent review is not necessary because the PFAC is an independent committee with representatives from all parties.[151]

However, several commenters stated that the NYSE should engage an independent third party to evaluate the structure and level of fees being paid for proxy distribution, as recommended by the NYSE Proxy Working Group in 2006.[152] Two commenters argued that an independent third-party audit is the best way to evaluate whether the fees are reimbursed fairly, equitably and

[125] *See supra* notes 4, 6, 9 and 13.

[126] *See supra* notes 7, 10, 12 and 13. As previously noted, NYSE Letter responded to the comments submitted in response to the Notice, NYSE Letter II responded to the Order Instituting Proceedings, NYSE Letter III provided additional cost information from Broadridge, and NYSE Letter IV responded to FOLIOfn Letter and FOLIOfn Letter II.

[127] *See* Steering Committee Letter, SCSGP Letter, iStar Letter, SCC Letter, Perficient Letter, Gartner Letter, CCMC Letter, Broadridge Letter, Darling Letter, ABC Letter, SIFMA Letter, Zumbox Letter, INVeSHARE Letter, Washington Letter; *see also* Schumer Letter (strongly supporting success fee to ''encourage the use of enhanced brokers' internet platforms'').

[128] *See* Steering Committee Letter, SCSGP Letter, SCC Letter, Broadridge Letter, NIRI Letter, Washington Letter.

[129] *See* SCSGP Letter, ABC Letter, Broadridge Letter, BNY Letter, SCC Letter.

[130] *See* SCSGP Letter, INVeSHARE Letter.

[131] *See* Broadridge Letter.

[132] *See* Steering Committee Letter, SCSGP Letter, iStar Letter, SCC Letter, Perficient Letter, CCMC Letter, Broadridge Letter, Darling Letter, ABC Letter, SIFMA Letter, NIRI Letter, Schumer Letter.

[133] *See* Zumbox Letter.

[134] *See* ABC Letter, Broadridge Letter, NIRI Letter, SCC Letter, ICI Letter, ICI Letter II, SCSGP Letter.

[135] *See* Washington Letter.

[136] *See* STA Letter, STA Letter II, STA Letter III, SSA Letter, Schafer Letter, Lovatt Letter, SCC Letter, IBC Letter, NIRI Letter, ICI Letter, ICI Letter II, BNY Letter, OTC Letter, CtW Letter II, AFL–CIO Letter; *see also* AST Letter. In addition, one commenter questioned whether the fee structure used by Broadridge should be subject to an independent audit. *See* CtW Letter.

[137] *See* STA Letter, STA Letter II, SSA Letter, Schafer Letter, Lovatt Letter, IBC Letter.

[138] *See* STA Letter II, Schafer Letter, Lovatt Letter, IBC Letter.

[139] *See* STA Letter II, Schafer Letter, Lovatt Letter, IBC Letter, BNY Letter, ICI Letter, CtW Letter.

[140] *See* SSA Letter, IBC Letter, Schafer Letter, Lovatt Letter.

[141] *See* Harrington Letter, ICC Letter, Sharegate Letter, CG Letter, CII Letter, Zumbox Letter, CtW Letter, CtW Letter II, AFSCME Letter, AFL–CIO Letter.

[142] *See* Broadridge Letter, SIFMA Letter, FOLIOfn Letter, FOLIOfn Letter II, Angel Letter.

[143] *See* SCSGP Letter, Broadridge Letter, BNY Letter.

[144] *See* ICI Letter, AST Letter.

[145] *See* FOLIOfn Letter.

[146] The Commission also received comments regarding Broadridge's decision to end its practice of disclosing voting tallies to shareholder proponents of shareholder proposals (*see* CII Letter II, Schumer Letter, AFSCME Letter, AFL–CIO Letter), establishing a performance based proxy fee structure (*see* Angel Letter), and Voting Instruction Forms applied to EBIPs (*see* CII Letter, Angel Letter; *see also infra* note 307 and accompanying text for discussion of Voting Instruction Forms). The Commission notes that these issues are beyond the subject of this proposed rule change by the NYSE. In addition, the Commission received a comment regarding the effective date for the proposed rules (*see* SIFMA Letter) and comments regarding the propriety of assigning the task of proxy regulation to the NYSE (*see* FOLIOfn Letter, Angel Letter). In its initial response letter, the Exchange stated its belief that a lengthy period before effectiveness of the proposed fee structure would appear to be unnecessary given that invoicing of proxy fees is typically handled by the intermediary rather than the broker-dealer and given that Broadridge stated in its comment letter that it is prepared to implement the new fee structure soon after approval. *See* NYSE Letter; *see also* Broadridge Letter. Further, subsequent to the Exchange's initial response letter, Broadridge stated that it ''is committed to implementing the new [fee] structure within a short time of its approval.'' *See* Broadridge Material. With regard to the comment that the Commission has assigned the task of proxy regulation to the NYSE, although the NYSE participates in some aspects of regulating the proxy process, the Commission has engaged in and overseen numerous rulemakings and overseen and reviewed SRO proposed rules relating to the proxy process.

[147] *See* Broadridge Letter, ABC Letter, INVeSHARE Letter, Angel Letter.

[148] *See* Broadridge Letter.

[149] *See* Angel Letter.

[150] *See* ABC Letter.

[151] *See* INVeSHARE Letter.

[152] *See* STA Letter, STA Letter II, SSA Letter, Schafer Letter, Lovatt Letter, NIRI Letter, SCC Letter, IBC Letter, ICI Letter, ICI Letter II, OTC Letter, CtW Letter II; *see also* AST Letter, FOLIOfn Letter.

objectively, and would eliminate the vested interests of those involved in the process.[153] Three other commenters believed the Commission should not approve the proposed rule change until the audit has been commissioned and completed,[154] while two others suggested that the Commission approve the proposal, but require an independent third-party review as part of an ongoing process.[155] One commenter believed that, without a third-party audit, many issuers would continue to question the validity of proxy fees.[156] Another commenter noted that there was no independent verification of the data on the Securities Industry and Financial Markets Association (''SIFMA'') study related to the costs of proxy processing,[157] and yet another believed that the PFAC did not have access to the information necessary to determine whether particular fees were reasonable.[158] Finally, one commenter expressed the view that a comprehensive assessment of the NYSE proposal's net impact on proxy distribution costs for all issuers, including mutual funds, would require further analysis.[159]

In its initial response, the Exchange stated that the PFAC determined that an independent review of proxy costs was unnecessary.[160] The Exchange noted that the PFAC itself was an independent body and that it reviewed audited financial information on Broadridge, segment information provided by Broadridge on its Web site, and several independent analyst reports on Broadridge that gave the PFAC comfort that the existing fees were not providing Broadridge with excessive margin on its activities.[161] Further, the Exchange stated that the NYSE proxy fees have been revised a number of times over the years without an independent review of proxy costs.[162] The Exchange stated that there is no requirement that an independent third-party review be conducted, and that such a review was conducted only in the context of significant rule changes developed in the late 1990s.[163] The Exchange also stated that ''given the availability of audited financials on Broadridge and the SIFMA survey of costs at representative brokerage firms undertaken at the NYSE's request, arguably the proposed fee changes have been based on information comparable to that used in the independent studies conducted in the late 1990s.'' [164]

In a supplemental response, the Exchange explained that the costs of the proxy distribution process have not typically been segregated from other costs incurred at firms and intermediaries.[165] The Exchange stated that the PFAC learned from conversations with various brokerage firms and intermediaries, including Broadridge, that there is no common methodology for tracking proxy distribution costs, ''nor do these entities segregate these costs from the cost of other similar processing activities that are not reimbursable by issuers.'' [166] The Exchange explained that this is why the ''PFAC and the Exchange 'judged that it would likely be impossible and certainly not cost effective, to engage an auditing firm to review industry data for purposes of the Committee's work.' '' [167] The Exchange reiterated that the PFAC requested that Broadridge provide it non-public financial data, but Broadridge declined.[168] However, the Exchange stressed that the ''PFAC did study available materials that allowed it to conclude that the fees it proposed did constitute a reasonable reimbursement of the industry's costs for proxy distribution to street name accounts.'' [169]

The Exchange also stated that the PFAC accepted that it was appropriate for Broadridge to make a reasonable profit.[170] In this context, the Exchange noted that, based on public information showing Broadridge's pre-tax margin on its Investment Communication Solutions Segment, Broadridge's margin was consistent with, and in most cases was significantly lower than, ''other firms in comparable businesses, such as transaction processing firms (*e.g.,* Visa), financial processing firms (*e.g.,* Fiserv), other processing firms (*e.g.,* MSCI) and securities industry infrastructure firms (*e.g.,* Computershare).'' [171] The Exchange stated that the ''PFAC found this credible evidence that the profit being earned by Broadridge on this business segment was reasonable.'' [172]

In response to concerns that the PFAC relied substantially on the limited information provided by Broadridge, the Exchange noted that the PFAC requested that Broadridge provide it non-public financial data, but Broadridge declined.[173] However, the Exchange explained that ''Broadridge was otherwise forthcoming with the PFAC and described at length their processes, and provided the PFAC with the detailed task list that was included with the Exchange's rule filing as an appendix to the SIFMA survey.'' [174] In addition, the Exchange noted that the PFAC met with a number of other industry participants to discuss the proxy processing business.[175]

The Exchange also provided additional information from Broadridge about the costs involved in providing proxy and report distribution services.[176] Among other things, Broadridge represented that the ''proposed fee structure results in a high degree of alignment between the overall fees paid and the reasonable costs of the services provided.'' [177] Broadridge estimated that the work associated with the basic processing fee, nominee coordination and intermediary unit fee and preference management fee would

[153] *See* NIRI Letter, ICI Letter.

[154] *See* STA Letter, STA Letter II, IBC Letter, AFL–CIO Letter; *see also* OTC Letter (stating the mere fact that much of the data supplied to the PFAC for its analysis of the proposed rule change came exclusively from Broadridge without an independent review and without additional sources discredits the results of the PFAC's research).

[155] *See* SCC Letter, SCSGP Letter.

[156] *See* NIRI Letter.

[157] *See* BNY Letter.

[158] *See* AFSCME Letter.

[159] *See* AST Letter, AST Letter II.

[160] *See* NYSE Letter.

[161] *Id. See also* Washington Letter (stating that the PFAC ''conducted an independent evaluation of how the underlying work and expenses have evolved (including a detailed analysis of the categories of work currently performed by Broadridge, the costs incurred by Broadridge and by bankers and brokers, and independent investment analyst reports regarding Broadridge's margins).'').

[162] *Id.* The Exchange also recognized, as noted by several commenters, that the Proxy Working Group formed in 2006 recommended that the NYSE engage an independent third party to analyze the reasonableness of the proxy fees and to commission an audit of Broadridge's costs and revenues for proxy mailing, but the Exchange pointed out that that Proxy Working Group did not renew its call for such independent analysis at the time an addendum to the group's report was published in 2007. *See* STA II Letter, NIRI Letter, SCC Letter, IBC Letter, BNY Letter, NYSE Letter.

[163] *Id.*

[164] *Id.* The Exchange also asserted that ''throughout the history of the NYSE proxy fees, negotiation among the members of a committee of issuers and brokers, supplemented by the comment process which accompanies a rule filing with the SEC, has been an effective method for reaching a workable consensus on what constitutes 'reasonable reimbursement.' '' *Id.*

[165] *See* NYSE Letter II.

[166] *Id.*

[167] *Id.* (quoting Notice).

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *Id., see also supra* note 161.

[174] *See* NYSE Letter II. In particular, the Exchange stated that the ''PFAC requested that Broadridge run tests of various proposals, so that the PFAC could analyze and compare in some detail how different fee structures would impact the issuer population, assisting the PFAC in determining to its satisfaction that its proposals fairly allocated the fees among different size issuers.'' *Id.*

[175] These market participants included Mediant Communications, Bank of America Merrill Lynch, Citibank, Morgan Stanley Smith Barney, Fidelity's National Financial and Curian Capital. *Id.*

[176] *See supra* note 12.

[177] *See* NYSE Letter III.

be 56.7%, 26% and 17.5% of total work effort, respectively, and that if the proposed fees had been in place in fiscal year 2012, such fees would have represented 55.4%, 27% and 18.9% of total fees paid, respectively. Accordingly, in Broadridge's estimation, there is a high degree of alignment between costs and services.[178]

B. Cost/Benefit Analysis of the Proxy Fee Proposals

Several commenters stated that the NYSE failed to undertake an analysis of the costs and benefits of the fee proposal, using the same degree of rigor applicable to SEC rule changes.[179] Two commenters stated that until an objective and comprehensive cost-benefit analysis can be developed, the SEC should disapprove this rule filing.[180]

The Exchange responded by noting that no such cost-benefit analysis is required by the relevant statute or SEC rules.[181] However, the Exchange also noted that ''the essence of the PFAC process was a negotiation among parties with often divergent interests seeking an outcome which to each was a balance of the costs and benefits involved.'' [182]

C. Equitable Allocation of Processing and Intermediary Unit Fees Between Large and Small Issuers

Several commenters stated that the proposed processing and intermediary fees do not allocate fees equitably between large and small issuers.[183] Moreover, two commenters believed that these fees should not be charged at the same level for beneficial owners who are not receiving an actual proxy package.[184] These commenters also stated that such fees fall disproportionately on smaller issuers, especially those with less than 300,000 beneficial owner positions.[185] They further stated that it was not fair for smaller issuers to be subject to more than a 20% increase in their proxy fees, while an issuer with 1,000,000 beneficial owners would have a decrease in processing and intermediary unit fees.[186]

The Commission also raised concerns in the Order Instituting Proceedings regarding the proposed tiered fees, noting that while the proposed tiered structures appeared to be an incremental improvement over the status quo, the Exchange had not clearly explained why the particular tiers or rates within each tier were chosen, nor had the Exchange provided evidence that either the Exchange or PFAC had ''conducted a meaningful review of the economies of scale present in the proxy processing business, or the overall costs associated therewith.'' [187] In response, the Exchange stated that the PFAC requested and reviewed numerous pricing scenarios from Broadridge to ensure that small issuers were not unduly impacted under the proposal.[188] The Exchange explained that ''the PFAC wished to develop a more equitable tiering arrangement, in which fees would decline not for all accounts with issuers of a certain size, but where the same price would apply to the first tier in all companies, a reduced price to the second tier in all companies, and so on.'' [189] According to the Exchange, the PFAC considered and analyzed a number of scenarios and determined that the proposed tiered arrangement was the most effective in removing the distortions of the current fee structure, which has a pricing ''cliff'' in that it applies a lower fee to all accounts with issuers of a certain size.[190] The Exchange also noted that ''[a]s a final check regarding the propriety of the proposed tiers, the PFAC had secured from Broadridge the estimate that overall under the current fees issuers with 100,000 or fewer accounts paid approximately 38% of proxy processing fees, issuers owned by more than 100,000 up to 500,000 accounts paid approximately 30% of such fees, and issuers owned by more than 500,000 accounts paid approximately 32% of the fees.'' [191] The Exchange stated that estimates of the impact of the proposed fees were that ''such proportions would continue, which the PFAC considered to be consistent with its goals and to represent a fair allocation among the issuer population.'' [192]

D. Fairness of the Fee Proposals

Six commenters believed that the proposal would improve transparency of the proxy fee structure so that it is clearer to issuers what services they are paying for and that the fees are consistent with the type and amount of work involved.[193] In addition, six commenters believed that the proposal is an improvement that helps eliminate the ''cliff'' pricing schedule.[194]

However, several commenters raised concerns about the possibility that issuers may be paying more than would constitute ''reasonable'' reimbursement for actual costs.[195] As a result, several commenters stated that the fee proposal favors the interests of broker-dealers and discriminates against issuers.[196] One commenter noted that a 2011 survey of transfer agent pricing compared to the NYSE proxy fee schedule concluded that market-based proxy fees for registered shareholders were more than 40% less than the proxy fees being charged to provide the same services to beneficial owners.[197] This commenter also noted that the same study found that all transfer agents participating in the survey charged processing and suppression fees that were significantly less than the fees being charged by broker-dealers under the current NYSE proxy fee schedule.[198] This commenter concluded that the NYSE proxy fee schedule, as proposed, does not satisfy the requirements of Section 6(b)(5) of the Act because the proposed fees are ''not based on actual costs incurred and exceed similar charges under competitive pricing and through other broker-dealer utilities operating on an at-cost basis.'' [199] Another commenter also disputed the NYSE's assertion that market forces currently shape the fees issuers are required to pay for proxy distribution, and believed a fuller explanation of how the proposed fees represent reimbursement for actual costs

[178] *See* NYSE Letter III. *See also* further summary of Broadridge Material in subpart D, Fairness of the Fee Proposals, *infra.*

[179] *See* STA Letter, STA Letter II, Schafer Letter, Lovatt Letter, IBC Letter.

[180] *See* STA Letter, STA Letter II, IBC Letter.

[181] *See* NYSE Letter. *See infra* Section V, Discussion and Commission Findings, for a discussion of the likely economic impact that the Commission considered in this context.

[182] *Id.* The Exchange also cited the PFAC's conclusions regarding Managed Accounts as an example of the PFAC's cost-benefit analysis. *Id.*

[183] *See* STA Letter II, IBC Letter, Schafer Letter, Lovatt Letter.

[184] *See* STA Letter II, IBC Letter.

[185] *See* STA Letter II, IBC Letter; *see also* OTC Letter.

[186] *See* STA Letter II, IBC Letter. These commenters concluded that even ''after accounting for economies of scale, the processing and intermediary unit fees proposed by the NYSE are not equitably allocated between large and small issuers, in light of the fact that there is no substantive justification for why smaller issuers with less than 300,000 beneficial owners should be bearing such a significantly large burden under the proposed fee schedule.''

[187] Order Instituting Proceedings, 78 FR 32522.

[188] *See* NYSE Letter II. *See also* Washington Letter (stating that the PFAC '' 'reality tested' the fee structure to assess whether there would be unintended consequences of significantly changing fees for categories of users.'').

[189] *Id.*

[190] *Id.*

[191] *Id.*

[192] *Id.*

[193] *See* Steering Committee Letter, SCSGP Letter, SCC Letter, Broadridge Letter, NIRI Letter, Washington Letter.

[194] *See* SCSGP Letter, ABC Letter, Broadridge Letter, BNY Letter, SCC Letter, INVeSHARE Letter.

[195] *See* STA Letter, STA Letter II, Schafer Letter, Lovatt Letter, IBC Letter, BNY Letter, ICI Letter.

[196] *See* STA Letter II, IBC Letter, Schafer Letter, Lovatt Letter, OTC Letter.

[197] *See* STA Letter II.

[198] *Id.*

[199] *Id.*

is necessary to ensure compliance with statutory requirements.[200]

In response to concerns regarding the fairness of the proposed rule change, the Exchange, through the Broadridge Material, took the position that the proposal improves the overall fairness and reasonableness of the fee allocation by considering a number of factors, such as an issuer's size and the characteristics of an issuer's shareholder base.[201] The Broadridge Material expressed the view that, under the current fee structure, fees paid for processing the largest issuers and jobs subsidize the fees paid for processing smaller issuers and jobs, and that the ''subsidy of smaller firms by larger firms is narrowed, but not eliminated, by the proposed fee structure.'' [202] Furthermore, according to the Broadridge Material, ''in comparison to the current, 'one-size-fits-all' fee structure, the proposed fee structure better recognizes economies of scale for issuers of different sizes, as measured by their number of beneficial shareholders.'' [203]

The Exchange, through the Broadridge Material, also represented that the ''proposed fees are lower than current fees, they provide greater total savings, and they contain measures and incentives to improve retail participation.'' [204] In particular, the Broadridge Material stated that issuers would have saved an estimated 4%–6% on average if the proposal had been in effect for 2012,[205] and expressed the view that the incentive fee structure would help continue to drive additional reductions in printing and postage costs.[206]

In addition, the Broadridge Material cited a study indicating that the regulated fees issuers pay for delivering a proxy to a beneficial shareholder (*e.g.,* through Broadridge) were lower on average than unregulated fees issuers pay for delivering a proxy to a registered shareholder, as well as a supplemental review performed by Broadridge that confirmed that conclusion.[207]

Finally, the Broadridge Material highlighted its major systems enhancements in recent years, and noted that its IT infrastructure, development and labor costs have risen by 8.4%, 15.4% and 8.1%, respectively, on a compound annual basis, over the past six years, while NYSE's regulated fees have not changed.[208]

Below is a more detailed summary of the comments regarding the significant fees on the NYSE schedule, as proposed in the rule filing.

1. Preference Management Fee

Several commenters raised concerns regarding the change of the paper and postage elimination fee into a preference management fee, which is assessed for all accounts for which a mailing is suppressed.[209] These commenters also highlighted the lack of any detailed analysis about the cost of the work involved for the fee.[210] In addition, these commenters questioned the appropriateness of the ''evergreen'' nature of the fees, which currently are charged not only in the year in which the electronic delivery is elected but also in each year thereafter.[211] One commenter stated that if ''Broadridge is paid to 'keep track' of a shareholder preference regarding householding or electronic delivery, it should not also be permitted to charge a basic processing fee and an intermediary unit fee for accounts that are suppressed.'' [212] Another commenter stated that the preference management fee has ''no apparent connection to the amount of effort involved in recording the beneficial owner's preference on the broker's system nor that involved in the suppression of mailing.'' [213] Furthermore, one commenter questioned why the tiered system was appropriate for the ''basic processing fee'' and ''supplemental fees,'' and not for the preference management fee.[214]

In its first response letter, the Exchange referred to its discussion in its rule filing of the appropriateness of charging the preference management fee every year, and noted that, following the SEC's review of the proxy fees put in place in 1997, the every-year approach was maintained by an independent proxy review committee.[215] In its second letter, in response to concerns raised in the Order Instituting Proceedings that the Exchange had not clearly explained why a tiered approach would be inappropriate for the preference management fee,[216] the Exchange stated that a tiered approach was not appropriate because preference management processing ''appeared to have fewer economies of scale than the other processing activities.'' [217] The Exchange also noted that the PFAC asked Broadridge ''to model a tiered approach for preference management fees, but determined that it was too complex, especially in light of the fact that the basic processing fees were being tiered.'' [218] The Exchange also represented that the work effort associated with both the basic processing fee and intermediary unit fee are separate and in addition to the activities supporting the preference management fee.[219]

2. Separately Managed and Wrap Accounts [220]

One commenter fully supported the reduction of the separately managed account fees [221] and another believed that the Exchange has taken a fair and

[200] *See* AFSCME Letter.

[201] *See* NYSE Letter III.

[202] *Id.*

[203] *Id.*

[204] *Id. See also* Washington Letter.

[205] *Id.* The Broadridge Material indicated that this figure is based on an analysis of ''all of the invoices Broadridge processed on behalf of its clients, using the proposed fees in place of the current fees, as charged, for U.S. equity proxy meetings.''

[206] *Id.* The Broadridge Material also stated that the ''total cost to issuers (fees, printing and postage) is lower by several hundred million dollars each year than it was at the time of the last fee review in 2002,'' and represented that in ''each of the past six years, the estimated annual savings not only exceeded the incentive fees paid out but all fees issuers paid.'' The Broadridge Material further expressed the view that the preference management fee and one-time EBIP incentive fee will ''drive investments in technology, and systems development by Broadridge and its clients—resulting in greater use of technology—with large and growing savings to issuers, and greater conveniences to shareholders in accessing proxy information and voting their shares.''

[207] *Id.* In addition, Broadridge stated that it compared the invoices for the registered shareholder processing services it performed on behalf of issuers in fiscal year 2012 to NYSE's proposed fees and the results showed that for ''over 80% of issuers and meetings, the proposed regulated fee issuers pay for delivering a proxy to a beneficial shareholder would be lower than the unregulated fee issuers pay for delivering a proxy to a registered shareholder.''

[208] *Id.* The Broadridge Material described how costs had been impacted by ''inflation, processing volumes, market activity, regulatory requirements and the evolution of technology, and highlighted the significant growth (116%) in the lines of computer code necessary to process communications from 2002 to 2011. In addition, Broadridge stated that as a result of these costs, and flat to declining volumes and fee revenues, profit margins at Broadridge's Investor Communications Services business group are at the low end of the processing services industry, on after-tax basis ranging from 9% to 11%.

[209] *See* STA Letter II, BNY Letter, ICI Letter, AFSCME Letter.

[210] *Id.*

[211] *See* STA Letter II, BNY Letter, ICI Letter, AFSCME Letter.

[212] *See* STA Letter II.

[213] *See* BNY Letter.

[214] *See* OTC Letter.

[215] *See* NYSE Letter.

[216] *See* Order Instituting Proceedings, 78 FR 32522.

[217] *See* NYSE Letter II. The NYSE stated that performance management fees have low set-up costs, as opposed to the basic processing fee, which has certain set-up costs irrespective of the size of the job. In addition, the Exchange noted that the PFAC determined to distinguish between managed accounts and other accounts in terms of the amount of the preference management fee.

[218] *Id.*

[219] *See* NYSE Letter III.

[220] *See infra* subpart E, Minimum Share Threshold for Managed Accounts.

[221] *See* INVeSHARE Letter.

reasonable approach with respect to charges for managed accounts by cutting the preference management fee in half for positions in managed accounts and eliminating the fee altogether for any position under five shares.[222] Several other commenters, however, expressed concern regarding the proxy fees for separately managed accounts, including wrap accounts.[223] One commenter highlighted the lack of detailed analysis for why the managed account fees should remain an issuer expense.[224] Three commenters questioned the validity of the amount of work involved in managing a separately managed account.[225] One commenter expressed uncertainty ''on the value or need to track accounts where there is no need or expectation to deliver proxy materials, since these accounts are voted by a single manager.'' [226] Another commenter expressed concern that ''private, nonpublic information is being sent to the broker-dealer's service provider when the broker-dealer should be the entity eliminating the accounts for proxy distribution. With today's technology, the broker-dealer would easily be able to extract only the accounts which truly should receive proxy materials.'' [227] Yet another commenter concluded that a fee prohibition should apply when a beneficial owner has instructed an investment adviser to receive issuer proxy materials and vote his or her proxies in lieu of the beneficial owner.[228]

In its first and fourth response letter, the Exchange referred to the discussion in its rule filing of the issue of the appropriateness of applying the preference management fee to managed accounts.[229] In its second letter, in response to concerns raised in the Order Instituting Proceedings that the Exchange had not provided a rationale for treating managed accounts differently only with respect to preference management fees,[230] the Exchange explained that the PFAC discussion focused on the preference management fee because the suppression of paper delivery for a managed account ''appeared to be more a consequence of the nature of the account than an effort made to suppress paper delivery.'' [231]

3. Nominee and Coordination Fees

One commenter stated that the proposed increase in the nominee coordination fee would be 10%, from $20 to $22 for each nominee holding at least one share of an issuer's stock.[232] This commenter noted that the fee appeared to be significantly higher than similar fees charged by the Depository Trust Company (''DTC'') and the National Securities Clearing Corporation (''NSCC''), two broker-dealer utilities that work on an at-cost basis.[233] This commenter stated that without independent confirmation of the actual cost of sending electronic search requests to nominees and processing the responses, ''it is hard to justify a 10% increase in this fee, especially when the cost of sending electronic requests, messages, and beneficial owner account information is significantly less expensive when conducted through the DTC and/or NSCC processing systems.'' [234]

4. Notice and Access Fees

Two commenters stated that there needs to be an independent review of the actual costs incurred for notice and access fees to reflect a rate of reasonable reimbursement.[235] Another commenter stated that the proposal does not provide information sufficient to analyze in detail the cost basis for notice and access fees.[236] One commenter noted that the proposal would generally codify Broadridge's current notice and access fees.[237] This commenter stated that ''even if the Commission determines that it is appropriate for such a fee to be charged, it is not reasonable for the fee to apply to all accounts, even those which receive the full set of proxy materials.'' [238] One commenter reiterated that the ''lack of an independent audit hampers the ability of issuers to know what costs are incurred, and why these fees are needed to handle a much lower level of mail processing, *i.e.,* the mailing of one piece instead of a four-piece proxy package.'' [239]

In its initial response letter, the Exchange referred to the discussion in its rule filing of notice and access fees, but emphasized that the PFAC members were satisfied with the overall level of notice and access costs.[240] The Exchange represented that the only question was whether Broadridge's approach with respect to those costs made sense and, after reviewing alternative approaches, the PFAC came to a consensus that Broadridge's approach was best.[241]

In addition, the NYSE explained, through the Broadridge Material, that notice and access requires ''incremental software and maintenance, additional processing of an issuer's shareholder position file, printing of the Notice . . ., establishment of a new production line for Notice processing, and management of inventory to timely fulfill shareholder requests for hard copies of proxy materials.'' [242] In addition, the Broadridge Material stated that every notice and access request ''makes different demands on three production streams, *i.e.,* for processing mailed Notices, for processing full sets and for processing electronic deliveries.'' [243] Thus, according to the Exchange, ''each and every issuer that chooses to use [notice and access] places additional demands on proxy systems and servicing costs.'' [244]

5. NOBO List Fees and Stratification

One commenter stated that the current NOBO list fees far exceed what should be considered reasonable and deserves further scrutiny.[245] This commenter noted that the proposed fee schedule codifies the fee that Broadridge historically has charged for issuers to obtain a list of NOBOs.[246] This commenter also raised concerns about the level of fees charged given the relatively uncomplicated nature of the work involved and the possibility that

[222] *See* SCSGP Letter.

[223] *See* STA Letter II, SSA Letter, BNY Letter.

[224] *See* STA Letter II. This commenter stated that the ''documentation and data processing for both wrap fee accounts and separately managed accounts are standardized within a broker-dealer's accounting platform.'' *See also* AFSCME Letter (noting that the proposal ''does not explain why issuers should reimburse indefinitely fees associated with not sending materials to a beneficial owner . . . because those owners have delegated their voting rights to an investment manager.'').

[225] *See* STA Letter II, BNY Letter, FOLIOfn Letter.

[226] *See* BNY Letter.

[227] *See* SSA Letter.

[228] *See* STA Letter II.

[229] *See* NYSE Letter, NYSE Letter IV. According to the Exchange, there is ''processing work to track and maintain the voting and distribution elections made by the beneficial owners of the stock positions in the managed account.'' *See* Notice, 78 FR 12387.

[230] *See* Order Instituting Proceedings, 78 FR 32522–23.

[231] *See* NYSE Letter II.

[232] *See* STA Letter II.

[233] *Id.*

[234] *Id.* The Commission notes that the Exchange stated in the Notice that the nominee coordination fee has declined by approximately 29% on an inflation-adjusted basis since it was first introduced in 1997. *See* Notice, 78 FR 12384.

[235] *See* STA Letter II, ICI Letter.

[236] *See* AST Letter.

[237] *See* ICI Letter.

[238] *Id.*

[239] *See* STA Letter II.

[240] *See* NYSE Letter.

[241] *Id.*

[242] *See* NYSE Letter III. In addition, the Exchange, through the Broadridge Material, represented that every notice and access request ''makes different demands on three production streams, *i.e.,* for processing mailed Notices, for processing full sets and for processing electronic deliveries.''

[243] *Id.*

[244] *Id.*

[245] *See* ICI Letter.

[246] *Id.*

issuers may be paying twice for the same information.[247]

Six commenters, however, supported the stratification of NOBO lists.[248] Three commenters believed that the proposal to provide stratified NOBO lists would reduce issuers' costs in communicating with shareholders.[249] Another commenter believed that stratified NOBO lists would enhance retail voter participation, as well as help issuers communicate with their shareholders at proxy time.[250]

Four commenters believed that the stratified NOBO lists should be made available outside of a record date.[251] One commenter noted its disappointment that an issuer could not request a stratified NOBO list outside of a record date, ''especially at a time when issuers have a greater need to communicate more frequently with their shareholders, and especially their street name holders.'' [252] Another commenter stated that the justification used by the NYSE for limiting stratification ''is the impact such a change would have on the proxy system, which appears to be the impact this would have on the vendor (Broadridge) that provides this information,'' [253] and took the position that any potential negative impact on the vendor is not sufficient justification to restrict potential benefits to issuers.[254] One commenter, however, believed that if the proposal were expanded to include requests for stratified lists at any time of the year, there would be an imbalance between fees and the work involved.[255] This commenter recommended that the Commission and the NYSE monitor developments with respect to NOBO lists for the first year of the new fees and, at the end of the first year, adjust the rule if necessary.[256]

The Exchange stated in its first response letter that it believes that there is a rational basis to distinguish between record date lists and other lists, and that it is concerned about the potential impact of the proposed NOBO list fee change on overall proxy fee revenues available to reimburse brokers for their costs.[257] The Exchange added that issuer and broker experience with the new rule would inform whether future changes are desirable.[258]

E. Minimum Share Threshold for Managed Accounts

One commenter, who stated that it has been adversely affected by fees attributable to managed accounts that hold fractional shares of its own stock, expressed full support for the proposal.[259] In addition, one commenter stated that the removal of fees for fractional share positions would help eliminate exposure some issuers have to large, unanticipated increases in the number of street name accounts from one year to the next.[260] This commenter estimated that this amendment would save issuers approximately $3.6 million over a period of twelve months.[261]

However, four commenters raised concerns regarding the five-share limit for fees for processing shares held through managed accounts.[262] One commenter stated that the rules for reimbursement should be based on actual (or a reasoned estimate of) proxy processing costs rather than on arbitrarily fixed thresholds.[263] Two commenters stated that the proposal lacked a detailed analysis concerning the basis for selecting any particular threshold.[264] Two commenters stated that the work required to process proxy distribution to managed accounts is the same, regardless of the number of shares held,[265] and one commenter stated the proposed approach has the potential to create an imbalance between the fees and the amount of work involved.[266] Instead of drawing the line at five shares, one commenter believed that issuers should not be required to reimburse brokers for processing managed accounts that have less than one whole share.[267] Another commenter believed that the same fees should apply regardless of how many shares—or fractions of shares—a shareholder owns if the account holder retains voting rights and thus receives the voting materials, rather than delegating voting rights to a manager.[268] In addition, one commenter suggested a per distribution fee that equals the average cost for all distributions actually made regardless of the number of shares held in a managed account.[269]

Furthermore, this commenter took the position that the proposal effectively disenfranchises shareholders who hold five or fewer shares in a security in a managed account because it would provide no reimbursement of costs for distribution of proxy materials to those shareholders.[270]

In the Order Instituting Proceedings, the Commission expressed concerns that the Exchange had not provided a clear explanation as to why the five-share threshold for charging proxy fees for managed accounts was chosen.[271] In its second response letter, the Exchange reiterated that ''the PFAC was concerned with the proliferation of managed accounts containing a very small number of an issuer's shares'' and that ''[t]he basic question was at what point did the benefit to an issuer in terms of shares voted become so minimal as to justify charging the issuer nothing for processing the account.'' [272] According to the Exchange, the PFAC considered setting the minimum share threshold for managed accounts at various points from a fractional share to 5, 10, 15, 20 and 25 shares, and obtained estimates of the economic impact of each of those, but ultimately reached consensus at the five share threshold.[273] The Exchange stated that ''the estimated impact on aggregate proxy fees was considered relatively modest (approximately $4.2 million), and it seemed clear that the voting benefit of five shares or less was limited, [t]o say the least.'' [274]

In its fourth response letter, the Exchange emphasized that the schedule of proxy fees is appropriately based on overall industry costs, not the costs of any individual firm.[275] The Exchange also referred to its discussion in its rule filing of the reimbursement of brokers

[247] *Id.*

[248] *See* ABC Letter, Broadridge Letter, NIRI Letter, SCC Letter, ICI Letter, ICI Letter II, SCSGP Letter.

[249] *See* ABC Letter, Broadridge Letter, NIRI Letter.

[250] *See* SCSGP Letter.

[251] *See* SCSGP Letter, STA Letter II, BNY Letter, NIRI Letter.

[252] *See* STA Letter II. This commenter also stated that ''issuers find it more cost-effective to order a subset of the NOBO list, segmented by whether or not a beneficial owner already voted on a solicitation, or stratified by a minimum threshold of shares held.''

[253] *See* BNY Letter.

[254] *Id.*

[255] *See* Broadridge Letter.

[256] *See* Broadridge Letter.

[257] *See* NYSE Letter.

[258] *Id.*

[259] *See* Gartner Letter.

[260] *See* Broadridge Letter.

[261] *Id.*

[262] *See* Broadridge Letter, SIFMA Letter, AST Letter, FOLIOfn Letter, FOLIOfn Letter II.

[263] *See* SIFMA Letter.

[264] *See* AST Letter, FOLIOfn Letter.

[265] *See* Broadridge Letter, SIFMA Letter.

[266] *See* Broadridge Letter.

[267] *Id.*

[268] *See* Angel Letter; *see also* FOLIOfn Letter II (stating that the costs for distribution to an account that holds three shares in a security is identical to the costs for distribution to an account that holds thirty or more shares).

[269] *See* FOLIOfn Letter II.

[270] *See* FOLIOfn Letter. This commenter stated further that ''although the argument is that no disenfranchisement occurs because firms would still be required to distribute materials to all shareholders, even though distribution to some would not be compensated, the result is that smaller investors are materially disfavored.''

[271] *See* Order Instituting Proceedings, 78 FR 32522.

[272] *See* NYSE Letter II.

[273] *Id.*

[274] *Id.*

[275] *Id.*

for their reasonable expenses, and stated that by providing ''reimbursement of the reasonable overall expenses of brokers/banks in the aggregate, the fees as proposed are consistent with the Exchange Act Rules 14b–1 and 14b–2, and are consistent in this respect with the fees approved by the SEC in prior proxy fee rule filings over the years.'' [276] In addition, the Exchange asserted that the ''average'' reimbursement approach suggested by one commenter is outdated and might benefit one particular firm, but it would not remedy the anomalous fee impact experienced by issuers resulting from the growth of low minimum investment managed accounts or encourage efforts to eliminate paper distribution.[277]

F. Burden on Competition

Several commenters stated that the structure and level of the proposed NYSE proxy fees place a burden on competition.[278] Five commenters stated that the NYSE rule filing does not adequately address the contract arrangements between broker-dealers and Broadridge.[279] In particular, two commenters expressed the view that the rule filing does not adequately address the rebates being provided by Broadridge to broker-dealers as a result of excess profits generated by the NYSE proxy fee schedule, which they believe create a burden on competition that is not necessary or appropriate,[280] while another commenter believed that the most significant burden to competition is the business practice of the primary provider of services in the proxy fee market and not the fee structure.[281] Two commenters believed that the SEC should ''disapprove the rule filing on the basis that the excess profits being generated are creating a burden on competition, as the dominant service provider in this area is able to use these excess profits to subsidize its ability to successfully encroach on the proxy servicing business of transfer agents.'' [282] One commenter stated, however, that although there is one dominant intermediary on the street side, brokers remain free to contract with any entity that can fulfill proxy process services to their clients or can provide those services themselves.'' [283]

In its first response letter, the Exchange referred to the discussion in its rule filing and the PFAC report of the payments made by Broadridge to certain of its broker-dealer clients pursuant to their contractual arrangements, but reiterated that ''the existence of these cost recovery payments is a completely rational result of the fact that the fees are 'one size' but have to 'fit all,' so that the firms with large volumes can be served at a lower unit cost, while those with smaller volumes have a higher unit cost to Broadridge.'' [284] The Exchange suggested that, contrary to one commenter's contention that the rebates reflect excess profits,[285] the rebates ''may also be viewed as a demonstration that market forces are directing the 'excess' to firms that can be serviced by Broadridge for a lower unit price but have themselves greater internal street name proxy administration costs, given their larger number of accounts.'' [286]

In its second letter, in response to concerns raised in the Order Instituting Proceedings that Broadridge's rebate arrangements may result in an unnecessary or inappropriate burden on competition,[287] the Exchange noted that, according to Broadridge approximately 200 of its 900 bank/broker clients receive ''cost recovery'' payments.[288] The Exchange noted that ''all firms have to incur at least some costs related to proxy distribution beyond the cost of retaining Broadridge,'' and took the position that those larger clients who receive cost recovery payments ''are most likely to have more sophisticated operations and greater costs.'' [289] In addition, the Exchange referred to a survey conducted by SIFMA that, according to the Exchange, ''demonstrated that on an industry basis, brokerage firms are not receiving reimbursement in excess of the costs they expend.'' [290] On this point, the Exchange referred to SIFMA's extended description of the proxy distribution activities undertaken by broker-dealers, beyond what is outsourced to third-party service providers like Broadridge.[291] In particular, the SIFMA description outlined major categories of activities broker-dealers engage in to support proxy services, including: (i) Preference management, (ii) data infrastructure, (iii) oversight and supervision, (iv) client service, and (v) record retention.[292]

G. Enhanced Broker Internet Platforms

Twelve commenters expressed general support for the proposed EBIP incentive fee, noting that it would reduce costs, enhance efficiency and/or lead to more retail shareholder participation.[293] Two of these commenters believed that the proposed success fee would increase the availability of EBIPs and potentially spur innovation in such platforms.[294] Two additional commenters that supported the proposed fee believed that it would result in higher retail shareholder engagement.[295]

Six commenters believed that the incentive structure for developing EBIPs could be further improved.[296] Three commenters expressed concern that the incentives provided to brokers for developing EBIPs do not extend to other more open platforms, such as ProxyDemocracy.org, Sharegate.com or other Web sites.[297] Two commenters stated that these and other entities should be afforded at least the same incentives as brokers.[298] These commenters also argued that EBIPs offer no real benefit to retail shareowners over e-delivery.[299] Several commenters expressed concern that brokers who set up EBIPs could be incentivized to create default voting mechanisms that essentially replicate uninformed ''broker voting,'' [300] or that the design of EBIPs otherwise could be unfair or biased.[301] Two commenters were of the view that the EBIP proposal addresses the needs

[276] *Id.*

[277] *Id.*

[278] *See* STA Letter II, IBC Letter, SSA Letter, Lovatt Letter, Schafer Letter.

[279] *See* STA Letter II, IBC Letter, SSA Letter, BNY Letter, CtW Letter II; *see also* AFSCME Letter (stating that the Commission should fully explore the conflicts of interest involving Broadridge and provide any guidance it deems appropriate before approving the proxy fee proposal).

[280] *See* STA Letter II, STA Letter III, IBC Letter. One of these commenters stated that there should be an examination of the rebates being provided to ensure that they do not come at the issuer's expense. *See* STA Letter II. This commenter also noted that this issue was previously raised by the Proxy Working Group in 2006 and the Proxy Concept Release, and expressed the view that the PFAC did not address this issue in any meaningful way. *Id. See infra* Section V, Discussion and Commission Findings, for a discussion of the likely economic impact that the Commission considered in this context.

[281] *See* INVeSHARE Letter.

[282] *See* STA Letter II, IBC Letter.

[283] *See* ABC Letter.

[284] *See* NYSE Letter.

[285] *See* STA II Letter.

[286] *See* NYSE Letter.

[287] *See* Order Instituting Proceedings, 78 FR 32523–24.

[288] *See* NYSE Letter II.

[289] *Id.*

[290] *Id.*

[291] *See* NYSE Letter III.

[292] *Id.*

[293] *See* Perficient Letter, SIFMA Letter, ABC Letter, CCMC Letter, Broadridge Letter, Darling Letter, SCSGP Letter, iStar Letter, Steering Committee Letter, SCC Letter, INVeSHARE Letter, Schumer Letter.

[294] *See* SIFMA Letter, ABC Letter.

[295] *See* NIRI Letter, Schumer Letter.

[296] *See* Harrington Letter, ICC Letter, Sharegate Letter, CG Letter, CII Letter, Zumbox Letter.

[297] *See* ICC Letter, Harrington Letter, CG Letter.

[298] *See* ICC Letter, CG Letter.

[299] *Id.*

[300] *See* ICC Letter, Harrington Letter, CG Letter; *see also* CtW Letter II.

[301] *See* AFSCME Letter, CtW Letter II, AFL–CIO Letter.

of issuers, brokers and Broadridge, rather than shareholders.[302] One commenter noted that the ''99 cent fee level was not based on any survey of brokers, or on the anticipated impact of any particular level of success fee on individual broker decisions to implement EBIPs.'' [303] One commenter requested that the Commission include investment advisors and beneficial owners in developing the incentive plan for EBIPs.[304] Two commenters recommended that the proposed rule change be delayed and amended to encourage an open form of client directed voting.[305] Another commenter recommended an approach to EBIPs that provides revenue streams to companies who prove they can provide a superior service to the investor customer.[306]

One commenter requested that the Commission consider issues regarding Voting Instruction Forms (''VIFs'') and EBIPs before finalizing the proposed rule change.[307] However, another commenter believed it is premature to regulate these details of EBIPs, and that experimentation with different types of platforms should be permitted.[308] Yet another commenter believed that providing additional incentives for integration of a customer's documents within one brokerage Web site would provide a stronger benefit to investors.[309] One commenter questioned whether the proposal improperly encourages the adoption of Internet voting procedures such as EBIP that, according to the commenter, shift control of the voting process to brokers and corporate managers.[310] This commenter also questioned whether the proposal would ensure proper Commission oversight of the preparation of clear, informative and balanced VIFs, and whether it would enable the creation of open rather than proprietary client directed voting systems.[311]

One commenter believed that the proposed EBIP fee is inequitable because it does not apply to accounts that already have converted to electronic delivery while having access to an EBIP,[312] and another commenter believed the incentive fees for EBIPs should apply to all EBIPs, not just new ones.[313] However, another commenter urged the Commission not to adopt an incentive fee for the development of EBIPs ''without evidence that such an incentive is necessary'' and noted that no evidence is presented that the PFAC obtained any data in support of the proposed financial incentive.[314]

The Exchange, in its initial response letter, noted that it proposed the EBIP incentive fee because it was supported by the PFAC and issuer representatives.[315] The Exchange expressed no opinion as to whether EBIPs would be used to facilitate client directed voting, as this was not an issue discussed with the PFAC.[316] The Exchange noted one commenter's concerns regarding the VIF used to obtain voting instructions from street name shareholders,[317] but stated that these concerns similarly were not discussed with the PFAC or in follow up EBIP discussions.[318] With respect to concerns about firms that have already instituted EBIPs, the Exchange referred to a related discussion in its rule filing, and noted that the proposed fee is premised on the expectation that investors who are provided EBIP will be more likely to elect to switch to e-delivery, with the attendant significant savings to issuers in paper and postage.[319]

H. Impact on Mutual Funds

Two commenters took the position that there should be further analysis of the impact the proposed rule change would have on proxy distribution fees paid by mutual funds and, in particular, the open-end funds that hold special meetings each year.[320] One of these commenters stated that the proposal could result in a significant fee increase in combined processing and intermediary unit fees for many mutual funds.[321] This commenter also stated that the ''net impact of the proposed changes will vary widely due to the complexity of a proposed fee structure that raises combined processing and intermediary costs for many funds (and especially funds conducting special meetings without the election of directors/trustees), while also reducing certain costs associated with 'managed accounts.' '' [322] This commenter noted that there was insufficient information to determine the cost basis and impact of the fee changes, including the extent to which related cost reductions could mitigate the impact of higher combined processing and intermediary unit fees.[323]

In its first response letter, the Exchange expressed the view that these two commenters [324] had premised their comments on a misunderstanding of the meaning of a ''special meeting.'' [325] According to the Exchange, such misunderstanding may have impacted the proxy fee analysis performed by the other commenter.[326] One commenter responded that ''the [Exchange's] response did not change (or specifically address) our view that there is a need for additional analysis of the proxy distribution fees paid by funds.'' [327]

V. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations

[302] *See* ICC Letter, CG Letter.

[303] *See* SIFMA Letter. This commenter also suggested that the rules for brokers' eligibility to receive a success fee be drafted to provide bright lines so that brokers are not compelled to conduct extensive analysis to determine how the fee might apply in their individual circumstances.

[304] *See* Harrington Letter.

[305] *See* ICC Letter, CG Letter; *see also* Angel Letter (stating that client directed voting will help increase shareholder participation).

[306] *See* Sharegate Letter.

[307] *See* CII Letter. Specifically, this commenter requested that the Commission consider (1) whether VIFs, including those distributed to beneficial shareowners by EBIPs, should be subject to the same degree of Commission oversight as proxy ballots; (2) whether EBIPs that distribute VIFs to beneficial shareowners should be prohibited from presenting voting options in a manner that unfairly tilts votes in favor of management recommendations; (3) whether VIFs, including those distributed to beneficial shareowners by EBIPs, should be prohibited from describing proxy ballot items using wording, headings, or fonts that differ from those used on the related proxy card; and (4) whether VIFs, including those distributed to beneficial shareowners by EBIPs, should not be permitted to tally unmarked shareowner votes in favor of management's recommendations when the underlying voting items are otherwise ineligible for discretionary voting by brokers. The Commission notes that these comments are beyond the subject of this proposed rule change by the NYSE.

[308] *See* Angel Letter.

[309] *See* Zumbox Letter.

[310] *See* CtW Letter, CtW Letter II.

[311] *Id.*

[312] *See* FOLIOfn Letter.

[313] *See* Angel Letter.

[314] *See* AFSCME Letter.

[315] *See* NYSE Letter.

[316] *Id.*

[317] *See* CII Letter.

[318] *See* NYSE Letter.

[319] *See* NYSE Letter IV.

[320] *See* ICI Letter, AST Letter.

[321] *See* AST Letter.

[322] *See* AST Letter.

[323] *See* AST Letter.

[324] *See, e.g.,* ICI Letter.

[325] *See* NYSE Letter.

[326] *Id., see also* AST Letter. With respect to that analysis, the Exchange asserts that it is not clear how many issuers were included, and that the experiences of particular issuers will differ. *See* NYSE Letter. The Exchange also noted that that analysis clearly states that it looks only at the basic processing and intermediary fees, and only at the fees applicable to special meetings. *Id.* In addition, the Commission notes that the Exchange has stated that the increased special meeting fees reflect the additional work required of the intermediary for these meetings, such as faster turnaround and more frequent vote tabulation, analytics and reporting because of the need for approval and concerns about quorum. *See* Notice, 78 FR 12390.

[327] *See* ICI Letter II. The commenter acknowledged its inclusion in the Exchange's Mutual Fund Proxy Fee Review group, which, according to the commenter, has been focusing on the ''interim fees'' associated with the distribution of annual and semi-annual reports to fund shareholders. *See* ICI Letter.

thereunder applicable to a national securities exchange.[328] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(4) of the Act,[329] which requires that an exchange have rules that provide for the equitable allocation of reasonable dues, fees and other charges among its members, issuers and other persons using its facilities; [330] Section 6(b)(5) of the Act,[331] which requires that the rules of an exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers or dealers; and Section 6(b)(8) of the Act,[332] which prohibits any exchange rule from imposing any burden on competition that is not necessary or appropriate in furtherance of the Act.

The Exchange's proposal has presented a number of complex and controversial issues, and generated substantial comment, both for and against. The Commission's Order Instituting Proceedings identified several areas where questions were raised as to whether the Exchange's proposal was consistent with the requirements of the Act, including those relating to the reasonableness of fees and their equitable allocation, unfair discrimination, and unnecessary burdens on competition. After carefully considering the proposal, the comment letters received and NYSE's responses, the Commission finds that, on balance, the proposal is consistent with the Act and therefore must be approved.[333]

The Commission recognizes that some commenters did not support certain aspects of the proposed rule change. The Commission, however, must approve a proposed rule change if it finds that the proposed rule change is consistent with the requirements of the Act and the applicable rules and regulations thereunder. NYSE responded to the comments received and the issues identified in the Order Instituting Proceedings, and no comments otherwise convinced us that the proposed rule change was not consistent with the Act and the applicable rules and regulations thereunder. As more fully discussed below, the Commission believes that, overall, the proposed rule change will improve the way proxy distribution and related expenses are allocated. The Exchange has proposed to amend its rules that provide a schedule of ''fair and reasonable'' rates of reimbursement by issuers to NYSE member organizations for expenses in connection with the processing of proxy materials and other issuer communications provided to investors holding securities in street name. The Exchange's proposal relies substantially on the recommendations of the PFAC, an advisory committee composed of representatives of issuers, broker-dealers and investors. The PFAC's recommendations, according to the Exchange, were intended to serve several goals, including supporting the current proxy distribution system given that it provides a reliable and accurate process for distributing proxies to street name stockholders; [334] encouraging and facilitating retail investor voting; improving the transparency of the fee structure; and ensuring that the fees are as fair as possible.[335]

In the Order Instituting Proceedings, the Commission acknowledged that aspects of the Exchange's proposal appear designed to make incremental improvements to the existing fee structure.[336] Nevertheless, the Commission believed significant questions existed as to whether the Exchange had provided adequate justification for material aspects of its proposal such that the Commission could make a determination that the proposal is consistent with the Act.[337]

Specifically, in the Order Instituting Proceedings, the Commission questioned the rigor with which the PFAC and the Exchange reviewed the costs associated with proxy processing in developing its recommendations, and noted the PFAC's reliance on publicly available financial information about Broadridge that did not break out the proxy distribution business as a standalone segment, as well as related analyst reports.[338] In addition, several commenters fundamentally questioned the basis for the proposed fee schedule, and believed the Exchange should first engage an independent third party to audit the actual costs incurred in proxy distribution activities.[339] In the Order Instituting Proceedings, the Commission concluded that neither the Exchange nor the PFAC had articulated a sufficient analysis of Broadridge's costs of providing proxy processing services, so that the Commission lacked a sufficient basis on which to assess whether the incremental changes proposed to the existing fee structure were consistent with the statutory standard.[340]

In response, the Exchange explained that, today, there is no common methodology for tracking the costs incurred in the proxy distribution process, and that they typically have not been segregated from other related costs either at broker-dealers or at intermediaries such as Broadridge.[341] The Exchange reiterated the information that led it to conclude that the proposed fees overall were reasonable, including the fact that the profit margins on Broadridge's broader business segment were consistent with the margins of firms in comparable businesses.[342] In addition, the Exchange cited a recent analysis by Broadridge indicating that the fees issuers pay for delivering proxies to registered shareholders, which are not governed by NYSE rule, generally are higher than the proposed fees for delivering proxies to beneficial shareholders.[343] The Exchange also provided supplemental information from Broadridge about the higher technology costs it incurred as the delivery of proxies became increasingly electronic, and detailed Broadridge's major technology investments over the past decade.[344] In this regard, the Commission recognizes the difficulties associated with attempts to assign substantial fixed costs, such as those incurred in building and maintaining technological infrastructure, to specific functions or activities. Finally, the Exchange stressed that the proposal was expected to lower overall proxy

[328] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f). We address comments about the potential competitive impact of the proposed rule change below.

[329] 15 U.S.C. 78f(b)(4).

[330] Relatedly, SEC Rules 14b–1 and 14b–2 condition broker-dealer's and bank's obligation to forward issuer proxy materials to beneficial owners on the issuer's assurance that it will reimburse the broker-dealer's or bank's reasonable expenses, both direct and indirect, incurred in connection with performing that obligation. *See* 17 CFR 240.14b–1 and 17 CFR 240.14b–2.

[331] 15 U.S.C. 78f(b)(5).

[332] 15 U.S.C. 78f(b)(8).

[333] 15 U.S.C. 78s(b)(2)(C)(i).

[334] *See* Proxy Concept Release, *supra* note 24.

[335] *See* Notice, 78 FR 12384.

[336] *See* Order Instituting Proceedings, 78 FR 32521–22.

[337] *Id.* at 32522.

[338] *Id.*

[339] *See* Section IV.A, *supra*.

[340] *See* Order Instituting Proceedings, 78 FR 32523.

[341] *See* NYSE Letter II.

[342] *See* notes 170–172, *supra* and accompanying text and NYSE Letter III.

[343] *See* note 207, *supra* and accompanying text and NYSE Letter III.

[344] *See* note 208, *supra* and accompanying text and NYSE Letter III.

distribution fees by at least 4%.[345] After reviewing the comments and the Exchange's responses, we conclude that the Exchange has adequately addressed these issues, and we find that the incremental changes proposed to the existing fee structure are consistent with applicable statutory and regulatory requirements.

In the Order Instituting Proceedings, the Commission also questioned the rigor with which the PFAC and the Exchange analyzed the individual components of the proposed fees to assure they met the statutory standards.[346] For example, with respect to the basic processing and supplemental fees, the Exchange proposed to introduce a new five-tiered rate structure, with incrementally lower fees for issuers with larger numbers of beneficial owner accounts. Although the Commission acknowledged the Exchange's desire to better reflect the economies of scale in processing issuers with a larger number of accounts, the Commission expressed concern, among other things, that the Exchange had not explained why the particular five tiers were chosen, or conducted a meaningful review of the economies of scale present in the proxy processing business.[347]

In response, the Exchange stressed that there were significant fixed ''set-up'' costs associated with each proxy distribution job, and provided an estimate from Broadridge that such fixed costs conservatively represent 25%, and for some functions as much as 50–60%, of total costs.[348] According to the Exchange, the proposed fee schedule does not fully reflect the benefits of economies of scale when providing services to large issuers but, sensitive to the potential impact of proxy distribution fees on small issuers, the PFAC determined it was equitable to continue a structure where there was some subsidization of smaller issuers by larger ones.[349] The Exchange also noted that, in assessing the fairness of the proposal, the PFAC considered that the overall percentage of proxy processing fees borne by small, medium, and large issuers would remain roughly the same under the new fee schedule.[350] Finally, as noted above, the Exchange provided supplemental information indicating that, in Broadridge's judgment, there was a high degree of alignment between the proposed fees and the required ''work efforts'' to provide the corresponding service (*e.g.,* basic processing is estimated to require 56.7% of the work effort and would represent approximately 55.4% of the proposed fees).[351] We find that the Exchange's responses adequately address our concerns about the individual components of the proposed fees and demonstrate that they are consistent with the Act and relevant rules and regulations thereunder.

With respect to the preference management fee, which currently is characterized as an ''incentive'' fee for eliminating paper mailings, the Commission raised questions in the Order Instituting Proceedings as to the nature of the ongoing work that would justify such a fee, and the rationale for eliminating the existing tiered rate structure.[352] The Exchange's response adequately addressed these concerns. The Exchange explained that ''preference management'' required confirmation of each preference record on a daily basis.[353] According to the Exchange, these ongoing tasks were largely a variable cost, and appeared to have fewer economies of scale than other processing activities.[354] The Exchange also provided Broadridge's assessment that its work effort associated with preference management activities (17.5%) is highly aligned with the proportion of preference management fees (18.9%).[355]

In the Order Instituting Proceedings, the Commission also raised questions as to the rationale for generally charging managed accounts one-half the rate of other accounts for the preference management fee, and for charging managed accounts with five or fewer shares no fees.[356] We find that the Exchange's further responses adequately articulate the rationale for this proposed change. The Exchange noted that managed accounts generate approximately half of all preference management fees,[357] and indicated that it was equitable for issuers and broker-dealers, in effect, to share the cost of ongoing preference management services, because managed accounts benefit broker-dealers by allowing them to gather assets and generate fee income.[358] The Exchange also noted the proliferation of low minimum investment managed accounts,[359] and indicated that, for very small managed account positions, it was equitable for there to be no fee given the minimal benefit to an issuer of the number of shares voted from these accounts.[360] The Exchange stressed that its rule is designed to provide reasonable reimbursement of the overall expenses of broker-dealers in the aggregate, and the extent of reimbursement of any individual firm would vary depending on the specifics of its account population.[361]

According to the Exchange, the PFAC—representing issuers, broker-dealers and investors—examined several possible thresholds, but reached consensus at the five-share level.[362] The Commission acknowledges that any general rule setting forth an industry-wide fee schedule for the reimbursement of reasonable broker-dealer expenses necessarily will not precisely reimburse the actual expenses incurred by individual firms. Broker-dealers nevertheless must comply with their obligations pursuant to Rules 14b-1 and 14b-2 under the Act if provided assurance of reimbursement of reasonable expenses as provided in NYSE Rules 451 and 465 and the related material.[363]

With respect to the notice and access fees, the Commission expressed concern in the Order Instituting Proceedings that the proposal essentially would codify Broadridge's existing fee schedule.[364] The Exchange responded to this concern by providing supplemental information from Broadridge detailing the work effort associated with notice and access services.[365] The Exchange previously had represented that there was general satisfaction with the current Broadridge notice and access fees, and although the PFAC had explored alternatives, none were more attractive.

Finally, in the Order Instituting Proceedings, the Commission expressed concern regarding the practice by Broadridge of rebating a portion of the fees paid by issuers for proxy processing to its larger broker-dealer clients, and questioned why these savings were not

[345] *See* NYSE Letter III.

[346] *See* Order Instituting Proceedings, 78 FR 32522–23.

[347] *Id.* at 32522.

[348] *See* NYSE Letter III.

[349] *See* NYSE Letter II.

[350] *Id.*

[351] *See* NYSE Letter III.

[352] *See* Order Instituting Proceedings, 78 FR 32522.

[353] *See* NYSE Letter.

[354] *See* NYSE Letter II.

[355] *See* NYSE Letter III.

[356] *See* Order Instituting Proceedings, 78 FR 32522–23.

[357] *See* NYSE Letter IV.

[358] *See* NYSE Letter II.

[359] *See* NYSE Letter IV.

[360] *See* NYSE Letter II.

[361] *See* NYSE Letter IV.

[362] *See* NYSE Letter II.

[363] Issuers must likewise nevertheless comply with their obligations under Rule 14a–13; the Commission does not view the rule change as inconsistent with or violating Regulation 14A. Accordingly, the Commission does not believe the NYSE proposal could effectively ''disenfranchise'' shareholders, as alleged by one commenter. *See* FOLIOfn Letter.

[364] *See* Order Instituting Proceedings, 78 FR 32523.

[365] *See* NYSE Letter III.

passed on to issuers.[366] Several commenters also were of the view that this practice placed an unnecessary burden on competition. In considering the impact on competition of these rebate practices, the Commission took into account the Exchange's representations that broker-dealers incur some costs related to proxy distribution beyond the cost of retaining Broadridge, and that, given the economies of scale associated with Broadridge's services, Broadridge can afford to make ''cost recovery'' payments to larger broker-dealers to reimburse them for some proxy distribution costs not outsourced to Broadridge.[367] Accordingly, these rebate arrangements may in fact appropriately reimburse broker-dealers for reasonable expenses incurred in connection with proxy distribution, and not represent an inappropriate competitive action. The Commission also considered the Exchange's representation that the proposal was expected to lower overall proxy distribution fees by at least 4%, in which case the proposal would not use Broadridge's competitive position to adversely affect, on average, the prices paid by issuers. We conclude the Exchange has adequately demonstrated that to the extent the proposed rule change allows rebate practices to continue, that does not place an unnecessary burden on competition in contravention of relevant statutory and regulatory requirements.

The Commission recognizes, as it did in the Order Instituting Proceedings, that the Exchange's proposal appears designed to make incremental improvements to the existing fee structure. For example, as noted above, the proposed five-tiered rate structure for the basic processing and supplemental fees arguably would more equitably allocate such fees among issuers by better reflecting the economies of scale in proxy processing. The proposal also would incrementally apply the rates in higher tiers, so as to avoid the rate ''cliff'' that currently exists with the supplemental fee tiers.

In addition, the proposal would appear to impose fees more equitably on managed accounts, where voting often is delegated by the beneficial shareholder to the investment manager and the positions held frequently are small. Specifically, the proposal would charge managed accounts one-half the rate of non-managed accounts for the preference management fee, and no fee for managed accounts with five or fewer shares. In addition, the proposal would provide the same treatment to wrap accounts and other managed accounts, ending the current disparate practice of charging no fees to managed accounts labeled as wrap accounts, but full fees to other managed accounts.

Finally, the proposal would, for a five-year test period, provide an EBIP incentive fee to encourage broker-dealers to offer customers the ability, among other things, to access proxy materials and vote through the broker-dealers' Web sites.[368] Commenters expressed the view that the availability of EBIPs would re-engage individual shareholders and encourage retail voting in corporate elections, which the Commission believes would further the protection of investors and the public interest.[369]

In sum, and as discussed in detail above, the Exchange has proposed a variety of revisions to its schedule of reasonable rates of reimbursement by issuers for the processing of proxy materials and other issuer communications provided to beneficial holders, including with respect to the basic, supplemental, preference management, notice and access, NOBO list, and EBIP incentive fees. The Commission views the proposed rule change as an overall package of changes and fees that is, on balance, an improvement to the NYSE's existing reimbursement rate structure. The proposed rule change reflects the consensus recommendation of the PFAC, which is composed of representatives of issuers, broker-dealers and investors, key constituencies impacted by the proposal. In the Order Instituting Proceedings, the Commission questioned the rigor with which the PFAC and the Exchange reviewed the costs associated with proxy processing in developing its recommendations, and analyzed the individual components of the proposed fees to assure they met the statutory standards. The Exchange responded by providing the additional explanation and supplemental information described above, including responses to specific comments on the individual components of the proposal. The Commission believes the Exchange has addressed the questions raised in the Order Instituting Proceedings sufficiently to allow the Commission, on balance, to find that the proposal is consistent with the Act. In approving the proposal, the Commission notes that the proxy system need not be reformed in a single step, and the Commission welcomes improvements to the current system, even incremental ones. In this regard, the Commission emphasizes that it continues to review the issues raised in the Proxy Concept Release, including ways to encourage competition in the proxy distribution process, so that more reliance can be placed on market forces to determine reasonable rates of reimbursement.

VI. Conclusion

For the foregoing reasons, the Commission believes that the proposed rule change is consistent with the Act.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[370] that the proposed rule change (SR–NYSE–2013–07) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[371]

Kevin M. O'Neill,

Deputy Secretary.

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[366] *See* Order Instituting Proceedings, 78 FR 32523.

[367] *See* NYSE Letter III. NYSE supported its representations with a description prepared by SIFMA of these additional proxy distribution costs.

[368] *See supra* notes 106, 108, 109, 110 and accompanying text for a description of the EBIP fee.

[369] *See* Section IV.G, *supra.*

[370] 15 U.S.C. 78s(b)(2).

[371] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70713; SR–NYSE–2013–21; SR–NYSEMKT–2013–25]

Self-Regulatory Organizations; New York Stock Exchange LLC; NYSE MKT LLC; Notice of Designation of Longer Period for Commission Action on Proceedings To Determine Whether To Disapprove Proposed Rule Changes, as Modified by Amendment Nos. 1, Amending NYSE Rule 104 and NYSE MKT Rule 104—Equities to Codify Certain Traditional Trading Floor Functions That May Be Performed by Designated Market Makers, To Make Exchange Systems Available to DMMs That Would Provide DMMs With Certain Market Information, To Amend the Exchanges' Rules Governing the Ability of DMMs To Provide Market Information To Floor Brokers, and To Make Conforming Amendments to Other Rules

October 18, 2013.

On April 9, 2013, the New York Stock Exchange LLC (''NYSE'') and NYSE MKT LLC (''NYSE MKT'') (collectively, the ''Exchanges'') each filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act

of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] proposed rule changes (''Proposals'') to amend certain of their respective rules relating to Designated Market Makers (''DMMs'')[3] and floor brokers. The SRO Proposals were published for comment in the **Federal Register** on April 29, 2013.[4] The Commission received two comment letters on the NYSE proposal.[5] On June 11, 2013, the Commission extended to July 26, 2013 the period in which to approve, disapprove, or institute proceedings to determine whether to disapprove the Proposals.[6]

On July 26, 2013, the Commission instituted proceedings to determine whether to approve or disapprove the Proposals.[7] The Commission thereafter received one comment letter on the NYSE proposal.[8] NYSE Euronext, on behalf of the Exchanges, submitted a response letter on September 5, 2013.[9]

Section 19(b)(2) of the Act[10] provides that, after initiating disapproval proceedings, the Commission shall issue an order approving or disapproving the proposed rule change not later than 180 days after the **Federal Register** publishes notice of the proposed rule change, unless the Commission determines that a longer period is appropriate and publishes the reasons for this determination, in which case the Commission may extend the period for issuing an order approving or disapproving the proposed rule change by not more than 60 days. The proposed rule changes were published for notice and comment in the **Federal Register** on April 29, 2013. October 26, 2013 is 180 days from that date, and December 25, 2013 (which is a Federal holiday) is an additional 60 days from that date.

The Commission finds it appropriate to designate a longer period within which to issue an order approving or disapproving the Proposals so that the Commission has sufficient time to consider the Proposals, the issues raised in the comment letters that have been submitted in connection with the Proposals, and the response to these issues in the NYSE Euronext response letter. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[11] designates December 24, 2013, as the date by which the Commission must either approve or disapprove the proposed rule changes SR–NYSE–2013–21 and SR–NYSEMKT–2013–25.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Kevin M. O'Neill,

Deputy Secretary.

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* NYSE Rule 98(b)(2). ''DMM unit'' means any member organization, or division or department within an integrated proprietary aggregation unit of a member organization that (i) has been approved by NYSE Regulation pursuant to section (c) of NYSE Rule 98, (ii) is eligible for allocations under NYSE Rule 103B as a DMM unit in a security listed on NYSE, and (iii) has met all registration and qualification requirements for DMM units assigned to such unit. The term ''DMM'' means any individual qualified to act as a DMM on the Floor of the Exchange under NYSE Rule 103. *See also* NYSE MKT Equities Rule 2(i). NYSE MKT Rule 2(i) defines the term ''DMM'' to mean an individual member, officer, partner, employee or associated person of a DMM unit who is approved by the Exchange to act in the capacity of a DMM. NYSE MKT Equities Rule 2(j) defines the term ''DMM unit'' as a member organization or unit within a member organization that has been approved to act as a DMM unit under NYSE MKT Equities Rule 98.

[4] *See* Securities Exchange Act Release Nos. 69427 (April 23, 2013), 78 FR 25118 (SR–NYSE–2013–21) (''NYSE Notice''); 69428 (April 23, 2013), 78 FR 25102 (SR–NYSEMKT–2013–25). On April 18, 2013, the Exchanges each filed Partial Amendment No. 1 to the Proposals. The purpose of the amendment was to file the Exhibit 3, which was not included in the April 9, 2013 filings.

[5] *See* Letter to Elizabeth M. Murphy, Secretary, Commission, from Daniel Buenza, Lecturer in Management, London School of Economics and Yuval Millo, Professor of Social Studies of Finance, University of Leicester, dated May 20, 2013 (''LSE Letter I''); Letter to Commission, from James J. Angel, Ph.D., CFA, Associate Professor of Finance, Georgetown University, McDonough School of Business, dated May 14, 2013 (''Angel Letter''). Although the comment letters addressed only the NYSE proposal, the NYSE and NYSE MKT proposals are essentially identical for relevant purposes.

[6] *See* Securities Exchange Act Release No. 69736, 78 FR 36284 (June 17, 2013) (SR–NYSE–2013–21); Release No. 69733, 78 FR 36284 (SR–NYSEMKT–2012–25) (June 17, 2013).

[7] *See* Securities Exchange Act Release No. 70047, 78 FR 46661 (August 1, 2013) (''Order Instituting Proceedings'').

[8] *See* Letter to Elizabeth M. Murphy, Secretary, Commission, from Daniel Buenza, Lecturer in Management, London School of Economics and Yuval Millo, Professor of Social Studies of Finance, University of Leicester, dated August 22, 2013 (''LSE Letter II'').

[9] *See* Letter to Elizabeth M. Murphy, Secretary, Commission, from Janet McGinness, Executive Vice President and Corporate Secretary, NYSE Euronext, dated September 5, 2013.

[10] 15 U.S.C. 78s(b)(2).

[11] 15 U.S.C. 78s(b)(2).

[12] 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70719; File No. SR–OCC–2013–16]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change Amending OCC's By-Laws and Rules To Reflect Enhancements in OCC's System for Theoretical Analysis and Numerical Simulations as Applied to Longer-Tenor Options

October 18, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 10, 2013, The Options Clearing Corporation (''OCC'') 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 OCC.[3] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and to approve the proposed rule change on an accelerated basis.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change would provide for enhancements in OCC's margin model for longer-tenor options (*i.e.,* those options with at least three years of residual tenor) and to reflect those enhancements in the description of OCC's margin model in OCC's Rules.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, OCC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. OCC has prepared summaries, set forth in sections A, B,

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] OCC also filed the proposed change as an advance notice under Section 806(e)(1) of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act titled the Payment, Clearing, and Settlement Supervision Act of 2010 (''Payment, Clearing and Settlement Supervision Act''). 12 U.S.C. 5465(e)(1). The Commission issued a notice of no objection to the advance notice on October 17, 2013. *See* Securities Exchange Act Release No. 70709 (October 17, 2013) (SR–OCC–2013–803).

and C below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The purpose of this proposed rule change is to provide for enhancements in OCC's margin model for longer-tenor options (*i.e.,* those options with at least three years of residual tenor) and to reflect those enhancements in the description of OCC's margin model in OCC's Rules. OCC also proposes to make changes to the description of OCC's margin model to clarify that description.

On August 30, 2012, OCC submitted a rule change with respect to OCC's proposal to clear certain over-the-counter options on the S&P 500 Index (''OTC Options'').[4] The OTC Options Rule Filing, as amended, added a statement appearing before Section 6 of Article XVII of OCC's By-Laws that ''THE BY–LAWS IN THIS SECTION (OTC INDEX OPTIONS) ARE INOPERATIVE UNTIL FURTHER NOTICE BY THE CORPORATION'' to clarify that OCC would not commence clearing OTC Options until the changes being made to OCC's margin model for longer-tenor options, as provided in this rule change, were put in place, notwithstanding whether the OTC Options Rule Filing had already been approved. OCC is now proposing to remove this statement from Section 6, which will allow OCC to commence clearing of OTC Options on the S&P 500 Index.

Additional information concerning OCC's proposal to clear OTC Options is included in the OTC Options Rule Filing. As described in the OTC Options Rule Filing, OCC intends to use its STANS margin system to calculate margin requirements for OTC Options on the same basis as for exchange-listed options cleared by OCC. However, OCC is proposing to implement enhancements to its risk models for all longer-tenor options (including OTC Options) in order to better reflect certain risks of longer-tenor options. The changes described herein would apply to all longer-tenor options cleared by OCC and would be implemented before OCC begins clearing OTC Options.

Margin Enhancements for Longer-Tenor Options

The proposed rule change includes daily OTC quotes, variations in implied volatility and valuation adjustments in the modeling of all longer-tenor options under STANS, thereby enhancing OCC's ability to set margin requirements through the use of risk-based models and parameters [5] and encouraging clearing members to have sufficient financial resources to meet their obligations to OCC.[6] The proposed rule change would not affect OCC's safeguarding of securities and funds in its custody or control because though it may change margin requirements in respect of certain longer-tenor options, it does not change the manner in which margin assets are pledged. In addition, the proposed rule change allows OCC to enhance its risk management procedures and controls related to longer-tenor options in accordance with the Commission's clearing agency standards.

OCC calculates clearing-level margin using STANS, which determines the minimum expected liquidating value of each account using a large number of projected price scenarios created by large-scale Monte Carlo simulations. OCC is proposing to implement enhancements to the STANS margin calculation methodology with respect to longer-tenor options and to amend Rule 601 to reflect these enhancements as well as to make certain clarifying changes in the description of STANS in Rule 601. The specific details of the calculations performed by STANS are maintained in OCC's proprietary procedures for the calculation of margin and coded into the computer systems used by OCC to calculate daily margin requirements.

OCC has proposed at this time to clear only OTC Options on the S&P 500 index and only such options with tenors of up to five years. However, OCC currently clears FLEX Options with tenors of up to fifteen years. While OCC believes that its current risk management practices are adequate for current clearing activity, OCC proposes to implement risk modeling enhancements with respect to all longer-tenor options.

Daily OTC Indicative Quotes

In general, the market for listed longer-tenor options is less liquid than the market for other options, with less volume and therefore less price information. In order to supplement OCC's pricing data derived from the listed markets, and improve the price discovery process for longer-tenor options, OCC proposes to include in the daily dataset of market prices used by STANS to value each portfolio indicative daily quotations obtained through a third-party service provider that obtains these quotations through a daily poll of OTC derivatives dealers. A third-party service provider was selected to provide this data in lieu of having the data provided directly by the OTC derivatives dealers in order to avoid unnecessarily duplicating reporting that is already done in the OTC markets.

Variations in Implied Volatility

To date, the STANS methodology has assumed that implied volatilities of option contracts do not change during the two-day risk horizon used by OCC in the STANS methodology. OCC's backtesting of its margin models has identified few instances in which this assumption would have, as a result of sudden changes in implied volatility, resulted in margin deposits insufficient to liquidate clearing member accounts without loss. However, as OCC expects to begin clearing more substantial volumes of longer-tenor options, including OTC Options, it believes that implied volatility shocks may become more relevant due to the greater sensitivity of longer-tenor options to implied volatility. OCC therefore proposes to introduce variations in implied volatility in the modeling of all longer-tenor options under STANS. This will be achieved by incorporating, into the set of risk factors whose behavior is included in the econometric models underlying STANS, time series of proportional changes in implied volatilities for a range of tenors and in-the-money and out-of-the-money amounts representative of the dataset provided by OCC's third-party service provider.

A review of individual S&P 500 Index put and call options positions with varying in-the-money amounts and with four to nine years of residual tenor indicates that the inclusion of modeled implied volatilities tends to result in less margin being held against short call positions and more margin being held against short put positions. These results are consistent with what would be expected given the strong negative correlation that exists between changes in implied volatility and market returns.

The description of the Monte Carlo simulations performed within STANS in Rule 601 references revaluations of assets and liabilities in an account under numerous price scenarios for ''underlying interests.'' In order to accommodate the proposed implied volatility enhancements, OCC is proposing to amend this portion of Rule 601 to provide that the scenarios used may also involve projected levels of

[4] The proposal to clear OTC Options was approved on December 14, 2012. *See* Securities Exchange Act Release No. 68434 (December 14, 2012), 77 FR 75243 (December 19, 2012) (SR–OCC–2012–14).

[5] 17 CFR 240.17Ad–22(b)(2).

[6] 17 CFR 240.17Ad–22(d)(2).

other variables influencing prices of cleared contracts and modeled collateral. Accordingly, the references to ''underlying interests'' are proposed to be deleted.

Valuation Adjustment

While historically OCC has not cleared a significant volume of longer-tenor options, OCC anticipates that there will be growth in volume of longer-tenor options, including OTC Options, being cleared with three to five year tenors. Longer-tenor options may represent a larger portion of any clearing member's portfolio in the future, and OCC has therefore identified a need to model anticipated changes in the value of longer-tenor options on a portfolio basis in order to address OCC's exposure to longer-tenor options that may have illiquid characteristics. OCC proposes to introduce a valuation adjustment into the portfolio net asset value used by STANS based upon the aggregate sensitivity of any longer-tenor options in a portfolio to the overall level of implied volatilities at three years and five years and to the relationship between implied volatility and exercise prices at both the three- and five-year tenors in order to allow for the anticipated market impact of unwinding a portfolio of longer-tenor options, as well as for any differences in the quality of data in OCC's third party service provider's dataset, given that month-end data may be subjected to more extensive validation by the service provider than daily data. In order to accommodate the planned valuation adjustment for longer-tenor options, new language would be added to Rule 601 to indicate that the projected portfolio values under the Monte Carlo simulations may be adjusted to account for bid-ask spreads, illiquidity, or other factors.

Clarification of Pricing Model Reference in Rule 601

Rule 601 currently refers to the use of ''options pricing models'' to predict the impact of changes in values on positions in OCC-cleared contracts. OCC is proposing to amend this description to reflect that OCC currently uses non-options related models to price certain instruments, such as futures contracts and U.S. Treasury securities. This change is not intended to be substantive and simply clarifies the description in Rule 601.

Effect on Clearing Members

The proposed rule change will affect clearing members who engage in transactions in longer-tenor options, and indirectly their customers, by enhancing the STANS margin calculation methodology for these options. The STANS enhancements could increase margin requirements with respect to these positions. However, OCC does not believe that the enhancements will result in significantly increased margin requirements for any particular clearing member, and therefore is not aware of any significant problems that clearing members are likely to have in complying with the proposed rule change.

The proposed rule change is consistent with the purposes and requirements of Section 17A(b)(3)(F) of the Exchange Act [sic] (the ''Act'')[7] because amending OCC's margin rules to accommodate longer-tenor options will promote the prompt and accurate clearance and settlement of securities transactions and facilitate the safeguarding of funds and securities within OCC's custody and control. In addition, and in accordance with Rule 17Ad–22(b)(2), the proposed rule change will allow OCC to use risk-based models to set clearing member margin requirements that will limit OCC's exposure to its clearing members under normal market conditions.[8] The proposed rule change is not inconsistent with any rules of OCC, including any other rules proposed to be amended.

(B) Clearing Agency's Statement on Burden on Competition

OCC does not believe that the proposed rule change would impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. With respect to a burden on competition among clearing agencies, OCC does not believe that the proposed rule change would have any impact because OCC is the only registered clearing agency that issues options and provides central counterparty services to the options markets.

OCC does not believe that enhancing OCC's margin model for longer-tenor options would inhibit access to any of OCC's services or disadvantage or favor any user of OCC's services in relationship to any other such user because the model enhancements would apply equally to all clearing members clearing longer-tenor options. Moreover, OCC believes that the proposed rule change would also promote competition among participants in the longer-tenor options markets. The rule change would enhance OCC's ability to manage risk within OCC's existing structure, and improve OCC's ability to reduce systemic risk to the longer-tenor options market in general as well as reduce inter-dealer counterparty risk in the OTC Options market, allowing for increased participation in this market.

For the foregoing reasons, OCC believes that the proposed rule change is in the public interest, would be consistent with the requirements of the Act applicable to clearing agencies, and would not impose a burden on competition that is unnecessary or inappropriate in furtherance of the purposes of the Act because the changes would enhance OCC's margin methodology for longer-tenor options in ways that help to promote the purposes of the Act and Rule 17Ad–22 thereunder as described above.[9]

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were not and are not intended to be solicited with respect to the proposed rule change and none have been received.

III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–OCC–2013–16 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–OCC–2013–16. 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

[7] 15 U.S.C. 78q–1(b)(3)(F).

[8] 17 CFR 240.17Ad–22(b)(2).

[9] 17 CFR 240.17Ad–22.

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 OCC and on OCC's Web site (*http://www.theocc.com/about/publications/bylaws.jsp*). All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–OCC–2013–16 and should be submitted on or before November 14, 2013.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

Section 19(b)(2)(C) of the Act [10] directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and rules and regulations thereunder applicable to such organization. After a careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act, particularly with the requirements of Section 17A of the Act,[11] and the rules and regulations thereunder.[12]

Section 17A(b)(3)(F) of the Act [13] requires the rules of a clearing agency to be designed to, among other things, promote the prompt and accurate clearance and settlement of securities transactions and to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible. The Commission finds that OCC's proposed rule change is consistent with these requirements because it amends OCC's margin rules to accommodate longer-tenor options and also includes a non-substantive change to clarify a pricing model reference in OCC Rule 601.

Rule 17Ad–22(b)(2) of the Act,[14] requires, in part, that a registered clearing agency that performs central counterparty services shall establish, implement, maintain and enforce written policies and procedures reasonably designed to use margin requirements to limit its credit exposures to participants under normal market conditions and use risk-based models and parameters to set margin requirements. The proposed change is consistent with this rule because it is designed to enhance STANS, which is a risk-based model OCC uses to set margin requirements to limit OCC's credit exposures to participants under normal market conditions.

Rule 17Ad–22(b)(3) of the Act [15] requires, in part, that a registered clearing agency that performs central counterparty services shall establish, implement, maintain and enforce written policies and procedures reasonably designed to maintain sufficient financial resources to withstand, at a minimum, a default by the participant family to which it has the largest exposure in extreme but plausible market conditions. This proposed change is consistent with this rule because it is designed to enhance STANS, which OCC uses to set margin requirements for longer-tenor options and should therefore help OCC maintain sufficient financial resources to withstand a default by the participant family to which it has the largest exposure in extreme but plausible market conditions.

The Commission finds that, pursuant to Section 19(b)(2)(C)(iii) of the Act,[16] there is good cause to approve the proposed rule change earlier than 30 days after the date of publication of the notice in the **Federal Register**. Approval of the proposal will allow OCC to immediately implement enhancements in its margin model for longer tenor options cleared by OCC, which should in turn facilitate the reduction in risk in the clearance and settlement of these securities.

V. Conclusion

On the basis of the foregoing, the Commission finds the proposed rule change consistent with the requirements of the Act, particularly with the requirements of Section 17A of the Exchange Act,[17] and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[18] that the proposed rule change (SR–OCC–2013–16) be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24918 Filed 10–23–13; 8:45 am]

BILLING CODE 8011–01–P

[10] 15 U.S.C. 78s(b)(2)(C).

[11] 15 U.S.C. 78q–1.

[12] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[13] 12 U.S.C. 78q–1(b)(3)(F).

[14] 17 CFR 240.17Ad–22(b)(2).

[15] 17 CFR 240.17Ad–22(b)(3).

[16] 15 U.S.C. 78s(b)(2)(C)(iii).

[17] 15 U.S.C. 78q–1.

[18] 15 U.S.C. 78s(b)(2).

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70717; File No. SR–NYSEMKT–2013–81]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Rule 975NY

October 18, 2013.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that on October 7, 2013, NYSE MKT LLC (the ''Exchange'' or ''NYSE MKT'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 975NY to specify that options transactions that involve Obvious Error or Catastrophic Error will (1) if the parties to the transaction are not Customers, be automatically adjusted by the Exchange, unless the parties agree to their own adjustments or to bust the transactions; or (2) if at least one of the parties to the transaction determined to be a Catastrophic Error is a Customer, be adjusted if the adjustment price would be within the Customer's limit price; otherwise, the transaction will be busted by the Exchange, unless the Customer accepts the Exchange's adjustment price or the parties to the transaction agree to an adjustment price. The text of the proposed rule change is available on the

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, at the Commission's Public Reference Room, and on the Commission's Web site at *http://www.sec.gov.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing to amend Rules 975NY(a)(3)(A)–(B), (d)(1), and (d)(3)(B), add a [sic] new paragraphs (d)(3)(D) and (d)(3)(F), re-designate previous (d)(3)(D) as (d)(3)(C) and make revisions to that paragraph, and re-designate previous (d)(3)(C) as (d)(3)(E) and make revisions to that paragraph. Current Rule 975NY adjusts the price of or busts transactions with respect to which there are Obvious or Catastrophic Errors, as those terms are defined in the rule. Whether an Obvious Error transaction is automatically adjusted or automatically busted depends on whether both parties to the transaction are Market Makers.[4] Specifically, if each party to an Obvious Error transaction is a Market Maker, the Exchange adjusts the transaction to a price determined in accordance with current Rule 975NY(a)(3)(A)(i)–(ii), unless the parties agree to adjust the transaction to a different price or to bust the trade within 10 minutes of being notified of the Obvious Error by the Exchange. Under current Rule 975NY(a)(3)(B), if at least one party to the Obvious Error is not a Market Maker, the Exchange busts the trade, unless both parties agree to an adjustment price for the transaction within 30 minutes of being notified by the Exchange of the Obvious Error.

Under current Rule 975NY(d)(3)(B), a Catastrophic Error Review Panel (the ''Panel''), upon notification from a Market Maker or an ATP Holder, determines if a Catastrophic Error has occurred. If so, the Panel instructs the Exchange to adjust the execution price(s) of the transaction(s) as set out in Rule 975NY(d)(3)(D), unless the parties agree to adjust the transaction to a different price. The remedies available to the parties to a Catastrophic Error under current Rule 975NY transaction [sic] do not depend on their status as Market Makers or non-Market Makers. Rather, if the Panel determines that a Catastrophic Error has occurred, the parties to the transaction, irrespective of their status, are obligated to take a price adjustment; the rule does not provide for busting a trade. The Panel's determination on Catastrophic Error constitutes final Exchange action on the issue.

In summary, under the current rule, the Exchange nullifies Obvious Error transactions unless all parties to the trade are Market Makers, in which case the Exchange adjusts the price of the transaction. With respect to Catastrophic Errors, the Exchange currently adjusts all transactions even if they involve non-Market Makers. The Exchange notes that while market professionals generally would prefer that all transactions be adjusted rather than nullified, there is an equally valid opposing view because adjustments can result in Customer orders being adjusted to prices that may be greater (less) than their limit order price, potentially by a large amount, which Customers would not expect.

To better balance the expectations of both market professionals and Customers, the Exchange is proposing to amend Rules 975NY(a)(3)(A)–(B), (d)(1), and (d)(3)(B), add a [sic] new paragraphs (d)(3)(D) and (d)(3)(F), re-designate previous (d)(3)(D) as (d)(3)(C) and make revisions to that paragraph, and re-designate previous (d)(3)(C) as (d)(3)(E) and make revisions to that paragraph. The Exchange is amending Rule 975NY to (1) provide that whether an Obvious Error or Catastrophic Error transaction is automatically adjusted or automatically busted depends on whether at least one of the parties to the transaction is a ''Customer,'' as that term is defined in Rule 900.2NY(18),[5] rather than a Market Maker; (2) generally conform the remedies available for both Obvious Error and Catastrophic Error transactions; (3) adjust the Theoretical Prices and the minimum amounts away from those Theoretical Prices at which transactions are deemed to be Catastrophic Errors; and (4) provide that a Trading Official,[6] rather than the Panel, will determine if a Catastrophic Error has occurred, subject to an appeal to the Panel, which would be renamed the CER Panel to distinguish it from the Obvious Error Panel (''OE Panel'').

If no party to an Obvious Error transaction is a Customer, the Exchange will adjust the execution price of the transaction as set out in the proposed amendments to Rule 975NY(a)(3)(A). Alternatively, the parties to the transaction could agree to adjust the transaction to a different price or to bust the trade within 10 minutes of being notified of the Obvious Error by the Exchange. This amendment is consistent with current Rule 975NY(a)(3)(A), but rather than apply to transactions that involve only Market Makers, it applies more broadly to transactions that do not involve Customers.

If at least one party to an Obvious Error transaction is a Customer, the Exchange will bust the trade under the proposed amendments to Rule 975NY(a)(3)(B), unless the parties agree to an adjustment price for the transaction within 30 minutes of being notified of the Obvious Error by the Exchange, consistent with how Obvious Errors involving Customers are handled today. The Exchange believes that this approach provides a means of addressing an Obvious Error trade that involves Customers while allowing trades involving non-Customers or market professionals to stand, albeit at adjusted prices. These adjusted prices potentially could be through the non-Customers' limit order price (in other words, the adjusted price could be higher than the limit price if it is a buy and lower than the limit price if it is a sell order). This approach, moreover, is consistent with that taken by the International Securities Exchange (''ISE'') in its Rule 720.[7]

The Exchange is also amending the procedures for addressing transactions involving Catastrophic Errors. Consistent with the proposed amendments to the Obvious Error provisions, if no party to a Catastrophic

[4] For the purposes of Rule 975NY, the term ''Market Maker'' means an ATP Holder acting as a Market Maker on the Exchange pursuant to Rule 920NY. *See* Rule 975NY, Commentary .05.

[5] Rule 900.2NY(18) defines ''Customer'' as ''an individual or organization that is not a Broker/Dealer; when not capitalized, 'customer' refers to any individual or organization whose order is being represented, including a Broker/Dealer.''

[6] Rule 900.2NY(83) [sic] defines ''Trading Official'' as ''an Exchange employee or officer, who is designated by the Chief Executive Officer, or its designee or by the Chief Regulatory Officer or its designee. Any Exchange employee or officer designated as a Trading Official will from time to time as provided in these rules have the ability to recommend and enforce rules and regulations relating to trading access, order, decorum, safety and welfare on the Exchange.''

[7] *See* Exchange Act Release No. 69467 (Apr. 26, 2013), 78 FR 25777, 25778 (May 2, 2013) (SR–ISE–2013–15).

Error transaction is a Customer, the Exchange will adjust the execution price of the transaction as set out in the proposed amendments to Rule 975NY(d)(3)(B) and new paragraph (d)(3)(C). Alternatively, the parties to the transaction can agree to adjust the transaction to a different price or to bust the trade within 10 minutes of being notified of the Catastrophic Error by the Exchange. If at least one party to a Catastrophic Error transaction is a Customer, the Exchange will adjust the trade under the proposed amendments to Rule 975NY(d)(3)(B), and such trades will be adjusted in accordance with new paragraph (d)(3)(C). If the adjustment price will violate the Customer's limit price, the Customer will have 30 minutes from the time the Exchange notifies the Customer of the adjusted price to accept it; otherwise, the Exchange will bust the trade. Notwithstanding the foregoing, both parties may agree to an adjustment price for the transaction within 30 minutes of being notified of the Catastrophic Error by the Exchange. As with Obvious Error transactions, the Exchange's approach to Catastrophic Errors as described above is generally consistent with ISE's approach in ISE Rule 720. In addition the Exchanges [sic] proposal to adjust, rather than bust, the trade when such adjustment price is within the Customer's limit price is consistent with the manner in which NASDAQ OMX PHLX (''PHLX'') handles Customer trades that involve a Catastrophic Error.[8] The Exchange believes such treatment is reasonable because the adjustment price will still be within the Customer's expectations for the price of the trade—the limit price set by the Customer.

The Exchange also is proposing to amend the minimum amounts away from the Theoretical Prices at which transactions will be deemed to have been executed in Catastrophic Error and the adjustment amount by which Theoretical Prices will be adjusted to determine execution prices. The revised Theoretical Prices, minimum amounts, and adjustment amounts will be set out in amended Rule 975NY(d)(1) and (d)(3)(E) so that the threshold for determining whether a Catastrophic Error has occurred will also be the same amount used to adjust any trades deemed to be Catastrophic Errors. The Theoretical Price category of ''Above $10 to $50'' will change to ''Above $10 to $20,'' and a new category of ''Above $20 to $50'' will be added. Moreover, the minimum amount away from the Theoretical Prices at which transactions will be deemed to have been executed in Catastrophic Error and the corresponding adjustment amounts will increase at Theoretical Prices above $50 as compared to the minimum amounts set out in current Rule 975NY. This is consistent with the approach that the Chicago Board Options Exchange takes in its CBOE Rule 6.25(d)(4).[9]

The Exchange is also proposing to amend Rule 975NY(d)(3)(B) and add new paragraph (d)(3)(D) to provide that a Trading Official, rather than the Panel, will determine if a Catastrophic Error has occurred, subject to an appeal to the Panel, which will be renamed the CER Panel to distinguish it from the Obvious Error Panel (''OE Panel''). The ISE similarly uses its exchange personnel to determine if a Catastrophic Error has occurred.[10] If a party disagrees with the Trading Official's Catastrophic Error determination with respect to a transaction, the party can appeal that determination to the CER Panel within 30 minutes of receiving notification of the determination. As noted above, all determinations by the CER Panel constitute final Exchange action on the matter at issue.

Pursuant to existing Rule 975NY(d)(3)(B), if upon review a CER Panel determines that a Catastrophic Error has not occurred, the ATP Holder requesting the review is subject to a charge of $5,000. Pursuant to this proposal, there will be no fee assessed if an ATP Holder requests that the Exchange review a transaction and make a determination as to whether a Catastrophic Error occurred. However, if an ATP Holder appeals the determination made by the Trading Official to a CER Panel and the CER Panel confirms the determination made by the Trading Official, a $5,000 fee will apply. The Exchange is proposing to move existing text regarding the $5,000 fee from subsection (d)(3)(B) to proposed subsection (d)(3)(F) to make clear when the fee applies. Assessing the $5,000 only in the event of an appeal to the CER Panel, but not for initial determinations made by the Trading Official, is consistent with the application of a similar $5,000 fee by ISE.[11]

Finally, in order to make the definition of Professional Customer found in Rule 900.2NY(18A) consistent with the proposed treatment of Professional Customers, the Exchange is amending the text to indicate that Professional Customers are to be treated the same as broker-dealers for purposes of Rule 975NY.

2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act,[12] in general, and furthers the objectives of Section 6(b)(5),[13] 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, in general, to protect investors and the public interest.

In particular, regarding Obvious Errors, the Exchange believes the proposed rule change relating to busting trades involving Customers and adjusting trade prices if none of the parties is a Customer will help market participants better manage risk associated with potential erroneous trades. In addition, regarding Catastrophic Errors, the Exchange believes that the proposal provides a fair process that will ensure that Customers are not forced to accept a trade that was executed in violation of the Customer's limit order price.

The automatic remedies applicable to Obvious or Catastrophic Error transactions involving only non-Customers differ from those applicable to such transactions involving at least one party that is a Customer, but the Exchange does not believe that the proposal is unfairly discriminatory. As discussed above, an Obvious or Catastrophic Error transaction involving only non-Customer parties is subject to an automatic price adjustment in accordance with terms set out in Rule 975NY, unless the parties agree to a different price adjustment or to bust the transaction within the applicable timeframe. Obvious or Catastrophic Error Transactions involving at least one party that is a Customer, by contrast, are subject to being adjusted automatically only if the adjustment price is within the Customer's limit price. Otherwise, the transaction is busted, unless the Customer accepts an adjustment price from the Exchange, or the parties to the transaction agree to adjust the price of the trade within the applicable timeframe, which is longer than the applicable timeframe for non-Customer transactions. The different treatment accorded Customers versus non-Customers recognizes that Customers are not necessarily immersed in the day-to-day trading of the markets, are less likely to be watching trading activity in a particular option throughout the day,

[8] *See* NASDAQ PHLX Rule 1092(f)(ii).

[9] *See* Securities Exchange Act Release No. 59981 (May 27, 2009), 74 FR 26447 (June 2, 2009) (SR–CBOE–2009–024).

[10] ISE Rule 720; *see* 78 FR at 25778.

[11] *See* ISE Rule 720(d)(4).

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(5).

and may have limited funds in their trading accounts. Automatically busting a Customer trade involving a Catastrophic Error to protect the Customer's limit order price, while giving the Customer a longer period of time than a non-Customer to choose a different remedy, *i.e.,* price adjustment, is not unfairly discriminatory because it is reasonable and fair to provide Customers, who are typically less sophisticated in trading matters than non-Customers, with additional options to protect themselves against the consequences of Catastrophic Errors.

The Exchange acknowledges that the proposal contains some uncertainty regarding whether a trade will be adjusted or busted, depending on whether one of the parties is a Customer, because a party would not know, when entering into the trade, whether the other party is a Customer. The Exchange believes that the proposal nevertheless promotes just and equitable principles of trade and protects investors and the public interest, because it eliminates a more serious uncertainty in the rule's operation today, which is *price* uncertainty. Today, a Customer's order can be adjusted to a significantly different price in the case of a Catastrophic Error, which is potentially more impactful than the possibility of busting the trade.

Furthermore, there is uncertainty in the current Obvious Error portion of Rule 975NY that market participants have dealt with for a number of years. Specifically, Rule 975NY(a)(3)(A) provides that if it is determined that an Obvious Error has occurred where each party to the transaction is a Market Maker on the Exchange, the execution price of the transaction will be adjusted by the Exchange (in accordance with subsection (i) and (ii) of the rule), unless both parties agree to adjust to a different price or to nullify the transaction within 10 minutes of being notified by the Exchange of the Obvious Error. Additionally, Rule 975NY(a)(3)(B) provides that if it is determined that an Obvious Error has occurred where at least one party to the transaction to the Obvious Error is not an Exchange Market Maker, the trade will be busted by the Exchange, unless both parties agree to adjust the price of the transaction within 30 minutes of being notified by the Exchange of the Obvious Error. Therefore, a Market Maker who prefers price adjustments over busting a trade cannot guarantee that outcome because, if he trades with a non-Market Maker, a resulting Obvious Error would only be adjusted if the party on the other side of the trade agrees to an adjustment. This uncertainty has been embedded in the rule and accepted by market participants. The Exchange believes that this proposal, despite the uncertainty based on whether a Customer is involved in a trade, is nevertheless consistent with the Act because the ability to nullify a Customer's trade involving an Obvious or a Catastrophic Error should prevent the price uncertainty that mandatory adjustment with respect Catastrophic Error creates under the current rule. The Exchange believes that the benefits afforded to Customers by knowing with certainty what the adjustment price of a Catastrophic Error will be, and being able to nullify the trade if they choose to do so, far outweighs any uncertainty that might arise by not knowing whether a Customer was involved as the contra-side on a given trade. A [sic] The Exchange believes that affording Customers this heightened degree of certainty which [sic] should promote just and equitable principles of trade and protect investors and the public interest.

The Exchange has also weighed carefully the need to assure that one market participant is not permitted to receive a windfall at the expense of another market participant that made an Obvious or a Catastrophic error against the need to assure that market participants are not simply being given an opportunity to reconsider poor trading decisions.

Further, the Exchange believes that the proposed rule change relating to a Trading Official making the determination of whether a Catastrophic Error has occurred will promote just and equitable principles of trade because the Exchange believes such determinations will be made in a more timely manner than is the case today. As the determinations will likely be more timely, the proposed change will reduce the length of time before participants gain certainty as to the outcome of Catastrophic Error review. The Exchange's Obvious and Catastrophic Error rule and the procedures that carry out the rule have consistently been based on specific and objective criteria. The Exchange believes this proposed rule change furthers that principle by adopting objective guidelines for the determination of which trades may be busted or adjusted and for the determination of whether or not a trade is deemed to be a Catastrophic Error.

In addition, the Exchange believes that the proposed changes to the pricing tables used in determining theoretical and adjustment values for transactions subject to Catastrophic Error reviews will remove impediments to and perfect the mechanism of a free and open market because the proposed changes will conform the theoretical and adjustment values applicable to Catastrophic Errors on other market venues.[14]

Finally, the Exchange believes that moving existing text regarding the $5,000 fee, as described above, will promote just and equitable principles of trade because the amendment will make clear when the fee is applicable. The amendment will clarify that the $5,000 fee will not be applicable when the Trading Official makes the initial determination as to whether a Catastrophic Error occurred, but will be applicable if, upon appeal, the CER Panel confirms the determinations made by the Trading Official. Further, the Exchange believes that the amendment will remove impediments to and perfect the mechanism of a free and open market because the amendment will conform the Exchange's application of the $5,000 fee to similar fees on other market venues. The Exchange also believes that assessing such a fee ensures the proper balance between allowing ATP Holders to seek review of determinations made by the Exchange and recovering the costs associated with requiring an additional layer of review by the CER Panel.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes the proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is intended to help market participants better manage the risk associated with erroneous options trades, and therefore, does not impose any burden on competition. Moreover, the Exchange believes the proposed rule change will enhance competition by conforming the Exchange's rules governing Obvious and Catastrophic Errors more closely to those of other exchanges. The treatment of Customers differently from non-Customers under the proposed rule amendments may result in market participants choosing to route orders to the Exchange, and therefore, attract order flow to the Exchange, rather than a competing exchange.

[14] *Supra* Footnote No. 11 [sic].

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [15] and Rule 19b–4(f)(6) thereunder.[16] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [17] and Rule 19b–4(f)(6)(iii) thereunder.[18]

A proposed rule change filed under Rule 19b–4(f)(6) [19] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[20] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) of the Act [21] to determine whether the proposed rule change should be approved or disapproved.

[15] 15 U.S.C. 78s(b)(3)(A)(iii).

[16] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) 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.

[17] 15 U.S.C. 78s(b)(3)(A).

[18] 17 CFR 240.19b–4(f)(6)(iii).

[19] 17 CFR 240.19b–4(f)(6).

[20] 17 CFR 240.19b–4(f)(6)(iii).

[21] 15 U.S.C. 78s(b)(2)(B).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEMKT–2013–81 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–NYSEMKT–2013–81. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Section, 100 F Street NE., Washington, DC 20549–1090, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing will also be available for inspection and copying at the NYSE's principal office and on its Internet Web site at *www.nyse.com.* All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEMKT–2013–81 and should be submitted on or before November 14, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24916 Filed 10–23–13; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70718; File No. SR–NYSEARCA–2013–104]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending NYSE Arca Options Rule 6.87

October 18, 2013.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on October 7, 2013, NYSE Arca, Inc. (the ''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NYSE Arca Options Rule 6.87 to specify that options transactions that involve Obvious Error or Catastrophic Error will (1) if the parties to the transaction are not Customers, be automatically adjusted by the Exchange at increments specified in the rule, unless the parties agree to their own adjustments or to bust the transactions; or (2) if at least one of the parties to the transaction determined to be a Catastrophic Error is a Customer, be adjusted if the adjustment price would be within the Customer's limit price; otherwise, the transaction will be busted by the Exchange, unless the Customer accepts the Exchange's adjustment price or the parties to the transaction agree to an adjustment price. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, at the Commission's Public Reference

[22] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

Room, and on the Commission's Web site at *http://www.sec.gov.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing to amend Rules 6.87(a)(3)(A)–(B), (d)(1), and (d)(3)(B), add a [sic] new paragraphs (d)(3)(D) and (d)(3)(F), re-designate previous (d)(3)(D) as (d)(3)(C) and make revisions to that paragraph, and re-designate previous (d)(3)(C) as (d)(3)(E) and make revisions to that paragraph. Current Rule 6.87 adjusts the price of or busts transactions with respect to which there are Obvious or Catastrophic Errors, as those terms are defined in the rule. Whether an Obvious Error transaction is automatically adjusted or automatically busted depends on whether both parties to the transaction are Market Makers.[4] Specifically, if each party to an Obvious Error transaction is a Market Maker, the Exchange adjusts the transaction to a price determined in accordance with current Rule 6.87(a)(3)(A)(i)–(ii), unless the parties agree to adjust the transaction to a different price or to bust the trade within 10 minutes of being notified of the Obvious Error by the Exchange. Under current Rule 6.87(a)(3)(B), if at least one party to the Obvious Error is not a Market Maker, the Exchange busts the trade, unless both parties agree to an adjustment price for the transaction within 30 minutes of being notified by the Exchange of the Obvious Error.

Under current Rule 6.87(d)(3)(B), a Catastrophic Error Review Panel (the ''Panel''), upon notification from a Market Maker or an OTP Holder, determines if a Catastrophic Error has occurred. If so, the Panel instructs the Exchange to adjust the execution price(s) of the transaction(s) as set out in Rule 6.87(d)(3)(D), unless the parties agree to adjust the transaction to a different price. The remedies available to the parties to a Catastrophic Error under current Rule 6.87 transaction [sic] do not depend on their status as Market Makers or non-Market Makers. Rather, if the Panel determines that a Catastrophic Error has occurred, the parties to the transaction, irrespective of their status, are obligated to take a price adjustment; the rule does not provide for busting a trade. The Panel's determination on Catastrophic Error constitutes final Exchange action on the issue.

In summary, under the current rule, the Exchange nullifies Obvious Error transactions unless all parties to the trade are Market Makers, in which case the Exchange adjusts the price of the transaction. With respect to Catastrophic Errors, the Exchange currently adjusts all transactions even if they involve non-Market Makers. The Exchange notes that while market professionals generally would prefer that all transactions be adjusted rather than nullified, there is an equally valid opposing view because adjustments can result in Customer orders being adjusted to prices that may be greater (less) than their limit order price, potentially by a large amount, which Customers would not expect.

To better balance the expectations of both market professionals and Customers, the Exchange is proposing to amend Rules 6.87(a)(3)(A)–(B), (d)(1), and (d)(3)(B), add a [sic] new paragraphs (d)(3)(D) and (d)(3)(F), re-designate previous (d)(3)(D) as (d)(3)(C) and make revisions to that paragraph, and re-designate previous (d)(3)(C) as (d)(3)(E) and make revisions to that paragraph. The Exchange is amending Rule 6.87 to (1) provide that whether an Obvious Error or Catastrophic Error transaction is automatically adjusted or automatically busted depends on whether at least one of the parties to the transaction is a ''Customer,'' as that term is defined in Rule 6.1(a)(29),[5] rather than a Market Maker; (2) generally conform the remedies available for both Obvious Error and Catastrophic Error transactions; (3) adjust the Theoretical Prices and the minimum amounts away from those Theoretical Prices at which transactions are deemed to be Catastrophic Errors; and (4) provide that a Trading Official,[6] rather than the Panel, will determine if a Catastrophic Error has occurred, subject to an appeal to the Panel, which would be renamed the CER Panel to distinguish it from the Obvious Error Panel (''OE Panel'').

If no party to an Obvious Error transaction is a Customer, the Exchange will adjust the execution price of the transaction as set out in the proposed amendments to Rule 6.87(a)(3)(A). Alternatively, the parties to the transaction could agree to adjust the transaction to a different price or to bust the trade within 10 minutes of being notified of the Obvious Error by the Exchange. This amendment is consistent with current Rule 6.87(a)(3)(A), but rather than apply to transactions that involve only Market Makers, it applies more broadly to transactions that do not involve Customers.

If at least one party to an Obvious Error transaction is a Customer, the Exchange will bust the trade under the proposed amendments to Rule 6.87(a)(3)(B), unless the parties agree to an adjustment price for the transaction within 30 minutes of being notified of the Obvious Error by the Exchange, consistent with how Obvious Errors involving Customers are handled today. The Exchange believes that this approach provides a means of addressing an Obvious Error trade that involves Customers while allowing trades involving non-Customers or market professionals to stand, albeit at adjusted prices. These adjusted prices potentially could be through the non-Customers' limit order price (in other words, the adjusted price could be higher than the limit price if it is a buy and lower than the limit price if it is a sell order). This approach, moreover, is consistent with that taken by the International Securities Exchange (''ISE'') in its Rule 720.[7]

The Exchange is also amending the procedures for addressing transactions involving Catastrophic Errors. Consistent with the proposed amendments to the Obvious Error provisions, if no party to a Catastrophic Error transaction is a Customer, the Exchange will adjust the execution price

[4] For the purposes of Rule 6.87, the term ''Market Maker'' means an OTP Holder acting as a Market Maker on the Exchange pursuant to Rule 6.32. *See* Rule 6.87, Commentary .05.

[5] Rule 6.1(a)(29) defines ''Customer'' in the same manner as the term is defined in paragraph (c)(6) of Rule 15c3–1 under the Act. The Exchange does not currently distinguish Customers from Professional Customers.

[6] Rule 6.1(b)(34) defines ''Trading Official'' as ''an Exchange employee or officer, who is designated by the Chief Executive Officer, or its designee or by the Chief Regulatory Officer or its designee. Any Exchange employee or officer designated as a Trading Official will from time to time as provided in these rules have the ability to recommend and enforce rules and regulations relating to trading access, order, decorum, safety and welfare on the Exchange.''

[7] *See* Exchange Act Release No. 69467 (Apr. 26, 2013), 78 FR 25777, 25778 (May 2, 2013) (SR–ISE–2013–15).

of the transaction as set out in the proposed amendments to Rule 6.87(d)(3)(B) and new paragraph (d)(3)(C). Alternatively, the parties to the transaction can agree to adjust the transaction to a different price or to bust the trade within 10 minutes of being notified of the Catastrophic Error by the Exchange. If at least one party to a Catastrophic Error transaction is a Customer, the Exchange will adjust the trade under the proposed amendments to Rule 6.87(d)(3)(B), and such trades will be adjusted in accordance with new paragraph (d)(3)(C). If the adjustment price will violate the Customer's limit price, the Customer will have 30 minutes from the time the Exchange notifies the Customer of the adjusted price to accept it; otherwise, the Exchange will bust the trade. Notwithstanding the foregoing, both parties may agree to an adjustment price for the transaction within 30 minutes of being notified of the Catastrophic Error by the Exchange. As with Obvious Error transactions, the Exchange's approach to Catastrophic Errors as described above is generally consistent with ISE's approach in ISE Rule 720. In addition, the Exchange's proposal to adjust, rather than bust, a trade when such adjustment price is within the Customer's limit price is consistent with the manner in which NASDAQ OMX PHLX (''PHLX'') handles Customer trades that involve a Catastrophic Error.[8] The Exchange believes such treatment is reasonable because the adjustment price will still be within the Customer's expectations for the price of the trade—the limit price set by the Customer.

The Exchange also is proposing to amend the minimum amounts away from the Theoretical Prices at which transactions will be deemed to have been executed in Catastrophic Error and the adjustment amount by which Theoretical Prices will be adjusted to determine execution prices. The revised Theoretical Prices, minimum amounts, and adjustment amounts will be set out in amended Rule 6.87(d)(1) and (d)(3)(E) so that the threshold for determining whether a Catastrophic Error has occurred will also be the same amount used to adjust any trades deemed to be Catastrophic Errors. The Theoretical Price category of ''Above $10 to $50'' will change to ''Above $10 to $20,'' and a new category of ''Above $20 to $50'' will be added. Moreover, the minimum amount away from the Theoretical Prices at which transactions will be deemed to have been executed in Catastrophic Error and the corresponding adjustment amounts will increase at Theoretical Prices above $50 as compared to the minimum amounts set out in current Rule 6.87. This is consistent with the approach that the Chicago Board Options Exchange takes in its CBOE Rule 6.25(d)(4).[9]

The Exchange is also proposing to amend Rule 6.87(d)(3)(B) and add new paragraph (d)(3)(D) to provide that a Trading Official, rather than the Panel, will determine if a Catastrophic Error has occurred, subject to an appeal to the Panel, which will be renamed the CER Panel to distinguish it from the Obvious Error Panel (''OE Panel''). The ISE similarly uses its exchange personnel to determine if a Catastrophic Error has occurred.[10] If a party disagrees with the Trading Official's Catastrophic Error determination with respect to a transaction, the party can appeal that determination to the CER Panel within 30 minutes of receiving notification of the determination. As noted above, all determinations by the CER Panel constitute final Exchange action on the matter at issue.

Pursuant to existing Rule 6.87(d)(3)(B), if upon review a CER Panel determines that a Catastrophic Error has not occurred, the OTP Holder requesting the review is subject to a charge of $5,000. Pursuant to this proposal, there will be no fee assessed if an OTP Holder requests that the Exchange review a transaction and make a determination as to whether a Catastrophic Error occurred. However, if an OTP Holder appeals the determination made by the Trading Official to a CER Panel and the CER Panel confirms the determination made by the Trading Official, a $5,000 fee will apply. The Exchange is proposing to move existing text regarding the $5,000 fee from subsection (d)(3)(B) to proposed subsection (d)(3)(F) to make clear when the fee applies. Assessing the $5,000 only in the event of an appeal to the CER Panel, but not for initial determinations made by the Trading Official, is consistent with the application of a similar $5,000 fee by ISE.[11]

2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act,[12] in general, and furthers the objectives of Section 6(b)(5),[13] 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, in general, to protect investors and the public interest.

In particular, regarding Obvious Errors, the Exchange believes the proposed rule change relating to busting trades involving Customers and adjusting trade prices if none of the parties is a Customer will help market participants better manage risk associated with potential erroneous trades. In addition, regarding Catastrophic Errors, the Exchange believes that the proposal provides a fair process that will ensure that Customers are not forced to accept a trade that was executed in violation of the Customer's limit order price.

The automatic remedies applicable to Obvious or Catastrophic Error transactions involving only non-Customers differ from those applicable to such transactions involving at least one party that is a Customer, but the Exchange does not believe that the proposal is unfairly discriminatory. As discussed above, an Obvious or Catastrophic Error transaction involving only non-Customer parties is subject to an automatic price adjustment in accordance with terms set out in Rule 6.87, unless the parties agree to a different price adjustment or to bust the transaction within the applicable timeframe. Obvious or Catastrophic Error Transactions involving at least one party that is a Customer, by contrast, are subject to being adjusted automatically only if the adjustment price is within the Customer's limit price. Otherwise, the transaction is busted, unless the Customer accepts an adjustment price from the Exchange, or the parties to the transaction agree to adjust the price of the trade within the applicable timeframe, which is longer than the applicable timeframe for non-Customer transactions. The different treatment accorded Customers versus non-Customers recognizes that Customers are not necessarily immersed in the day-to-day trading of the markets, are less likely to be watching trading activity in a particular option throughout the day, and may have limited funds in their trading accounts. Automatically busting a Customer trade involving a Catastrophic Error to protect the Customer's limit order price, while giving the Customer a longer period of time than a non-Customer to choose a different remedy, *i.e.,* price adjustment, is not unfairly discriminatory because it is reasonable and fair to provide Customers, who are typically less sophisticated in trading matters than non-Customers, with additional options

[8] *See* NASDAQ PHLX Rule 1092(f)(ii).

[9] *See* Securities Exchange Act Release No. 59981 (May 27, 2009), 74 FR 26447 (June 2, 2009) (SR–CBOE–2009–024).

[10] ISE Rule 720(c)(2); *see* 78 FR at 25778.

[11] *See* ISE Rule 720(d)(4).

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(5).

to protect themselves against the consequences of Catastrophic errors.

The Exchange acknowledges that the proposal contains some uncertainty regarding whether a trade will be adjusted or busted, depending on whether one of the parties is a Customer, because a party would not know, when entering into the trade, whether the other party is a Customer. The Exchange believes that the proposal nevertheless promotes just and equitable principles of trade and protects investors and the public interest, because it eliminates a more serious uncertainty in the rule's operation today, which is price uncertainty. Today, a Customer's order can be adjusted to a significantly different price in the case of a Catastrophic Error, which is potentially more impactful than the possibility of busting the trade.

Furthermore, there is uncertainty in the current Obvious Error portion of Rule 6.87 that market participants have dealt with for a number of years. Specifically, Rule 6.87(a)(3)(A) provides that if it is determined that an Obvious Error has occurred where each party to the transaction is a Market Maker on the Exchange, the execution price of the transaction will be adjusted by the Exchange (in accordance with subsection (i) and (ii) of the rule), unless both parties agree to adjust to a different price or to nullify the transaction within 10 minutes of being notified by the Exchange of the Obvious Error. Additionally, Rule 6.87(a)(3)(B) provides that if it is determined that an Obvious Error has occurred where at least one party to the transaction to the Obvious Error is not an Exchange Market Maker, the trade will be busted by the Exchange, unless both parties agree to adjust the price of the transaction within 30 minutes of being notified by the Exchange of the Obvious Error. Therefore, a Market Maker who prefers price adjustments over busting a trade cannot guarantee that outcome because, if he trades with a non-Market Maker, a resulting Obvious Error would only be adjusted if the party on the other side of the trade agrees to an adjustment. This uncertainty has been embedded in the rule and accepted by market participants. The Exchange believes that this proposal, despite the uncertainty based on whether a Customer is involved in a trade, is nevertheless consistent with the Act because the ability to nullify a Customer's trade involving an Obvious or a Catastrophic Error should prevent the price uncertainty that mandatory adjustment with respect Catastrophic Error creates under the current rule. The Exchange believes that the benefits afforded to Customers by knowing with certainty what the adjustment price of a Catastrophic Error will be, and being able to nullify the trade if they choose to do so, far outweighs any uncertainty that might arise by not knowing whether a Customer was involved as the contra-side on a given trade. The Exchange believes that affording Customers this heightened degree of certainty should promote just and equitable principles of trade and protect investors and the public interest.

The Exchange has also weighed carefully the need to assure that one market participant is not permitted to receive a windfall at the expense of another market participant that made an Obvious or a Catastrophic Error against the need to assure that market participants are not simply being given an opportunity to reconsider poor trading decisions.

Further, the Exchange believes that the proposed rule change relating to a Trading Official making the determination of whether a Catastrophic Error has occurred will promote just and equitable principles of trade because the Exchange believes such determinations will be made in a more timely manner than is the case today. As the determinations will likely be more timely, the proposed change will reduce the length of time before participants gain certainty as to the outcome of a Catastrophic Error review. Further, this change will help ensure consistency between Obvious Error and Catastrophic Error procedures whereby initial determinations are made by the Exchange and any appeal of a determination goes before either an Obvious Error or Catastrophic Error Review Panel. The Exchange's Obvious and Catastrophic Error rule and the procedures that carry out the rule have consistently been based on specific and objective criteria. The Exchange believes this proposed rule change furthers that principle by adopting objective guidelines for the determination of which trades may be busted or adjusted and for the determination of whether or not a trade is deemed to be a Catastrophic Error.

In addition, the Exchange believes that the proposed changes to the pricing tables used in determining theoretical and adjustment values for transactions subject to Catastrophic Error reviews will remove impediments to and perfect the mechanism of a free and open market because the proposed changes will conform the theoretical and adjustment values applicable to Catastrophic Errors on other market venues.[14]

Finally, the Exchange believes that moving existing text regarding the $5,000 fee, as described above, will promote just and equitable principles of trade because the amendment will make clear when the fee is applicable. The amendment will clarify that the $5,000 fee will not be applicable when the Trading Official makes the initial determination as to whether a Catastrophic Error occurred, but will be applicable if, upon appeal, the CER Panel confirms the determinations made by the Trading Official. Further, the Exchange believes that the amendment will remove impediments to and perfect the mechanism of a free and open market because the amendment will conform the Exchange's application of the $5,000 fee to similar fees on other market venues. The Exchange also believes that assessing such a fee ensures the proper balance between allowing OTP Holders to seek review of determinations made by the Exchange and recovering the costs associated with requiring an additional layer of review by the CER Panel.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes the proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is intended to help market participants better manage the risk associated with erroneous options trades, and therefore, does not impose any burden on competition. Moreover, the Exchange believes the proposed rule change will enhance competition by conforming the Exchange's rules governing Obvious and Catastrophic Errors more closely to those of other exchanges. The treatment of Customers differently from non-Customers under the proposed rule amendments may result in market participants choosing to route orders to the Exchange, and therefore, attract order flow to the Exchange, rather than a competing exchange.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

[14] *Supra* Footnote No. 10 [sic].

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [15] and Rule 19b–4(f)(6) thereunder.[16] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [17] and Rule 19b–4(f)(6)(iii) thereunder.[18]

A proposed rule change filed under Rule 19b–4(f)(6) [19] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[20] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) of the Act [21] 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 is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEARCA–2013–104 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEARCA–2013–104. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Section, 100 F Street NE., Washington, DC 20549–1090, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing will also be available for inspection and copying at the NYSE's principal office and on its Internet Web site at *www.nyse.com.* All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEARCA–2013–104 and should be submitted on or before November 14, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–24917 Filed 10–23–13; 8:45 am]

BILLING CODE 8011–01–P

[15] 15 U.S.C. 78s(b)(3)(A)(iii).

[16] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) 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.

[17] 15 U.S.C. 78s(b)(3)(A).

[18] 17 CFR 240.19b–4(f)(6)(iii).

[19] 17 CFR 240.19b–4(f)(6).

[20] 17 CFR 240.19b–4(f)(6)(iii).

[21] 15 U.S.C. 78s(b)(2)(B).

[22] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[File No. 500–1]

Order of Suspension of Trading; In The Matter of Crown Alliance Capital Limited

October 22, 2013.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Crown Alliance Capital Limited (''Crown Alliance''), quoted under the ticker symbol CACL, because of questions regarding the accuracy of assertions in Crown Alliance's public filings concerning the company's assets and shareholders and because of potentially manipulative conduct in the trading of Crown Alliance's shares.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 9:30 a.m. EDT on October 22, 2013 through 11:59 p.m. EST on November 4, 2013.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2013–25144 Filed 10–22–13; 4:15 pm]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[File No. 500–1]

Order Of Suspension of Trading; In the Matter of ARX Gold Corp.

October 22, 2013.

It appears to the Securities and Exchange Commission (''Commission'') that there is a lack of current and accurate information concerning the securities of ARX Gold Corp. (''ARX Gold''), quoted under the ticker symbol DUCP, because of questions regarding the authorship of, and accuracy of information contained in, an exhibit, dated June 15, 2012 and entitled ''Feasibility Study ARX Springs & ARX Pacific Properties For Mining Project Located in Wide Bay Burnett Region, Queensland, Australia,'' to ARX Gold's Form 10–K filed on September 4, 2013 and an exhibit, dated May 7, 2012 and entitled ''Definitive Feasibility Study on the ARX Springs and ARX Pacific Properties located in Wide Bay Burnett

Region, Queensland, Australia,'' to its Form 8–K filed on May 30, 2012. On October 3, 2013, ARX Gold filed an amended Form 10–K purporting ''to delete an exhibit which was *erroneously filed''* with the 10–K filed on September 4, 2013 (emphasis added) without explicitly identifying or explaining that the Feasibility Study was the exhibit it sought to delete. ARX Gold has not amended its May 2012 Form 8–K and its October 2013 amendment to the Form 10–K does not disclaim the purported facts described in the earlier Feasibility Study filed with the Commission.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company.

Therefore, *it is ordered,* pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 9:30 a.m. EDT on October 22, 2013, through 11:59 p.m. EST on November 4, 2013.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2013–25143 Filed 10–22–13; 4:15 pm]

BILLING CODE 8011–01–P

DEPARTMENT OF STATE

[Public Notice 8504]

30-Day Notice of Proposed Information Collection: Request for Determination of Possible Loss of United States Citizenship

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

SUMMARY: The Department of State has submitted the information collection described below to the Office of Management and Budget (OMB) for approval. In accordance with the Paperwork Reduction Act of 1995 we are requesting comments on this collection from all interested individuals and organizations. The purpose of this Notice is to allow 30 days for public comment.

DATES: Submit comments directly to the Office of Management and Budget (OMB) up to November 25, 2013.

ADDRESSES: Direct comments to the Department of State Desk Officer in the Office of Information and Regulatory Affairs at the Office of Management and Budget (OMB). You may submit comments by the following methods:

- *Email: oira_submission@omb.eop.gov.* You must include the DS form number, information collection title, and the OMB control number in the subject line of your message.
- *Fax:* 202–395–5806. Attention: Desk Officer for Department of State.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection instrument and supporting documents, to Derek A. Rivers, Bureau of Consular Affairs, Overseas Citizens Services (CA/OCS/L), U.S. Department of State, SA–17, 10th Floor, Washington, DC 20522–1707, who may be reached at *mailto: Ask-OCS-L-Public-Inquiries@state.gov.*

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* Request for Determination of Possible Loss of United States Citizenship
- *OMB Control Number:* No.1405–0178
- *Type of Request:* Extend
- *Originating Office:* Bureau of Consular Affairs, Overseas Citizens Services (CA/OCS)
- *Form Number:* DS–4079
- *Respondents:* United States Citizens
- *Estimated Number of Respondents:* 1,729
- *Estimated Number of Responses:* 1,729
- *Average Hours Per Response:* 15 minutes
- *Total Estimated Burden:* 432 hours
- *Frequency:* On Occasion
- *Obligation to Respond:* Required to obtain or retain benefits

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper functions of the Department
- Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used
- Enhance the quality, utility, and clarity of the information to be collected
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of proposed collection: The purpose of the DS–4079 questionnaire is to determine current citizenship status and the possibility of loss of United States citizenship. The information provided assists consular officers and the Department of State in determining if the U.S. citizen has lost his or her nationality by voluntarily performing an expatriating act with the intention of relinquishing United States nationality. 8 U.S.C. 1501 grants authority to collect this information.

Methodology: The Bureau of Consular Affairs will post this form on Department of State Web sites to give respondents the opportunity to complete the form online, or print the form and fill it out manually and submit the form in person or by fax or mail.

Dated: October 1, 2013.

Michelle Bernier-Toth,

Managing Director, Bureau of Consular Affairs, Overseas Citizens Services, Department of State.

[FR Doc. 2013–25017 Filed 10–23–13; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF STATE

[Public Notice 8505]

Notice of Receipt of an Application by Magellan Pipeline Company, L.P., for Issuance of a Presidential Permit To Operate and Maintain Existing Pipeline Facilities on the Border of the United States and Mexico

October 18, 2013.

AGENCY: Department of State.

ACTION: Notice of Receipt of an Application by Magellan Pipeline Company, L.P., for Issuance of a Presidential Permit to Operate and Maintain Existing Pipeline Facilities on the Border of the United States and Mexico.

SUMMARY: Notice is hereby given that the Department of State (DOS) has received from Magellan Pipeline Company, L.P. (''Magellan'') notice that it has acquired the rights to operate and maintain pipeline facilities permitted under a 1995 Presidential Permit issued to Chevron Pipeline Company (''Chevron''). Magellan requests that a new or amended Presidential Permit be issued to it with respect to the pipeline facilities.

Magellan is a wholly-owned subsidiary of Magellan Midstream Partners, L. P. (''MMP'') and owns and operates a lengthy pipeline for the transportation of refined petroleum products that extends into 14 states along the Gulf Coast and through the middle part of the United States.

The permitted facilities consist of existing 2.75-mile 8.625-inch carbon

steel pipelines that extend from El Paso, Texas to the U.S. boundary with Mexico.

Through corporate transactions, Chevron assigned the permit to Plains Pipeline L.P. (Plains). On July 1, 2013, Plains assigned its rights to the 1995 permit to NMPL LLC which was subsequently merged into Magellan.

Magellan affirms that the operation and maintenance of the permitted facilities authorized by the 1995 Permit will remain substantially the same, and it is not seeking authorization for new construction or a change in operations.

Under E.O. 13337 the Secretary of State is designated and empowered to receive all applications for Presidential Permits for the construction, connection, operation, or maintenance at the borders of the United States, of facilities for the exportation or importation of liquid petroleum, petroleum products, or other fuels (except natural gas) to or from a foreign country. The Department of State is circulating this application to concerned federal agencies for comment. The Department of State has the responsibility to determine whether issuance of a new or amended Presidential Permit in light of Magellan's acquisition of the pipeline facilities would be in the U.S. national interest.

DATES: Interested parties are invited to submit comments within 30 days of the publication date of this notice by email to *MagellanPipelinePermit@state.gov*mailto: With regard to whether issuing a new Presidential Permit reflecting the corporate succession would be in the national interest. The application is available at *http://www.state.gov/e/enr.*

FOR FURTHER INFORMATION CONTACT: Office of Energy Diplomacy, Energy Resources Bureau (ENR/EDP/EWA) Department of State 2201 C St. NW., Ste. 4843, Washington DC 20520 Attn: Michael Brennan Tel: 202–647–7553.

Dated: October 18, 2013.

Michael Brennan,

Energy Officer, Office of Europe, Western Hemisphere and Africa, Bureau of Energy Resources, U.S. Department of State.

[FR Doc. 2013–25009 Filed 10–23–13; 8:45 am]

BILLING CODE 4710–09–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Human Response to Aviation Noise in Protected Natural Areas Survey

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on July 31, 2013, vol. 78, no. 147, page 46404. This research is important for establishing the scientific basis for air tour management policy decisions in the National Parks as mandated by the National Parks Air Tour Management Act of 2000.

DATES: Written comments should be submitted by November 25, 2013.

FOR FURTHER INFORMATION CONTACT: Kathy DePaepe at (405) 954–9362, or by email at: *Kathy.DePaepe@faa.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120–0744.

Title: Human Response to Aviation Noise in Protected Natural Areas Survey.

Form Numbers: There are no FAA forms associated with this request.

Type of Review: Renewal of an information collection.

Background: The data from this research are critically important for establishing the scientific basis for air tour management policy decisions in the National Parks as mandated by the National Parks Air Tour Management Act of 2000 (NPATMA). The research expands on previous aircraft noise dose-response work by using a wider variety of survey methods, by including different site types and visitor experiences from those previously measured, and by increasing site type replication.

Respondents: Approximately 16,800 visitors to National Parks annually.

Frequency: Information is collected on occasion.

Estimated Average Burden per Response: 15 minutes.

Estimated Total Annual Burden: 4,200 hours annually.

ADDRESS: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the attention of the Desk Officer, Department of Transportation/FAA, and sent via electronic mail to *oira_submission@omb.eop.gov,* or faxed to (202) 395–6974, or mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street NW., Washington, DC 20503.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Issued in Washington, DC, on October 21, 2013.

Albert R. Spence,

FAA Assistant Information Collection Clearance Officer, IT Enterprises Business Services Division, AES–200.

[FR Doc. 2013–24967 Filed 10–23–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Service Difficulty Report

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval for to renew an information collection. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on June 27, 2013, vol. 78, no. 124, page 38795. The collection involves requirements for operators and repair stations to report

any malfunctions and defects to the Administrator.

DATES: Written comments should be submitted by November 25, 2013.

FOR FURTHER INFORMATION CONTACT: Kathy DePaepe at (405) 954–9362, or by email at: *Kathy.DePaepe@faa.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120–0663.

Title: Service Difficulty Report.

Form Numbers: FAA Form 8070–1.

Type of Review: Renewal of an information collection.

Background: This collection affects certificate holders operating under 14 CFR Part 121, 125, 135, and 145 who are required to report service difficulties. The data collected identifies mechanical failures, malfunctions, and defects that may be a hazard to the operation of an aircraft. The FAA uses this data to identify trends that may facilitate the early detection of airworthiness problems.

Respondents: Approximately 7,695 air carriers and repair stations.

Frequency: Information is collected on occasion.

Estimated Average Burden per Response: 10 minutes.

Estimated Total Annual Burden: 6,107 hours.

ADDRESS: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the attention of the Desk Officer, Department of Transportation/FAA, and sent via electronic mail to *oira_submission@omb.eop.gov,* or faxed to (202) 395–6974, or mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street NW., Washington, DC 20503.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Issued in Washington, DC, on October 21, 2013.

Albert R. Spence,

FAA Assistant Information Collection Clearance Officer, IT Enterprises Business Services Division, AES–200.

[FR Doc. 2013–24965 Filed 10–23–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Request To Release Airport Property at Charleston International Airport, Charleston, South Carolina

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice.

SUMMARY: The Federal Aviation Administration (FAA) is considering a request to release and authorize the sale of three parcels totaling 266.954-acres of airport property located at the Charleston International Airport, Charleston, South Carolina, and invites public comment on this notice. The three parcels of airport property are planned to be sold by the Charleston County Aviation Authority for the proposed use of aircraft manufacturing. Currently, ownership of the property provides for protection of FAR Part 77 surfaces and compatible land use which would continue to be protected with deed restrictions required in the transfer of land ownership.

DATES: Comments must be received on or before November 25, 2013.

ADDRESSES: Documents are available for review by prior appointment at the following location: Atlanta Airports District Office, Attn: Rob Rau, South Carolina Planner, 1701 Columbia Ave., Suite 2–260, College Park, Georgia 30337–2747, Telephone: (404) 305–7004.

Comments on this notice may be mailed or delivered in triplicate to the FAA at the following address: Atlanta Airports District Office, Attn: Rob Rau, South Carolina Planner, 1701 Columbia Ave., Suite 2–260, College Park, Georgia 30337–2747.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Senator Paul G. Campbell, Jr., Director of Airports, Charleston International Airport at the following address: 5500 International Boulevard, Suite 101, Charleston, South Carolina 29418–6911.

FOR FURTHER INFORMATION CONTACT: Rob Rau, South Carolina Planner, Atlanta Airports District Office, 1701 Columbia Ave., Suite 2–260, College Park, Georgia 30337–2747, (404)305–7004. The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: In accordance with the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), Public Law 106–181 (Apr. 5, 2000; 114 Stat. 61), this notice must be published in the **Federal Register** 30 days before the Secretary may waive any condition imposed on a federally obligated airport by grant agreements. The FAA invites public comment on the request to release property at the Charleston International Airport under the provisions of AIR 21.

The FAA is reviewing a request by the Charleston County Aviation Authority to release 266.954 acres of airport property at the Charleston International Airport. The Charleston County Aviation Authority plans to sell the subject property for the purpose of aircraft manufacturing and related support functions.

All three Parcels of land were originally acquired from Georgia Pacific under ADAP Grant 6–45–0012–01 in September, 1976 for future airport development.

1. Parcel A is 141.1 acres, the largest of the three parcels. It is located northwest of the intersection of International Boulevard and Michaux Parkway. The Airport Surveillance Radar (ASR–9) is located on this parcel. The Charleston County Aviation Authority granted an easement to the FAA for this facility that runs with the land into perpetuity or until abandoned by the FAA.

2. Parcel B is 103.0 acres located south of International Boulevard, east of Michaux Parkway and west of Interstate 526 (Mark Clark Expressway).

3. Parcel C is 22.8 acres fronting International Boulevard and encompasses three office buildings and other various site improvements. This property is commonly referred to as the South Carolina Research Authority (SCRA) Tract or Trident area.

Fair market value will be obtained from the sale of the subject airport property. The use of the revenue generated from the sale of the property will be in accordance with FAA's *Policy and Procedures Concerning the Use of Airport Revenue,* published in the **Federal Register** on February 16, 1999 (64 FR 7696). The Aviation Authority's airport account will be properly compensated, thereby serving the interests of civil aviation. In addition, the proposed use of this property is compatible with airport operations.

Any person may inspect the request in person at the FAA office listed above

under **FOR FURTHER INFORMATION CONTACT**. In addition, any person may, upon request, inspect the request, notice and other documents germane to the request in person at the Charleston International Airport.

Issued in Atlanta, Georgia on October 10, 2013.

Larry F. Clark,

Assistant Manager, Atlanta Airports District Office Southern Region.

[FR Doc. 2013–24985 Filed 10–23–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Buy America Waiver Notification

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice.

SUMMARY: This notice provides information regarding the FHWA's finding that a Buy America waiver is appropriate for the use of 0.5 in. x 0.008 in. steel fibers with ultimate tensile strength of 290 ksi. in Ultra High Performance Concrete (UHPC) at the joints and closure pours between deck pours of a Federal-aid project; US–6 over D&RGW Railroad in Utah.

DATES: The effective date of the waiver is October 25, 2013.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Mr. Gerald Yakowenko, FHWA Office of Program Administration, (202) 366–1562, or via email at *gerald.yakowenko@dot.gov.* For legal questions, please contact Mr. Michael Harkins, FHWA Office of the Chief Counsel, (202) 366–4928, or via email at *michael.harkins@dot.gov.* Office hours for the FHWA are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this document may be downloaded from the **Federal Register**'s home page at: *http://www.archives.gov* and the Government Printing Office's database at: *http://www.access.gpo.gov/nara.*

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 in a Federal-aid construction project. The regulation also provides for a waiver of the Buy America requirements when the application would be inconsistent with the public interest or when satisfactory quality domestic steel and iron products are not sufficiently available. This notice provides information regarding the FHWA's finding that a Buy America waiver is appropriate to use UHPC 0.5 in. x 0.008 in. steel fibers with ultimate tensile strength 290 ksi. on Federal-aid project US–6 over D&RGW Railroad in Utah.

In accordance with Division A, section 122 of the ''Consolidated and Further Continuing Appropriations Act, 2012'' (Pub. L. 112–284), the FHWA published a notice of intent to issue a waiver on its Web site for UHPC steel fibers for a project in Utah (*http://www.fhwa.dot.gov/construction/contracts/waivers.cfm?id=90*) on July 23rd. The FHWA received no comments in response to the publication. During the 15-day comment period, the FHWA conducted additional nationwide review to locate potential domestic manufacturers of UHPC 0.5 in. x 0.008 in. steel fibers with ultimate tensile strength of 290 ksi. Based on all the information available to the agency, the FHWA concludes that there are no domestic manufacturers of the UHPC steel fibers.

In accordance with the provisions of section 117 of the SAFETEA–LU Technical Corrections Act of 2008 (Pub. L. 110–244, 122 Stat. 1572), the FHWA is providing this notice as its finding that a waiver of Buy America requirements is appropriate for the use of non-domestic UHPC 0.5 in. x 0.008 in. steel fibers with ultimate tensile strength of 290 ksi. by the State of Utah. The FHWA invites public comment on this finding for an additional 15 days following the effective date of the finding. Comments may be submitted to the FHWA's Web site via the link provided to the Utah waiver page noted above.

Authority: 23 U.S.C. 313; Pub. L. 110–161, 23 CFR 635.410.

Issued on: October 7, 2013.

Victor M. Mendez,

Federal Highway Administrator.

[FR Doc. 2013–24974 Filed 10–23–13; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. AB 825X]

Turtle Creek Industrial Railroad, Inc.—Discontinuance of Service Exemption—in Westmoreland County, PA

Turtle Creek Industrial Railroad, Inc. (TCIR), has filed a verified notice of exemption under 49 CFR part 1152 subpart F—*Exempt Abandonments and Discontinuances of Service* to discontinue service over approximately 9.8 miles of rail line from milepost 0.9 near Trafford, Pa., to milepost 10.7 in Export, Pa. (the Line). The Line traverses United States Postal Service Zip Codes 15085, 15668, and 15632.

TCIR has certified that: (1) No local traffic has moved over the Line for at least two years; (2) no overhead traffic has moved over the Line for at least two years, and if there were any, it could be rerouted over other lines; (3) no formal complaint filed by a user of rail service on the Line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the Line either is pending with the Surface Transportation Board (Board) or with any U.S. District Court or has been decided in favor of complainant within the two-year period; and (4) the requirements at 49 CFR 1105.12 (newspaper publication) and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the discontinuance shall be protected under *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho,* 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) to subsidize continued rail service has been received, this exemption will become effective on November 23, 2013, unless stayed pending reconsideration.[1] Petitions to stay that do not involve environmental issues and formal expressions of intent to file an OFA to subsidize continued

[1] This notice was scheduled to be published in the **Federal Register** during the time that the agency was closed due to a lapse in appropriations. Because publication of this notice has been delayed, the effective date of the exemption will also be delayed to provide adequate notice to the public.

rail service under 49 CFR 1152.27(c)(2),[2] must be filed by November 4, 2013.[3] Petitions to reopen must be filed by November 13, 2013, with the Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to TCIR's representative: Richard R. Wilson, 518 N. Center Street, Ste. 100, Ebensburg, PA 15931.

If the verified notice contains false or misleading information, the exemption is void *ab initio.*

Board decisions and notices are available on our Web site at ''*WWW.STB.DOT.GOV.*''

Decided: October 21, 2013.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Derrick A. Gardner,

Clearance Clerk.

[FR Doc. 2013–25013 Filed 10–23–13; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35770]

BNSF Railway Company—Trackage Rights Exemption—Union Pacific Railroad Company

Pursuant to a written trackage rights agreement, Union Pacific Railroad Company (UP) has agreed to grant overhead trackage rights to BNSF Railway Company (BNSF) over the following UP rail lines: (1) From Houston, Tex. (Tower 81), on the UP Harrisburg Subdivision at milepost 4.6 to the beginning of UP's Glidden Subdivision at milepost 13.6, and on to Rosenberg, Tex. (Tower 17), on UP's Glidden Subdivision at milepost 36.3 (Rosenburg Route); and (2) from the Clinton Industrial Lead connection, at the Terminal Subdivision at milepost 359.6, to the Houston Public Elevator #2 (HPE#2) (Clinton Route).[1]

This transaction will be consummated on or shortly after the effective date of this exemption, November 7, 2013.[2]

The purpose of this transaction is to enable BNSF to make overhead movements of all commodities over the Rosenburg Route and overhead movements of grain consigned to HPE#2 and empty grain cars in return over the Clinton Route.

As a condition to this exemption, any employees affected by the trackage rights will be protected by the conditions imposed in *Norfolk & Western Railway—Trackage Rights—Burlington Northern, Inc.,* 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Railway—Lease & Operate—California Western Railroad,* 360 I.C.C. 653 (1980).

This notice is filed under 49 CFR 1180.2(d)(7). If the notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Stay petitions must be filed by October 31, 2013 (at least seven days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 35770, must be filed with the Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Karl Morell, Ball Janik LLP, 655 Fifteenth Street NW., Suite 225, Washington, DC 20005.

Board decisions and notices are available on our Web site at ''*WWW.STB.DOT.GOV.*''

Decided: October 21, 2013.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Derrick A. Gardner,

Clearance Clerk.

[FR Doc. 2013–25014 Filed 10–23–13; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8038–R

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 8038–R, Request for Recovery of Overpayments Under Arbitrage Rebate Provisions.

DATES: Written comments should be received on or before December 23, 2013 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to LaNita Van Dyke at Internal Revenue Service, Room 6511, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *Lanita.VanDyke@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Request for Recovery of Overpayments Under Arbitrage Rebate Provisions.

OMB Number: 1545–1750.

Form Number: 8038–R.

Abstract: Under Treasury Regulations section 1.148–3(i), bond issuers may recover an overpayment of arbitrage rebate paid to the United States under Internal Revenue Code section 148. Form 8038–R is used to request recovery of any overpayment of arbitrage rebate made under the arbitrage rebate provisions.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: State, local or tribal governments.

Estimated Number of Respondents: 200.

Estimated Time per Respondent: 12 hours, 16 minutes.

Estimated Total Annual Burden Hours: 2,458.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

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[2] Each OFA must be accompanied by the filing fee, which is currently set at $1,600. *See* 49 CFR 1002.2(f)(25).

[3] Because this is a discontinuance proceeding and not an abandonment, trail use/rail banking and public use conditions are not appropriate. Likewise, no environmental or historic documentation is required here under 49 CFR 1105.6(c) and 49 CFR 1105.8(b), respectively.

[1] A redacted copy of the trackage rights agreement was filed with the verified notice of exemption. An unredacted version was filed under seal along with a motion for protective order, which will be addressed in a separate decision.

[2] This notice was scheduled to be published in the **Federal Register** during the time that the agency was closed due to a lapse in appropriations. Because publication of this notice has been delayed, the effective date of the exemption will also be delayed to provide adequate notice to the public.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: September 24, 2013.

R. Joseph Durbala,

IRS Tax Analyst.

[FR Doc. 2013–24959 Filed 10–23–13; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Forms 2210 and 2210–F

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 2210, Underpayment of Estimated Tax by Individuals, Estate, and Trusts, and Form 2210–F, Underpayment of Estimated Tax by Farmers and Fishermen.

DATES: Written comments should be received on or before December 23, 2013 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette B. Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the forms and instructions should be directed to R. Joseph Durbala at Internal Revenue Service, (202) 622–3634, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *RJoseph.Durbala@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Underpayment of Estimated Tax by Individuals, Estate, and Trusts (Form 2210), and Underpayment of Estimated Tax by Farmers and Fishermen (Form 2210–F).

OMB Number: 1545–0140.

Form Number: 2210 AND 2210–F.

Abstract: Internal Revenue Code section 6654 imposes a penalty for failure to pay estimated tax. Form 2210 is used by individuals, estates, and trusts and Form 2210–F is used by farmers and fisherman to determine whether they are subject to the penalty and to compute the penalty if it applies. The Service uses this information to determine whether taxpayers are subject to the penalty, and to verify the penalty amount.

Current Actions: There are no changes to the burden previously approved by OMB.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households, business or other for-profit organizations, and farms.

Estimated Number of Respondents: 599,999

Estimated Time per Respondent: 4 hrs.

Estimated Total Annual Burden Hours: 2,405,663.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: October 7, 2013.

Yvette Lawrence,

IRS, Reports Clearance Officer.

[FR Doc. 2013–24934 Filed 10–23–13; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for the TE/GE Compliance Check Questionnaires

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning the TE/GE Compliance Check Questionnaires.

DATES: Written comments should be received on or before December 23, 2013 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to R. Joseph Durbala, (202) 622–3634, at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *RJoseph.Durbala@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: TE/GE Compliance Check Questionnaires.

OMB Number: 1545–2071.

Form Number: Not applicable.

Abstract: These compliance questionnaires are a critical component

of TE/GE's comprehensive enforcement program. TE/GE uses these questionnaires to gain a better understanding of the compliance behavior of individual segments of the tax-exempt community and to identify and resolve specific instances of non-compliance with the laws and regulations governing tax-exempt organizations, employee pension plans, tax-exempt bonds and governmental entities.

Current Actions: There are no changes to the collection efforts, however we are asking to increase the burden estimates (by 16,500 hours) previously approved by OMB, to better reflect ongoing activities. This request is for renewal purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Tax Exempt organizations (including recipients of Tax-Exempt Bonds), Sponsors of Employee Plans, or Government entities.

Estimated Number of Respondents: 9,000.

Estimated Time per Respondent: 6 hours.

Estimated Total Annual Burden Hours: 54,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: October 11, 2013.

Yvette Lawrence,

IRS, Reports Clearance Officer.

[FR Doc. 2013–24957 Filed 10–23–13; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 1098

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 1098, Mortgage Interest Statement.

DATES: Written comments should be received on or before December 23, 2013 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to LaNita Van Dyke, at Internal Revenue Service, Room 6511, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *Lanita.VanDyke@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Mortgage Interest Statement.

OMB Number: 1545–0901.

Form Number: Form 1098.

Abstract: Form 1098 is used to report $600 or more of mortgage interest received from an individual in the course of the mortgagor's trade or business.

Current Actions: There is no change in the paperwork burden previously approved by OMB. This form is being submitted for renewal purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals and Households.

Estimated Number of Respondents: 171,000.

Estimated Time per Respondent: 7 minutes.

Estimated Total Annual Burden Hours: 8,038,699.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: September 24, 2013.

R. Joseph Durbala,

IRS Tax Analyst.

[FR Doc. 2013–24962 Filed 10–23–13; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8838

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information

collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 8838, Consent To Extend the Time To Assess Tax Under Section 367-Gain Recognition Agreement.

DATES: Written comments should be received on or before December 23, 2013 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for copies of the form and instructions should be directed to LaNita Van Dyke at Internal Revenue Service, Room 6511, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *Lanita.VanDyke@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Consent To Extend the Time To Assess Tax Under Section 367-Gain Recognition Agreement.

OMB Number: 1545–1395.

Form Number: 8838.

Abstract: Form 8838 is used to extend the statute of limitations for U.S. persons who transfer stock or securities to a foreign corporation. The form is filed when the transferor makes a gain recognition agreement. This agreement allows the transferor to defer the payment of tax on the transfer. The IRS uses Form 8838 so that it may assess tax against the transferor after the expiration of the original statute of limitations.

Current Actions: There are no changes being made to the Form 8838 at this time.

Type of Review: Extension of a current approval.

Affected Public: Business or other for-profit organizations and individuals.

Estimated Number of Respondents: 666.

Estimated Time per Respondent: 8 hrs., 14 min.

Estimated Total Annual Burden Hours: 5,482.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: September 24, 2013.

R. Joseph Durbala,

IRS Tax Analyst.

[FR Doc. 2013–24981 Filed 10–23–13; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning health insurance portability for group health plans and group health insurance issuers under HIPAA Titles I & IV.

DATES: Written comments should be received on or before December 23, 2013 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of regulations should be directed to R. Joseph Durbala, at (202) 622–3634, or at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *RJoseph.Durbala@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Final Regulations for Health Coverage Portability for Group Health Plans and Group Health Insurance Issuers Under HIPAA Titles I & IV.

OMB Number: 1545–1537. *Regulation Project Number:* TD 9166 (Final).

Abstract: This document contains final regulations governing portability requirements for group health plans and issuers of health insurance coverage offered in connection with a group health plan. The rules contained in this document implement changes made to the Internal Revenue Code, the Employee Retirement Income Security Act, and the Public Health Service Act enacted as part of the Health Insurance Portability and Accountability Act of 1996.

Current Actions: There is no change to these existing regulations.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, not-for-profit institutions, and state, local, or tribal governments.

Estimated Number of Respondents: 2,600,000.

Estimated Time per Respondent: Varies.

Estimated Total Annual Burden Hours: 262,289.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the

quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: October 9, 2013.

Yvette Lawrence,

IRS, Reports Clearance Officer.

[FR Doc. 2013–24945 Filed 10–23–13; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection: Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning unified rule for loss on subsidiary stock.

DATES: Written comments should be received on or before December 23, 2013 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulation should be directed to LaNita Van Dyker at Internal Revenue Service, Room 6511, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet, at *Lanita.VanDyke@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Unified Rule for Loss on Subsidiary Stock.

OMB Number: 1545–2096.

Regulation Project Number: REG–157711–02 (TD 9424—final).

Abstract: This document contains final regulations under sections 358, 362(e)(2), and 1502 of the Internal Revenue Code (Code). The regulations apply to corporations filing consolidated returns, and corporations that enter into certain tax-free reorganizations. The regulations provide rules for determining the tax consequences of a member's transfer (including by deconsolidation and worthlessness) of loss shares of subsidiary stock. In addition, the regulations provide that section 362(e)(2) generally does not apply to transactions between members of a consolidated group. Finally, the regulations conform or clarify various provisions of the consolidated return regulations, including those relating to adjustments to subsidiary stock basis.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 100.

Estimated Time per Respondent: 15 minutes.

Estimated Total Annual Burden Hours: 25.

The following paragraph applies to all of the collections of information covered by this notice.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: September 24, 2013.

R. Joseph Durbala,

IRS Tax Analyst.

[FR Doc. 2013–24984 Filed 10–23–13; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Rev. Proc. 2007–35

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Revenue Procedure 2007–35, Statistical Sampling for purposes of Section 199.

DATES: Written comments should be received on or before December 23, 2013 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the revenue procedure should be directed to LaNita Van Dyke, at Internal Revenue Service, Room 6511, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet, at *Lanita.VanDyke@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Statistical Sampling for purposes of Section 199.

OMB Number: 1545–2072.

Revenue Procedure Number: RP–2007–35.

Abstract: This revenue procedure provides for determining when statistical sampling may be used in purposes of section 199, which provides a deduction for income attributable to domestic production activities, and establishes acceptable statistical sampling methodologies.

Current Actions: Extension of a previously approved collection.

Affected Public: Business or other for-profit institutions, and individuals or households or farms.

Estimated Number of Respondents: 300.

Estimated Time per Respondent: 8 hours.

Estimated Total Annual Burden Hours: 2,400.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: September 24, 2013.

R. Joseph Durbala,

IRS Tax Analyst.

[FR Doc. 2013–24958 Filed 10–23–13; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Revenue Procedure 2004–46

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Revenue Procedure 2004–46, Relief from Late GST Allocation.

DATES: Written comments should be received on or before December 23, 2013 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the revenue procedure should be directed to R. Joseph Durbala at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 622–3634, or through the Internet at *RJoseph.Durbala@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Relief from Late GST Allocation.

OMB Number: 1545–1895.

Revenue Procedure Number: Revenue Procedure 2004–46.

Abstract: Revenue Procedure 2004–46 provides guidance to certain taxpayers in order to obtain an automatic extension of time to make an allocation of the generation-skipping transfer tax exemption. Rather than requesting a private letter ruling, the taxpayer may file certain documents directly with the Cincinnati Service Center to obtain relief.

Current Actions: There are no changes being made to the revenue procedure at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 50.

Estimated Annual Average Time per Respondent: 7 hours.

Estimated Total Annual Hours: 350.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: October 1, 2013.

Yvette Lawrence,

IRS, Reports Clearance Officer.

[FR Doc. 2013–24932 Filed 10–23–13; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Cognitive and Psychological Research Coordinated by Statistics of Income on Behalf of All IRS Operations Functions

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Cognitive and Psychological Research Coordinated by Statistics of Income on Behalf of All IRS Operations Functions.

DATES: Written comments should be received on or before December 23, 2013 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or

copies of the form and instructions should be directed to R. Joseph Durbala, (202) 622–3634, at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *RJoseph.Durbala@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Cognitive and Psychological Research Coordinated by Statistics of Income on Behalf of All IRS Operations Functions.

OMB Number: 1545–1349.

Abstract: The proposed research will improve the quality of data collection by examining the psychological and cognitive aspects of methods and procedures such as: Interviewing processes, forms redesign, survey and tax collection technology and operating procedures (internal and external in nature).

Current Actions: We will be conducting different opinion surveys, focus group sessions, think-aloud interviews, and usability studies regarding cognitive research surrounding forms submission or IRS system/product development.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals and businesses or other for-profit organizations.

Estimated Number of Respondents: 225,000.

Estimated Time per Respondent: 30 minutes.

Estimated Total Annual Burden Hours: 112,500.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: September 30, 2013.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. 2013–24944 Filed 10–23–13; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Forms W–8BEN, W–8BEN–E, W–8ECI, W–8EXP, and W–8IMY

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form W–8BEN, Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding, Form W–8BEN–E, Certificate of Status of Beneficial Owner for United States Tax Withholding, Form W–8ECI, Certificate of Foreign Person's Claim for Exemption From Withholding on Income Effectively Connected With the Conduct of a Trade or Business in the United States, Form W–8EXP, Certificate of Foreign Government or Other Foreign Organization for United States Tax Withholding, Form W–8IMY, Certificate of Foreign Intermediary, Foreign Flow-Through Entity, or Certain U.S. Branches for United States Tax Withholding, and the EW–8 MOU Program.

DATES: Written comments should be received on or before December 23, 2013 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Martha Brinson, at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 622–3869, or through the Internet at *Martha.R.Brinson@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Form W–8BEN, Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding, W–8BEN–E, Certificate of Status of Beneficial Owner for United States Tax Withholding, Form W–8ECI, Certificate of Foreign Person's Claim for Exemption From Withholding on Income Effectively Connected With the Conduct of a Trade or Business in the United States, Form W–8EXP, Certificate of Foreign Government or Other Foreign Organization for United States Tax Withholding, and Form W–8IMY, Certificate of Foreign Intermediary, Foreign Flow-Through Entity, or Certain U.S. Branches for United States Tax Withholding.

OMB Number: 1545–1621.

Form Number: W–8BEN, W–8BEN–E, W–8ECI, W–8EXP, and W–8IMY.

Abstract: Form W–8BEN is used for certain types of income to establish that the person is a foreign person, is the beneficial owner of the income for which Form W–8BEN is being provided and, if applicable, to claim a reduced rate of, or exemption from, withholding as a resident of a foreign country with which the United States has an income tax treaty. Form W–8ECI is used to establish that the person is a foreign person and the beneficial owner of the income for which Form W–8ECI is being provided, and to claim that the income is effectively connected with the conduct of a trade or business within the United States. Form W–8EXP is used by a foreign government, international organization, foreign central bank of issue, foreign tax-exempt organization, or foreign private foundation. The form is used by such persons to establish foreign status, to claim that the person is the beneficial owner of the income for which Form W–8EXP is given and, if applicable, to claim a reduced rate of, or exemption from, withholding. Form W–8IMY is provided to a withholding agent or payer by a foreign intermediary, foreign partnership, and certain U.S. branches to make representations regarding the status of beneficial owners or to transmit appropriate documentation to the withholding agent. Reg. § 1.1441–

1(e)(4)(iv) provides that a withholding agent may establish a system for a beneficial owner to electronically furnish a Form W–8 or an acceptable substitute Form W–8. Withholding agents with systems that electronically collect Forms W–8 may voluntarily choose to participate in the IRS EW–8 MOU Program. The EW–8 MOU Program is a collaborative process between the withholding agents and IRS.

Current Actions: On March 18, 2010, the Hiring Incentives to Restore Employment Act of 2010, Public Law 111–147 (H.R. 2847) (the Act) was enacted into law. Section 501(a) of the Act added chapter 4 (sections 1471–1474) to Subtitle A of the Code. Section 1471(a) generally requires a withholding agent to deduct and withhold a tax equal to 30 percent on any withholdable payment made to an FFI, unless the FFI has an agreement requiring such FFI to satisfy the obligations specified in section 1471(b). On January 28, 2013, the Treasury Department and IRS issued final regulations under chapter 4 (sections 1471–1474) in T.D. 9610 (78 FR 5874). The general requirements of an FFI Agreement are described in § 1.1471–4 and provided the substantive requirements applicable to a participating FFI under the FFI agreement. Various changes were made to the forms covered under this approval number to comply with the withholding, due diligence, reporting requirements of U.S. accounts (defined in § 1.1471–1(b)(125)), and expanded affiliate group requirements of a participating FFI are described in § 1.1471–4(a) through (e).

Type of Review: Revision of a currently approved collection.

Affected Public: Individuals, business or other for-profit organizations, and not-for-profit institutions.

	Number respondents	Time per respondent/hours	Total annual burden hours
Form W–8BEN	3,000,000	7.18	21,540,000
Form W–8BEN–E	100,000	25.23	2,523,000
Form W–8ECI	180,000	9.13	1,643,400
Form W–8EXP	240	20.05	4,812
Form W–8IMY	400	25.23	10,092
E–W8 MOU Program	1	1	1
Total	3,280,641	.....	25,721,305

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: October 7, 2013.

Yvette Lawrence,

IRS, Reports Clearance Officer.

[FR Doc. 2013–24964 Filed 10–23–13; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Advisory Council to the Internal Revenue Service; Meeting

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: The Internal Revenue Service Advisory Council (IRSAC) will hold a public meeting on Wednesday, November 20, 2013.

FOR FURTHER INFORMATION CONTACT: Ms. Lorenza Wilds, IRSAC Program Manager, National Public Liaison, CL: NPL, 7559, 1111 Constitution Avenue NW., Washington, DC 20224. Telephone: 202–622–6440 (not a toll-free number). Email address: **Public_liaison@irs.gov.*

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988), a public meeting of the IRSAC will be held on Wednesday, November 20, 2013, from 9:00 a.m. to 1:15 p.m. at the Melrose Hotel, 2430 Pennsylvania Ave. NW., Potomac Ballroom, Washington, DC 20036. Issues to be discussed include, but not limited to: *The IRS Should Continue to Expand Voluntary Correction Programs to Facilitate Taxpayers Self-Reporting Prior Year Non-compliance, Risk Assessing Large Taxpayers, Schedule M–3, ''Net Income (Loss) Reconciliation for Corporations with Total Assets of $10 Million or More'', Strategies to Increase Use of Online Payment Agreements, Modifications to Notice CP2030, Reducing Processing Time for the Form 2848, Power of Attorney and Declaration of Representative, Assisting Tax Preparers Working with Clients that are Victims of Identity Theft, Guidance to Practitioners Regarding Professional Obligations, Circular 230 Enrollment of Former Internal Revenue Service Employees.* Reports from the four IRSAC subgroups, Large Business and International, Small Business/Self-Employed, Wage & Investment, and the Office of Professional Responsibility will also be presented and discussed. Last minute agenda changes may preclude advanced notice. The meeting room accommodates approximately 80 people, IRSAC members and Internal Revenue Service officials inclusive. Due to limited seating, please call Lorenza Wilds to confirm your attendance. Ms. Wilds can be reached at 202–622–6440. Attendees are encouraged to arrive at least 30 minutes before the meeting begins. Should you wish the IRSAC to consider a written statement, please write to Internal Revenue Service, Office of National Public Liaison, CL:NPL:7559, 1111 Constitution Avenue

NW., Washington, DC 20224, or email **Public_liaison@irs.gov.*

Dated: October 18, 2013.

Carl L. Medley,

Designated Federal Official (DFO), Branch Chief, National Public Liaison.

[FR Doc. 2013–24963 Filed 10–23–13; 8:45 am]

BILLING CODE 4830–01–P

FEDERAL REGISTER

Vol. 78 Thursday,
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Part II

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Threatened Status for Dakota Skipper and Endangered Status for Poweshiek Skipperling; Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dakota Skipper and Poweshiek Skipperling; Proposed Rules

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R3–ES–2013–0043; 4500030113]

RIN 1018–AY01

Endangered and Threatened Wildlife and Plants; Threatened Status for Dakota Skipper and Endangered Status for Poweshiek Skipperling

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, propose to list the Dakota skipper as a threatened species and the Poweshiek skipperling as an endangered species under the Endangered Species Act of 1973, as amended. If we finalize this rule as proposed, it would extend the Act's protections to the Dakota skipper and the Poweshiek skipperling. The effect of this regulation is to add the Dakota skipper and the Poweshiek skipperling to the List of Endangered and Threatened Wildlife. We also propose a special rule under section 4(d) of the Act that outlines the prohibitions necessary and advisable for the conservation of the Dakota skipper, if it is listed as a threatened species.

DATES: *Written Comments:* We will accept comments received or postmarked on or before December 23, 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 **ADDRESSES** section by December 9, 2013.

Public Informational Meetings: To better inform the public of the implications of the proposed listing and to answer any questions regarding this proposed rule, we plan to hold five public informational meetings. We have scheduled informational meetings regarding the proposed rule in the following locations:

(1) Minot, North Dakota, on November 5, 2013, at the Souris Valley Suites, 800 37th Avenue SW;

(2) Milbank, South Dakota, on November 6, 2013, at the Milbank Chamber of Commerce, 1001 East 4th Avenue;

(3) Milford, Iowa, on November 7, 2013, at the Iowa Lakeside Laboratory, 1838 Highway 86;

(4) Holly, Michigan, on November 13, 2013, at the Rose Pioneer Elementary School, 7110 Milford Road; and

(5) Berlin, Wisconsin, on November 14, 2013, at the Berlin Public Library, 121 West Park Avenue.

Except for the meeting in Berlin, Wisconsin, each informational meeting will be from 5:30 p.m. to 8:00 p.m.; the meeting in Berlin, Wisconsin will be from 4:30 p.m. to 7:00 p.m.

ADDRESSES: You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* In the Search box, enter FWS–R3–ES–2013–0043, which is the docket number for this rulemaking. Then, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. You may submit a comment by clicking on ''Comment Now!''

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R3–ES–2013–0043; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We request that you send comments only by the methods described above. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

FOR FURTHER INFORMATION CONTACT: Pete Fasbender, Field Supervisor, U.S. Fish and Wildlife Service, Twin Cities Ecological Services Office, 4101 American Boulevard East, Bloomington, Minnesota, 55425, by telephone (612) 725–3548 or by facsimile (612) 725–3609. Persons who use a telecommunications device for the deaf (TDD) may 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. A species may warrant protection through listing under the Act if it meets the definition of an endangered or threatened species throughout all or a significant portion of its range.

This rule consists of:

- A proposed rule to list the Poweshiek skipperling as an endangered species;
- A proposed rule to list the Dakota skipper as threatened species; and
- A proposed special rule under section 4(d) of the Act that outlines the prohibitions necessary and advisable for the conservation of the Dakota skipper.

Elsewhere in today's **Federal Register**, we propose to designate critical habitat for the Dakota skipper and Poweshiek skipperling under the Act.

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. Furthermore, whenever a species is listed as a threatened species, we may issue regulations that are necessary and advisable for the conservation of that species under section 4(d) of the Act.

We have determined the threats to both species include:

- Habitat loss and degradation of native prairies and prairie fens, resulting from conversion to agriculture or other development; ecological succession and encroachment of invasive species and woody vegetation primarily due to lack of management; past and present fire, haying, or grazing management that degrades or eliminates native prairie grasses and flowering forbs; flooding; and groundwater depletion, alteration, and contamination.
- Other natural or manmade factors, including loss of genetic diversity, small size and isolation of sites, indiscriminate use of herbicides such that it reduces or eliminates nectar sources, climate conditions such as drought, and other unknown stressors.
- Existing regulatory mechanisms are inadequate to mitigate these threats to both species.

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 government agencies, the scientific community, industry, or any other interested party 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 the species, its habitat, or both.

(2) The factors that are the basis for making a listing determination for a 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;

(5) Any information on the biological or ecological requirements of these species and ongoing conservation measures for these species and their habitat;

(6) Specific information on the amount and distribution of the Dakota skipper and Poweshiek skipperling and their habitat; and

(7) Our approach to determining the status of each species at each site, and our definitions of ''present,'' ''unknown,'' ''possibly extirpated,'' and ''extirpated'' as described under *Species Status,* below.

(8) Suitability of the proposed 4(d) rule for the conservation, recovery, and management of the Dakota skipper.

(9) Whether it would be appropriate to allow routine livestock grazing activities on lands inhabited by Dakota skipper in any additional counties. The proposed 4(d) rule would allow routine livestock grazing activities on lands inhabited by the Dakota skipper in counties where the species does not primarily occur in relatively flat and moist (wet-mesic or mesic) prairie habitats. Wet-mesic or mesic habitats in which the Dakota skipper occurs are typically hayed after July 15 and not grazed. We are seeking comments on whether or not grazing may be implemented in these habitats in a manner that would allow for the persistence of the Dakota skipper.

(10) Any information on Tribal regulations or Tribal conservation efforts that may affect either the Dakota skipper or Poweshiek skipperling and their habitat.

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 (such as scientific journal articles or other publications) 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, Twin Cities Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**).

Previous Federal Actions

The U.S. Fish and Wildlife Service (Service) initiated proceedings to list the Dakota skipper as a threatened species in 1978 (43 FR 28938), but withdrew the proposed rulemaking after Congress amended the Endangered Species Act in 1979 (45 FR 58171). The Dakota skipper was designated a category 2 candidate species in the May 22, 1984, Notice of Review (49 FR 21664) and remained a category 2 species (January 6, 1989, 54 FR 572; November 21, 1991, 56 FR 58830; and November 15, 1994, 59 FR 59020). A category 2 candidate was defined as a species for which information in the Service's possession indicates that listing was possibly appropriate, but for which sufficient information on biological vulnerability and threats was not currently available to support a proposal for listing under the Act.

On January 21, 1994, the Service received a petition from the Biodiversity Legal Foundation to list the Dakota skipper as an endangered or threatened species and to designate critical habitat. We made a 90-day finding that the petition presented substantial information to indicate that the requested action may be warranted; the finding was published in the **Federal Register** on July 28, 1994 (59 FR 38424). On February 27, 1995, we announced a 12-month finding in which we determined that the species should remain as a category 2 candidate, that timely appropriate prairie management and protection may eliminate the need to list the species, and that researchers indicated that more surveys, particularly in Minnesota, Iowa, and North Dakota, were needed (60 FR 10535).

In a December 5, 1996 (61 FR 64481) decision, the Service discontinued the practice of maintaining a list of species regarded as ''category-2 candidates.'' Instead, the Service would keep a single list of candidate species—species for which the Service has on file sufficient information to support issuance of a proposed listing rule.

In 2002, the Service reviewed the status of the Dakota skipper and determined that it met the definition of a candidate species. The Dakota skipper was assigned a listing priority number of 11 on June 13, 2002 (67 FR 40657).

The Dakota skipper remained a candidate species with a listing priority number of 11 in subsequent notices, including May 4, 2004 (69 FR 24876), May 11, 2005 (70 FR 24870), and September 12, 2006 (71 FR 53756). The Service changed the listing priority from 11 to 8 on December 6, 2007 (72 FR 69034), and the Dakota skipper remained a candidate species with a listing priority number of 8 in subsequent notices, including December 10, 2008 (73 FR 75176), November 9, 2009 (74 FR 57804), November 10, 2010 (75 FR 69222), and October 26, 2011 (76 FR 66370).

On May 12, 2003, the Service received a petition from the Biodiversity Conservation Alliance and five others to list the Dakota skipper as endangered or threatened and to designate critical habitat. The Service agreed with the petitioners, by virtue of having made it a candidate in 2002, that the Dakota skipper warranted listing as threatened or endangered under the Act. The petition did not contain evidence supporting emergency listing or changing the listing priority number; therefore, the Service took no further action on the petition.

On July 12, 2011, the Service filed a proposed settlement agreement with the Center for Biological Diversity in a consolidated case in the U.S. District Court for the District of Columbia. The settlement agreement was approved by the court on September 9, 2011. As part of this settlement agreement, the Service agreed to complete a proposed listing rule or not warranted finding for the Dakota skipper by September 30, 2013.

The Service identified the Poweshiek skipperling (*Oarisma poweshiek*) as a candidate species, with a listing priority number of 2, in a notice of review published in the **Federal Register** on October 26, 2011 (76 FR 66370).

Status Assessments for Dakota Skipper and Poweshiek Skipperling

Background

Dakota Skipper

Species Description

The Dakota skipper (*Hesperia dacotae*) is a member of the skipper family Hesperiidae and was first described in 1911 from collections taken at Volga, South Dakota, and Grinnell, Iowa (Skinner 1911 in Royer and Marrone 1992a, p. 1). The family Hesperiidae includes 3 other subfamilies, and the genus *Hesperia* contains 18 species (Miller and Brown 1981, p. 31; Ferris 1989 in Royer and Marrone 1992a, p. 1). Dakota skipper is the accepted common name for *H. dacotae.*

The Dakota skipper is a small to medium-sized butterfly with a wingspan of 2.4–3.2 centimeters (cm) (0.9–1.3 inches (in)) and hooked antennae (Royer and Marrone 1992a, p. 3). Like other Hesperiidae species, Dakota skippers have a faster and more powerful flight than most butterflies because of a thick, well-muscled thorax (Scott 1986, p. 415).

Adult Dakota skippers have variable markings. The dorsal surface of adult male wings ranges in color from tawny-orange to brown and has a prominent mark on the forewing; the ventral surface is dusty yellow-orange (Royer and Marrone 1992a, p. 3). The dorsal surface of adult females is darker brown with diffused tawny orange spots and a few diffused white spots restricted to the margin of the forewing; the ventral surfaces are dusty gray-brown with a faint white spotband across the middle of the wing (Royer and Marrone 1992a, p. 3). Adult Dakota skippers may be confused with the Ottoe skipper (*H. ottoe*), which is somewhat larger with slightly longer wings (Royer and Marrone 1992a, p. 3). Dakota skipper pupae are reddish-brown, and the larvae are light brown with a black collar and dark brown head (McCabe 1981, p. 181).

General Life History

Dakota skippers are univoltine (having a single flight per year), with an adult flight period that may occur from the middle of June through the end of July (McCabe 1979, p. 6; McCabe 1981, p. 180; Dana 1991, p. 1; Royer and Marrone 1992a, p. 26; Skadsen 1997, p. 3; Swengel and Swengel 1999, p. 282). The actual flight period varies somewhat across the range of each species and can also vary significantly from year-to-year, depending on weather patterns. Females emerge slightly later than males (Dana 1991, p. 1), and the observed sex ratio of Dakota skippers was roughly equal during peak flight periods (Dana 1991, p. 15; Swengel and Swengel 1999, pp. 274, 283).

The Dakota skipper flight period in a locality lasts two to four weeks, and mating occurs throughout this period (Braker 1985, p. 46; McCabe and Post 1977a, p. 38; McCabe and Post 1977b, p. 36; McCabe 1979, p. 6; McCabe 1981, p. 180; Dana 1991, p. 15; Swengel and Swengel 1999, p. 282). Adult male Dakota skippers exhibit perching behavior (perch on tall plants to search for females), but occasionally appear to patrol in search of mating opportunities (Royer and Marrone 1992a, p. 25).

Dakota skippers lay eggs on broadleaf plants (McCabe 1981, p. 180) and grasses (Dana 1991, p. 17), although larvae feed only on grasses. Potential lifetime fecundity is between 180 and 250 eggs per female Dakota skipper; realized fecundity depends upon longevity (Dana 1991, p. 26). Female Dakota skippers lay eggs daily in diminishing numbers as they age (Dana 1991, pp. 25–26). Dana (1991, p. 32) estimated the potential adult life span of Dakota skipper to be 3 weeks and the average life span (or residence on site before death or emigration) to be 3 to 10 days on one Minnesota prairie.

Dakota skippers overwinter as larvae and complete one generation per year. Dakota skipper eggs hatch after incubating for 7–20 days; therefore, hatching is likely completed before the end of July. After hatching, Dakota skipper larvae crawl to the bases of grass plants where they form shelters at or below the ground surface with silk, fastened together with plant tissue (Dana 1991, p. 16). They construct 2–3 successively larger shelters as they grow (Dana 1991, p. 16). The larvae emerge from their shelters at night to forage (McCabe 1979, p. 6; McCabe 1981, p. 181; Royer and Marrone 1992a, p. 25) and appear to clip blades of grass and bring them back to their shelters to consume (Dana 2012a, pers. comm.).

Dakota skippers have six or seven larval stages (instars) (Dana 1991, pp. 14–15) and overwinter (diapause) in ground-level or subsurface shelters during either the fourth or fifth instar (McCabe 1979, p. 6; McCabe 1981, pp. 180, 189; Dana 1991, p. 15; Royer and Marrone 1992a, pp. 25–26). In the spring, larvae resume feeding and undergo two additional molts before they pupate. During the last two instars, larvae shift from buried shelters to horizontal shelters at the soil surface (Dana 1991, p. 16).

Food and Water

Nectar and water sources for adult Dakota skippers vary regionally and include purple coneflower (*Echinacea angustifolia*), bluebell bellflower (*Campanula rotundifolia*), white prairie clover (*Dalea candida*), upright prairie coneflower (*Ratibida columnifera*), fleabanes (*Erigeron spp.*), blanketflowers (*Gaillardia spp.*), black-eyed Susan (*Rudbeckia hirta*), groundplum milkvetch (*Astragalus crassicarpus*), and yellow sundrops (*Calylophus serrulatus*) (McCabe and Post 1977b, p. 36; Royer and Marrone 1992a, p. 21). Plant species likely vary in their value as nectar sources due to the amount of nectar available during the adult flight period (Dana 1991, p. 48). Swengel and

Swengel (1999, pp. 280–281) observed nectaring at 25 plant species, but 85 percent of the nectaring was at the following three plants, in declining order of frequency: Purple coneflower, blanketflower, and groundplum milkvetch. Dana (1991, p. 21) reported the use of 25 nectar species in Minnesota with purple coneflower most frequented; McCabe (1979, p. 42, McCabe 1981, p. 187) observed Dakota skippers using eight nectar plants. In addition to nutrition, the nectar of flowering forbs provides water for Dakota skipper, which is necessary to avoid desiccation during flight activity (Dana 1991, p. 47; Dana 2013, pers. comm.).

Dakota skipper larvae feed only on several native grass species; little bluestem (*Schizachyrium scoparium*) is a frequent food source of the larvae (Dana 1991, p. 17; Royer and Marrone 1992a, p. 25), although they have been found on *Panicum* spp., *Poa* spp., and other native grasses (Royer and Marrone 1992a, p. 25). Seasonal senescence patterns of grasses relative to the larval period of Dakota skippers are likely important in determining the suitability of grass species as larval host plants. Large leaf blades, leaf hairs, and the distance from larval ground shelters to palatable leaf parts preclude the value of big bluestem and Indian grass as larval food plants (Dana 1991, p. 46).

Dispersal

Dakota skipper are not known to disperse widely; the species was evaluated among 291 butterfly species in Canada as having relatively low mobility. Experts estimated Dakota skipper to have a mean mobility of 3.5 (standard deviation = 0.7) on a scale of 0 (sedentary) to 10 (highly mobile) (Burke *et al.* 2011, p. 2279; Fitzsimmons 2012, pers. comm.). Dakota skippers may be incapable of moving greater than 1 kilometer (km) (0.6 miles (mi)) between patches of prairie habitat separated by structurally similar habitats (*e.g.,* crop fields, grass-dominated fields or pasture, but not necessarily native prairie) (Cochrane and Delphey 2002, p. 6). Royer and Marrone (1992a, p. 25) concluded that Dakota skippers are not inclined to disperse, although they did not describe individual ranges or dispersal distances. McCabe (1979, p. 9; 1981, p. 186) found that concentrated activity areas for Dakota skippers shift annually in response to local nectar sources and disturbance.

In a mark-recapture study, average adult movements of Dakota skipper were less than 300 meters (m) (984 feet (ft)) over 3–7 days; marked adults crossed less than 200 m (656 ft) of unsuitable habitat between two prairie patches and moved along ridges more frequently than across valleys (Dana 1991, pp. 38–40). Dana (1997, p. 5) later observed reduced movement rates across a small valley with roads and crop fields compared with movements in adjacent widespread prairie habitat. Skadsen (1999, p. 2) reported possible movement of Dakota skippers in 1998 from a known population at least 800 m (2625 ft) away to a site with an unusually heavy growth of purple coneflower; he had not found Dakota skippers in three previous years when coneflower production was sparse. The two sites were connected by native vegetation of varying quality, interspersed by a few asphalt and gravel roads (Skadsen 2001, pers. comm.).

In summary, dispersal of Dakota skipper is very limited due in part to its short adult life span and single annual flight. Therefore, the species' extirpation from a site is likely permanent unless it is within about 1 km (0.6 mi) of a site that generates a sufficient number of emigrants or is artificially reintroduced to a site; however, the capability to propagate the Dakota skipper is currently lacking.

Habitat

Dakota skippers are obligate residents of undisturbed (remnant, untilled) high-quality prairie, ranging from wet-mesic tallgrass prairie to dry-mesic mixed-grass prairie (Royer and Marrone 1992a, pp. 8, 21). High-quality prairie contains a high diversity of native plant species, including flowering herbaceous plants (forbs). Royer and Marrone (1992a, p. 21) categorized Dakota skipper habitat into two main types that were once intermixed on a landscape scale, but are now mostly segregated. The first, referred to as ''Type A'' by Royer *et al.* (2008, pp. 14–16), is low wet-mesic prairie that occurs on near-shore glacial lake deposits. Type A Dakota skipper habitat is dominated by bluestem grasses, with three other plant species almost always present and blooming during Dakota skipper's flight period: Wood lily (*Lilium philadelphicum*), bluebell bellflower, and mountain deathcamas (smooth camas; *Zigadenus elegans*) (McCabe 1981, p. 190). This habitat type has a high water table and is subject to intermittent flooding in the spring, but provides ''sufficient relief to provide segments of non-inundated habitat during the spring larval growth period within any single season'' (Royer *et al.* 2008, p. 15). Common forbs in bloom during the late season in Type A habitat include Rocky Mountain blazing star (*Liatris ligulistylis*), Canada goldenrod (*Solidago canadensis*), strict blue-eyed grass (*Sisyrinchium montanum*), common goldstar (*Hypoxis hirsuta*), and black-eyed Susan (Lenz 1999a, p. 6). Type A habitats also contain small patches of dry-mesic prairie inhabited by Dakota skippers. Common forb species in these dry-mesic areas include stiff sunflower (*Helianthus pauciflorus Nutt. ssp. pauciflorus*), and candle anenome (*Anemone cylindrica*), although purple coneflower was rare in these habitats (Lenz 1999a, pp. 6–11). Dakota skipper inhabits Type A habitat in north-central North Dakota, southeast North Dakota, and Manitoba.

The second Dakota skipper habitat type, referred to as ''Type B'' by Royer *et al.* (2008, p. 14), occurs on rolling terrain over gravelly glacial moraine deposits and is dominated by bluestems and needle grasses (*Heterostipa spp.*). As with Type A habitat, bluebell bellflower and wood lily are also present in Type B habitats, but Type B habitats also support more extensive stands of purple coneflower, upright prairie coneflower, and common gaillardia (*Gaillardia aristata*) (Royer and Marrone 1992a, p. 22). Both Type A and Type B prairies may contain slightly depressional (low topographical areas that allow for the collection of surface water) wetlands with extensive flat areas and slightly convex hummocks, which are dryer than the wet areas (Lenz 1999b, pp. 4, 8).

In northeastern South Dakota, Dakota skippers inhabit primarily Type B habitats with abundant purple coneflower, but they also occur in nearby Type A habitats in some areas (Skadsen 1997, p. 4). All Type A habitats occupied by Dakota skipper in South Dakota are near hill prairie (Type B) habitats that are managed with fall haying (Skadsen 2006b, p. 2).

Little bluestem and porcupine grass are the predominant grass species in Dakota skipper habitat in South Dakota (Skadsen 2006b, p. 2). Dry-mesic prairies suitable for Dakota skippers in South Dakota typically include little bluestem, side oats grama, porcupine grass, needle-and-thread grass (*H. comata*), and prairie dropseed, and a high diversity and abundance of forbs, including purple coneflower, purple prairie clover (*Dalea purpurea*), white prairie clover, yellow sundrops, prairie groundsel (*Packera plattensis*), groundplum milkvetch, eastern pasqueflower (*Pulsatilla patens*), old man's whiskers (prairie smoke, *Geum triflorum*), western silver aster (*Symphyotrichum sericeum*), dotted blazing star (*Liatris punctata*), tall blazing star (*L. asper*), meadow zizia

(*Zizia aptera*), blanket flower (*Gaillardia sp.),* prairie sagewort (*Artemisia frigida*), and leadplant (*Amorpha canescens*) (Skadsen 2006b, pp. 1–2). Purple coneflower occurs at all sites where the Dakota skipper has been recorded in South Dakota, although it is absent at some sites where Dakota skipper is abundant in other states (Skadsen 2006b, p. 2).

In Minnesota, Dakota skippers inhabit Type B habitats. Dana (1997, p. 8) described typical habitat in Minnesota as dry-mesic prairie dominated by mid-height grasses with an abundance of nectar sources including purple coneflower and prairie milkvetch (*Astragalus laxmannii Jacq. var. robustior*). Southern dry prairies in Minnesota are described as having sparse shrub cover (less than 5 percent) composed primarily of leadplant, with prairie rose (*Rosa arkansana*), wormwood sage, or smooth sumac (*Rhus glabra*) present and few, if any, trees (Minnesota DNR 2012a). Dana (1991, p. 21) never encountered Dakota skippers in wet or wet-mesic prairies in Minnesota, despite abundance of suitable plants and the frequent use of these habitats by similar skipper species. In systematic surveys at twelve Minnesota sites, Swengel and Swengel (1999, pp. 278–279) found that Dakota skippers were significantly more abundant on dry prairie than on either wet-mesic prairie. In Manitoba, Dakota skippers inhabit Type A habitats, occupy the slightly higher, drier areas of wet-mesic prairie where nectar sources are more abundant (Webster 2003, p. 7). Occupied habitats in Saskatchewan are similar to the drier upland dry-mesic mixed-grass prairie hillside habitats in Manitoba, which is dominated by bluestems and needlegrass. The Dakota skipper was most common on ridgetops and hillsides near purple coneflower (Webster 2003, p. 8).

In North Dakota, an association of bluestems (*Schizachyrium scoparium, Andropogon gerardii*) and needlegrasses, typically invaded by Kentucky bluegrass (*Poa pratensis*), typifies dry-mesic Dakota skipper habitat in the rolling terrain of river valleys and the Missouri Coteau (Royer and Marrone 1992a, p. 22). These prairies, located on the western edge of the species' known range, typically contain wood lily, bluebell bellflower, coneflowers, and other asters as nectar sources; in some areas, mountain deathcamas also occurs (Royer and Marrone 1992a, p. 22). The location of larval food plants rarely seems to affect Dakota skipper distribution within habitats because these warm-season grasses are usually dominant and evenly dispersed (Swengel 1994, p. 6), although invasion by smooth brome grass (*Bromus inermis*) and other invasive species may displace or extirpate native larval food plants (Culliney 2005, p. 134, Bahm *et al.* 2011, p. 240, LaBar and Schultz 2012, p. 177).

Two key factors, soils unsuitable for agriculture and steep topography, have allowed remnant native prairie habitats inhabited by Dakota skippers to persist (Royer and Marrone 1992a, p. 22). McCabe (1979, pp. 17–18; 1981, p. 192) and Royer *et al.* (2008, p. 16) have linked the historical distribution of Dakota skippers to surface geological features and soils that are glacial in origin and, possibly, regional precipitation-evaporation ratios (ratio of evaporation occurring naturally in one location over a given area compared to the amount of precipitation, such as rain and snow, falling over the same area). Soil types typical of Dakota skipper sites were described as sandy loams, loamy sand, or loams (Lord 1988 in Royer *et al.* 2008, pp. 3, 10). Additional edaphic (soil) features, such as soil moisture, compaction, surface temperature, pH, and humidity, may be contributing factors in larval survival and, thus, important limiting factors for Dakota skipper populations (Royer *et al.* 2008, p. 2). For example, edaphic parameters measured in sites throughout the range of Dakota skipper included a bulk density (an indicator of soil compaction) that ranged from 0.9g/cm^3 to 1.3 g/cm^3 and mean soil pH that ranged from 6.3 to 6.7 with high micro-scale variation (variation on a small scale) (Royer *et al.* 2008, p. 10). Soil texture ranged from 4 to 12 percent clay, 53 to 74 percent sand, and 14 to 39 percent silt (Royer *et al.* 2008, p. 12). Seasonal soil temperatures, measured at three depths (20, 40, and 60 cm (8, 16, and 24 in)) were the same at all depths within a site; Minnesota sites generally had higher soil temperatures at all depths than sites in North Dakota or South Dakota (Royer *et al.* 2008, p. 11).

Dakota skipper larvae are particularly vulnerable to desiccation (drying out) during dry summer months and require ''vertical water distribution'' (movement of shallow groundwater to the soil surface) in the soils or wet low areas to provide relief from high summer temperatures (Royer *et al.* 2008, pp. 2, 16). Humidity may also be essential for larval survival during winter months since the larvae cannot take in water during that time and depend on humid air to minimize water loss through respiration (Dana 2013, pers. comm.). Royer (2008, pp. 14–15) measured microclimalogical levels (climate in a small space, such as at or near the soil surface) within ''larval nesting zones'' (between the soil surface and 2 cm deep) throughout the range of Dakota skippers, and found an acceptable rangewide seasonal (summer) mean temperature range of 18 to 21°C (64 to 70 °F), rangewide seasonal mean dew point ranging from 14 to 17 °C (57 to 63 °F), and rangewide seasonal mean relative humidity between 73 and 85 percent.

Species Occupancy

We generally consider the Dakota skipper or Poweshiek skipperling to be ''present'' at sites where the species was detected during the most recent survey, if the survey was conducted in 2002 or more recently and there is no evidence to suggest the species is now extirpated from the site, (*e.g.,* no destruction or obvious and significant degradation of the species' habitat), with the exception of the following five sites. We consider the species to be present at one Poweshiek skipperling site in Michigan where the species was observed at the site in 1996 and no further surveys have been conducted. This site, however, still has suitable habitat for the species according to species experts in the State and at least one other species of prairie fen dependent butterfly is present (Hosler 2013, pers. comm.). Therefore, the Poweshiek skipperling is most likely still present at this site. We also consider the species to be present at one Dakota skipper site (Frenchman's Bluff Preserve in Minnesota) where the most recent survey was from 1993. At this site, no evidence suggests the species is not still present because, based on a species-expert review of the site, the habitat and management is still conducive to the species. Additional sites where we consider Dakota skipper to be present include two sites in Minnesota with 1996 records (Bluestem Prairie and Buffalo River State Park) and one site with a 1998 record (an unnamed site in North Dakota). Although no survey for the species has taken place at Bluestem Prairie since 1996, a 2012 assessment of the habitat at the site indicates that this site is a high-quality prairie that contains the native prairie flora conducive to the Dakota skipper (Selby 2012, p. 9). The site at Buffalo River State park, which adjoins Bluestem Prairie, has not been surveyed since 1996 but recent habitat assessments show that it still contains prairie habitats with the native prairie flora conducive to the species (MN DNR 2013, unpubl.). Furthermore, the species expert in Minnesota supports that the species is most likely still present at these sites. Little information is known about the one unnamed site in North

Dakota; however, the best information we have indicates that the habitat is still suitable for the species, and the North Dakota species expert supports that the species is likely present.

We assigned a status of ''unknown'' if the species was found in 1993 or more recently, but not in the most recent one to two sequential survey year(s) since 1993 and there is no evidence to suggest the species is now extirpated from the site (*e.g.,* no destruction or obvious and significant degradation of the species' habitat). We considered a species is to be ''possibly extirpated'' at sites where it was detected at least once prior to 1993, but not in the most recent one to two sequential survey years(s). A species is also considered ''possibly extirpated'' at sites where it was found prior to 1993 and no surveys have been conducted in 1993 or more recently. At least three sequential years of negative surveys were necessary for us to consider the species ''extirpated'' from a site, because of the difficulty of detecting these species, as explained further in this section. A species is also considered ''extirpated'' at sites where habitat for the species is no longer present.

When determining whether the species occupancy is unknown, possibly extirpated, or extirpated at a particular site, we used the survey year 1993 as a cut-off date, because most known sites (more than 75 percent of known Poweshiek skipperling sites and over 89 percent of known Dakota skipper sites) have been surveyed at least once since 1993 and survey data more than 20 years old may not reflect the current status of a species or its habitat at a site (for example, due to habitat loss from secondary succession of woody vegetation or a change in plant communities due to invasive species). Although it cannot be presumed that the species is absent at sites not surveyed since 1993, the likelihood of occupancy of these sites should be considered differently than sites with more recent survey data (*e.g.,* due to woody vegetation succession over time). When analyzing survey results, we disregarded negative surveys conducted outside of the species' flight period or under unsuitable conditions (*e.g.,* high wind speeds).

After we applied these standards to initially ascertain the status of the species, we asked species experts and Service personnel to help verify, modify, or correct species' occupancy at each site (particularly for sites with questionable habitat quality or those that have not been surveyed recently). In most cases, we used the status confirmed during expert review, unless we received additional information (*e.g.,* additional survey or habitat data provided after the expert reviews) that suggests a different status at a particular site.

Timing of surveys is based on initial field checks of nectar plant blooms and sightings of butterfly species with synchronous emergence (sightings of butterfly species that emerge at the same time as Dakota skipper and Poweshiek skipperling), and, more recently, emergence estimated by a degree-day emergence model using high and low daily temperature data from weather stations near the survey sites (Selby, undated, unpublished dissertation). Surveys are conducted during flight periods when the species' abundance is expected to be at levels at which the species can be detected. However, as with many rare species, detection probabilities are imperfect and some uncertainty remains between non-detection and true absence (Gross *et al.* 2007, pp. 192, 197–198; Pellet 2008, pp. 155–156). Three sequential years of negative surveys is sufficient to capture variable detection probabilities, since each survey year typically encompasses more than one visit (*e.g.,* the average number of visits per Dakota skipper site per year ranges from 1 to 11) and the probability of false absence after 5–6 visits drops below 5 percent for studied butterfly species with varying average detection probabilities (Pellet 2008, p. 159). Therefore, the site is considered ''extirpated'' if there are three sequential years of negative surveys.

It cannot be presumed that the species is not persisting at a site only because there have not been recent surveys. At several sites, the species has persisted for longer than 20 years; for example, Dakota skipper was first recorded at Scarlet Fawn Prairie in South Dakota in 1985 and has had positive detections every survey since that date—the most recent detection was in 2012. The year 1993 was chosen based on habitat-related inferences, specifically, the estimated time for prairie habitat to degrade to non-habitat due to woody encroachment and invasive species. For example, native prairies with previous light-grazing management that were subsequently left idle transitioned from mixed grass to a mix of woody vegetation and mixed grass in 13 years and it was predicted that these idle prairies would be completely lost due to woody succession in a 30-year timeframe (Penfound 1964, pp. 260–261). The time for succession of idle prairie depends on numerous factors, such as the size of the site, edge effects (the changes that occur on the boundary of two habitat types), and the plant composition of adjacent areas.

This approach is the most objective way to evaluate the data range-wide. Most sites have been surveyed over multiple years, although the frequency and type of surveys varied among sites and years. In several cases, species experts provided input on occupancy based on their familiarity with the habitat quality and stressors to populations at particular sites.

To summarize, there are few sites with relatively older data where we consider the species to still be present. In general, most sites with a present status have had a positive detection in 2002, or more recently with a few exceptions. At one Poweshiek skipperling site, the species was observed at the site in 1996, and no further surveys have been conducted. The remaining Poweshiek skipperling sites where the species is considered present have had detections in 2012, except one site where the species was detected in 2011 and no further surveys have occurred. Likewise, at four Dakota skipper sites we consider the species to be present with the most recent record from 2001 or earlier including one site where the most recent survey was from 1993, two sites with 1996 records, and one site with a 1998 record. No evidence suggests that the species is not still present at these sites because the best information indicates that the site's habitat is still conducive to the butterfly, and, therefore, the species may still be present there. We also consider Dakota skipper to be present at the following sites: 20 sites in Canada that were surveyed only once in 2002; 1 additional site with a 2002 detection of the species and a favorable habitat assessment in 2012; 1 site with a 2003 detection; 1 site with a 2005 detection; 2 sites with a 2006 detection; 25 sites in Canada that were surveyed only once in 2007; 1 additional site with a 2007 detection; 7 sites with a positive detection in 2008; 2 sites with a positive detection in 2009; and 27 sites with positive detections in 2012.

Population Distribution and Occupancy Status

Once found in native prairies in five states and two Canadian provinces, the Dakota skipper and its habitat have undergone dramatic declines; the species is now limited to native prairie remnants in three states and two Canadian provinces. The Dakota skipper is presumed extirpated from Illinois and Iowa and no longer occurs east of western Minnesota—an approximately 690-kilometer (km) (430-mile) reduction of its range. Populations persist in

western Minnesota, northeastern South Dakota, North Dakota, southern Manitoba, and southeastern Saskatchewan. Royer and Marrone (1992a, p. 5) stated that Dakota skippers may also occur in far eastern Montana and southeastern Saskatchewan, in habitats similar to those occupied by the species in northwestern North Dakota. The Dakota skipper was subsequently found in Saskatchewan in 2001 after 40 years of searching (Hooper 2002, pers. comm.), but Royer (2002, pers. comm.) no longer thinks that the species occurs in Montana.

From its earliest identification, the Dakota skipper was considered rare (Royer and Marrone 1992a, p. 1), although considerable destruction of its habitat likely occurred even before the species was first described in 1911. Habitat destruction and degradation has greatly fragmented Dakota skipper's range from its core through its northern and western fringes (McCabe 1981, p. 179; Royer and Marrone 1992a, p. 28; Schlicht and Saunders 1994, p. 1; Royer 1997, p. 2; Schlicht 1997a, p. 2; Schlicht 1997b, p. 2; Skadsen 1997, pp. 25–26; Skadsen 1999, p. 15; Swengel and Swengel 1999, p. 267). The historical distribution of Dakota skippers may never be precisely known because ''much of tallgrass prairie was extirpated prior to extensive ecological study'' (Steinauer and Collins 1994, p. 42), such as butterfly surveys. Destruction of tallgrass and mixed-grass prairie began in 1830 (Samson and Knopf 1994, p. 418), but significant documentation of the ecosystem's butterfly fauna did not begin until about 1960. Therefore, most of the species' decline probably went unrecorded. Based on records of vouchered specimens, however, we know that Dakota skipper range has contracted northward out of Illinois and Iowa. The species was last recorded in Illinois in 1888 (McCabe 1981, p. 191) and in Iowa in 1992 (Orwig and Schlicht 1999, p. 6). Britten and Glasford's (2002, pp. 363, 372) genetic analyses support the presumption that this species formerly had a relatively continuous distribution; the small genetic divergence (genetic distance) among seven sites in Minnesota and South Dakota indicate that populations there were once connected. Dakota skipper dispersal is very limited due in part to its short adult life span and single annual flight. Therefore, the species' extirpation from a site is likely permanent unless it is within about 1 km (0.62 mi) of a site that generates a sufficient number of emigrants or is artificially reintroduced to a site.

The Dakota skipper's range once comprised native prairie in five states and Canada, extending from Illinois to Saskatchewan; it now occurs only in native prairie remnants in portions of three states and two Canadian provinces. Of the 259 historically documented sites, there are 91 sites where we consider the Dakota skipper to be present, 81 sites with unknown status, 40 possibly extirpated sites, and 47 that are considered extirpated (Table 1). Approximately half (45 of 91) of the sites where the species is considered to be present are located in Canada, mostly within three isolated complexes, and were observed in either 2002 or 2007 with no subsequent surveys. The remaining 46 sites where the species is considered to be present are about equally distributed among Minnesota (14 sites), North Dakota (18 sites), and South Dakota (14 sites). Researchers made positive detections of the species in 27 of these sites in 2012. Other sites with a present status with relatively older positive detections and no subsequent surveys for the species include 2 sites with positive detections in 1996, one site with a positive detection in 1998, one site with a positive detection in 2002, one site with a positive detection in 2003, one site with a positive detection in 2005, 2 sites with a positive detection in 2006, one site with a positive detection in 2007, 7 sites with a positive detection in 2008, and 2 sites with a positive detection in 2009. At several of these sites, the habitat has been assessed more recently than they were surveyed for the species. The distribution and status of Dakota skipper in each state of known historical or extant occurrence are described in detail below.

TABLE 1—NUMBER OF HISTORICALLY DOCUMENTED DAKOTA SKIPPER SITES WITHIN EACH STATE AND THE NUMBER OF SITES WHERE THE SPECIES IS THOUGHT TO BE PRESENT, UNKNOWN, POSSIBLY EXTIRPATED, OR EXTIRPATED

State	Present	Unknown	Possibly extirpated	Extirpated	Total	Percent of total number of historical sites by state
Illinois	.....	.....	.....	1	1	0.4
Iowa	.....	.....	.....	3	3	1
Minnesota	14	22	18	12	66	26
North Dakota	18	13	10	13	54	21
South Dakota	14	46	10	15	85	33
Manitoba	31	0	2	3	36	14
Saskatchewan	14	0	0	0	14	5
Total Number of Historically Documented Sites	91	81	40	47	259	.....
Percent of the Total Number of Historical Sites by Occupancy	35	31	16	18	.....	100

Illinois

Dakota skippers are considered to be extirpated from Illinois. The species was last recorded near Chicago in 1888 (McCabe 1981, p. 191).

Iowa

There are three historical records of Dakota skippers in three counties in Iowa (Dickinson, Poweshiek, and Woodbury), but the species is presumed extirpated from the State (Schlicht and Orwig 1998, pp. 84–85; Selby 2004a, pp. 1, 5; Selby 2012, pers. comm.; Nekola and Schlicht 2007, p. 9). The species was last seen at Cayler Prairie (Dickinson County) in 1992, but surveys of this site in 2000, 2004, 2005, and 2007 were negative, so we presume it to be extirpated from that site (Schlicht and Orwig 1998, p. 85; Selby 2004a, p. 5; Selby 2006a, p. 5; Selby 2008, p. 6).

The species was not observed at eight sites surveyed between 1988–1997 (Swengel and Swengel 1999, pp. 288–289), at eight sites surveyed in 2004 (Selby 2004a, p. 5), nor during extensive surveys at 32 sites in 2007 (Selby 2008, p. 6).

Minnesota

Minnesota historically contained about 26 percent of the sites where the Dakota skipper has been recorded (Table 1) (Service 2013, unpubl. geodatabase). Since the earliest known record (1965) of the species in Minnesota, 66 sites have been recorded in the State, but recent surveys indicate that the species is declining in the State (Service 2013, unpubl. geodatabase). Of the 66 known locations of Dakota skipper in Minnesota; the species is extirpated or possibly extirpated from 30 of those sites and the status is unknown at 22 others (Service 2013, unpubl. geodatabase). Dakota skipper is considered to be present at 14 sites in Minnesota in 6 counties: Clay, Lincoln, Murray, Norman, Pipestone, and Pope, although 2 of those sites have not been surveyed since 1996 and 1 site has not been surveyed since 1993.

McCabe (1981, p. 187) observed very stable population numbers in Minnesota prairies that he visited repeatedly from 1968–1979. On dry-mesic prairie in Lincoln County, Minnesota, Dana (Dana 1997, pp. 3–5) also observed stable numbers into the thousands during his intensive studies from 1978 to 1983. Schlicht (1997a, p. 13) and Reiser (1997, p. 16) reported more variable numbers on the same sites in 1995–1996, and based on these more recent observations, Dana (1997, pp. 3–5) suggested that populations could experience significant size fluctuations between years. At Hole-in-the-Mountain preserve, Minnesota, Dana (1991, pp. 36–37) found peak abundance of approximately 1,000 Dakota skippers over about 40 ha (98 ac); he estimated that 2,000–3,000 individuals may have been alive at various times during the flight period and that only one-third to one-half of adults were alive simultaneously. Where they occur, these high adult densities persist for only about a week to 10 days during the single annual flight period (Selby and Glenn-Lewin 1989, pp. 24–28).

The percentage of sites surveyed each year in Minnesota with positive detections remained relatively stable from 1985 to 2005, with an average detection rate of 67 percent for all survey years with more than one site surveyed (excluding sites newly discovered in the first year it was discovered), an average of 70 percent detection rate for survey years with 5 or more sites surveyed and an average of 66 percent detection rate for survey years with 10 or more sites surveyed. One exception to the high detection rates was 1994; only 26 percent (5 of 19 sites) of sites surveyed in 1994 resulted in positive detections. Recent surveys of the species resulted in significantly lower than average positive detections. The percent of sites surveyed each year with positive detections has recently decreased from 70 percent (7 of 10 sites) in 2005, to 47 percent (8 of 17 sites) in 2007, to 56 percent (10 of 18 sites) in 2008, to 6 percent (1 of 18 sites) in 2012 (for years with greater than 10 sites surveyed, see Figure 1). Only one individual was detected in Minnesota during 2012 surveys, which included 18 sites with previous records and 23 prairie remnants without previous records for the species (Dana 2012c, pers. comm.; Runquist 2012a, pers. comm.; Olsen 2012, pers. comm.). The cause for this sharp decline is unknown.

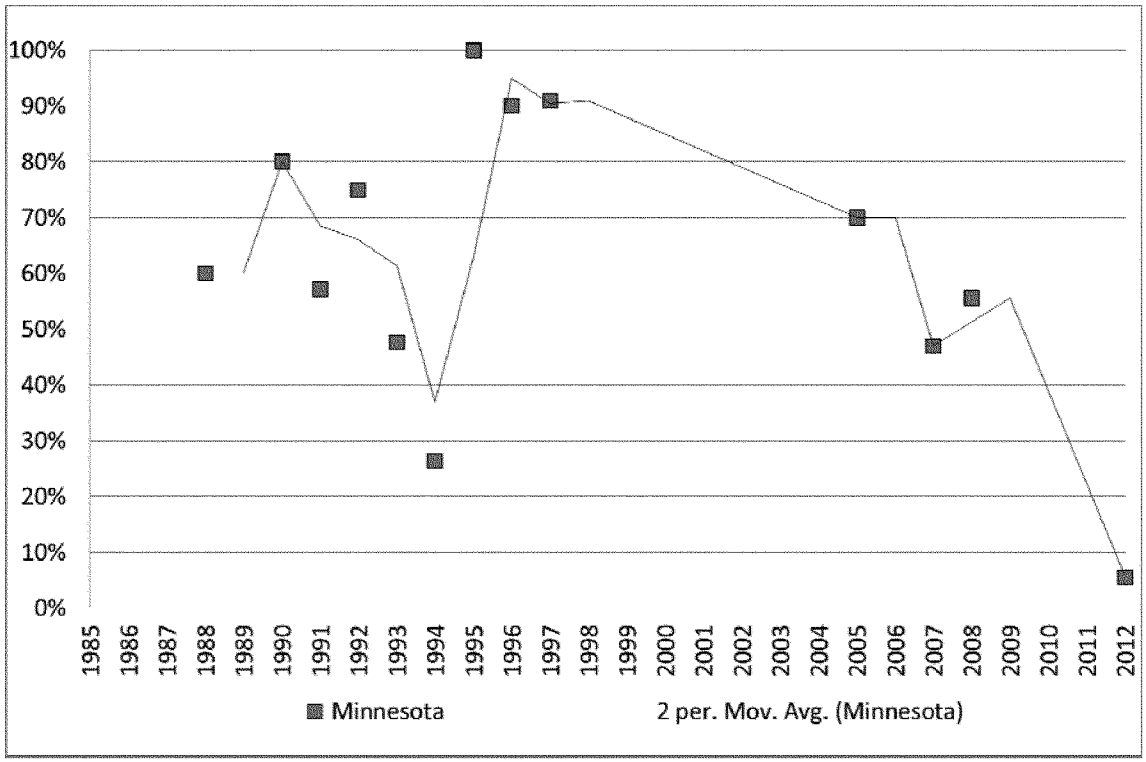


Figure 1: Percent of surveyed sites with positive detections of Dakota skipper for years with at least 5 surveys in Minnesota since 1985 with line showing the moving average over time. These data exclude new sites in the first year of discovery, as well as sites that were surveyed but where the species has never been found (null sites).

The Dakota skipper is presumed extirpated at 12 sites in Minnesota; at 7 of these sites the species has not been observed since 1984 or earlier. Four sites at which the species is now presumed to be extirpated have had fairly recent positive observations. The species was last observed at Prairie Waterfowl Production Area (WPA) in Big Stone County in 2000 (Skadsen 2000, p. 1), for example, but was not found in 2008 (Selby 2009a, p. i), 2010, and 2012 (Service 2013, unpubl. geodatabase). Dakota skippers were observed at the Glacial Lakes WPA in 2001 (Schlicht 2001b, p. 18), but the species was not observed in 2003, 2004, and 2005 (Selby 2006b, p. Appendix A xii); the species is now considered to be extirpated at that site (Service 2013, unpubl. geodatabase). The last observation of Dakota skipper at the Big Stone National Wildlife Refuge (NWR) in Lac Qui Parle County was in 2000, and it was not observed during surveys in 2009, 2011, or 2012 (Skadsen 2012a, p. 5). Dakota skippers were observed at Chippewa Prairie in 1995, but not in 1996, 2005, and 2012 (Service 2013, unpubl. geodatabase). Of the 18 sites where the species is possibly extirpated, 10 have not been surveyed since the species was last seen in 1988 or earlier. Dakota skippers at two of the sites where the species is possibly extirpated have not been observed since 1991 (Service 2013, unpubl. geodatabase). The remaining 6 sites had positive observations prior to 1993, were surveyed once more recently, and had a negative observation (Service 2013, unpubl. geodatabase).

The status of Dakota skipper is unknown at 22 sites; Dakota skipper have not been observed at 11 of these sites since the mid- to late 1990s, despite one or two years of survey effort at several sites. The remaining 11 sites with unknown status have had positive observations in 2007 or more recently, but are given this designation due to a subsequent negative survey. For example, Dakota skipper was documented at the Gens Prairie in Murray County and Woodstock Prairie in Pipestone County in 2007, but the species was not observed during surveys in 2008 (Selby 2009a, p. Appendix 5 li, xxxiii and Appendix 4 xlix).

In 2007 and 2008, the Minnesota DNR carried out a broad survey effort to assess the status of Dakota skipper and other prairie butterflies in the State after experts noted significant declines in these species in west-central Minnesota beginning in 2003 (Selby 2006b, p. 30). Researchers surveyed 17 and 19 sites with previous Dakota skipper records in 2007 and 2008, respectively; Dakota skipper was found at 8 sites each year and at 1 site where it had not previously been recorded (Selby 2009a, p. 6). The surveys confirmed Dakota skipper's extirpation from one site in Cottonwood County, where it was last recorded in 1970.

A parallel study in 2007 (Dana 2008), consisted of more intensive work at a few sites thought to contain some of the State's most viable populations of Dakota skipper. Among these sites was The Nature Conservancy's Hole-in-the-Mountain preserve in Lincoln County, which was the only Minnesota population rated as secure in 2002 (Cochrane and Delphey 2002, p. 16). The 2007 surveys indicated that the site still supported a substantial population, but that it may have decreased in size since earlier studies were conducted (Dana 1991, p. 36; Dana 2008, p. 18). Dakota skippers were not detected during the 2012 flight period (Runquist

2012, pp. 13–14, 18–20; Runquist 2012a, pers. comm.); therefore, we consider the status of the species at the Hole-in-the-Mountain preserve to be unknown.

Relatively important populations of Dakota skipper in Minnesota may still occur at the Prairie Coteau, Felton Prairie, and Glacial Lakes complexes, but the 2012 survey results raised concern for the species' status at Prairie Coteau. The number of Dakota skippers encountered per 100 m (328 ft) of transect at Prairie Coteau State Natural Area (SNA) were 1.7 in 1990 and 1.1 in 2007 (Dana 2008, p. 19). No Dakota skippers were observed at Prairie Coteau SNA during the 2012 flight period (Runquist 2012, pp. 9–10); therefore, we consider the status of the species to be unknown at that site. Selby (2009b, Appendix 4, p. iv) recorded 14 Dakota skippers during a 5-hour survey in 2007 at the Felton Prairie SNA. During a one-hour survey in 2008, nine Dakota skippers were recorded and with little indication of any substantial change since the previous year (Selby 2009b, Appendix 5, p. iv); Felton Prairie has not been resurveyed since 2008 (Service 2013, unpubl. geodatabase). The number of Dakota skippers recorded during recent surveys at Glacial Lakes State Park has been low despite good habitat conditions. An apparently widespread population was present as recently as 2001 when Skadsen (2001, p. 24) found Dakota skippers along almost all of 25 mi (40 km) of transect in and around the park—he recorded as many as 31 Dakota skippers along one transect (Skadsen 2001, p. 24). Selby (2009a, p. l and liv) surveyed the same areas in 2007 and 2008, describing habitat at survey sites as good to excellent, but recorded only eight Dakota skippers during about seven hours of surveys in and around the park (Selby 2009a, p. 1 and liv). Glacial Lakes State Park surveys conducted in 2012 were outside of the Dakota skipper flight period (Runquist 2012a, pers. comm.).

In summary, the Dakota skipper is now considered to be extirpated or possibly extirpated from at least 30 of the 66 sites in Minnesota, which historically contained approximately 26 percent of all known historical Dakota skipper locations rangewide (Table 1). The species is considered to be present and unknown at 14 and 22 sites, respectively. However, only one individual male was detected in the State during 2012 surveys, which included 18 sites with previous records; 2012 surveys for undiscovered populations were also carried out on 23 prairie remnants without previous records for the species. Similar surveys of prairie remnants with no previous documentation of Dakota skipper were completed in Minnesota in 2007 and 2008. Based on these surveys, the likelihood that significant undiscovered Dakota skipper populations occur in Minnesota is low.

North Dakota

North Dakota historically contained approximately 21 percent of all known historical locations of Dakota skippers rangewide (Table 1); the State contained 54 historical sites distributed among 18 counties (Service 2013, unpubl. geodatabase). The Dakota skipper is currently present at 18 sites in 5 North Dakota counties, of these, 13 occur within the Towner-Karlsruhe complex in McHenry County, 1 is within the Sheyenne National Grasslands complex in Ransom County, 2 in northern McKenzie County, 1 site is in Wells County, and 1 site in McLean County. Of the 18 sites where we consider the Dakota skipper to be present, 15 sites had positive observations of the species in 2012 and the remaining 3 sites had positive observations between 1998 and 2003. The status of the species is unknown at 13 sites; 10 of these sites have not had positive records since the mid- to late 1990s and the other 3 sites had positive records between 2001 and 2003. The Dakota skipper is presumed extirpated from 13 sites and 4 counties, primarily due to heavy grazing, weed control, and other disturbances (*e.g.,* bulldozing at Killdeer Mountain to reduce aspen growth, Royer 1997). The species is possibly extirpated from 10 additional sites and 3 additional counties. Researcher surveyed 25 sites, believed to possibly have Dakota skipper populations, in 2012; of these sites, 23 had previous records of the species (Royer and Royer 2012a, entire). Thirteen of the 25 surveyed sites had Dakota skipper present (Royer and Royer 2012a, pp. 3–4; Royer and Royer 2012b, pp. 2–3). One new site was found in 2012 (Royer and Royer 2012a, p. 33), adjacent to a site with previous records but with different land-ownership, so the researcher considered it a new site. Another new site was found in North Dakota in 2012, in Wells County, where two observations were made—possibly the same individual (HDR, Inc. 2012, pp. 21–23). At sites with Dakota skipper, lower average encounter frequencies were observed across the State in 2012 (state average = 9.4 encounters per hour) than during the 1996–1997 statewide surveys (state average = 17.4 encounters per hour) (Royer and Royer 2012b, p. 5; Royer and Royer 2012a. pp. 7–8).

Of the Dakota skipper populations in North Dakota, none may be secure, although the Towner-Karlsruhe complex was considered to be the stronghold for the species in the State in 2002 (Cochrane and Delphey 2002, p. 17) and most of the sites where the species is currently present are still occupied by ''viable populations'' (Royer 2012a, pers. comm.). All of the habitat where the species is present in the Towner-Karlsruhe complex is Type A (wet-mesic) habitat (Royer and Marrone 1992a, p. 21–22; Royer *et al.* 2008, pp. 14–16). Five sites within the Towner-Karlsruhe complex are owned by the North Dakota State Land Department, and the remaining seven sites with extant populations are privately owned. Some Towner-Karlsruhe sites are linked by highway rights-of-way that contain native prairie vegetation and by other prairie remnants (Royer and Royer 2012a, p. 18). In 2002, none of these sites were described as secure (Cochrane and Delphey 2002, pp. 66–67) since each is subject to private or State management options that could extirpate Dakota skipper from the site. In 1999, it was estimated that about 30 percent of the Towner-Karlsruhe area still contained native prairie (Lenz 1999b, p. 2); more recent observations indicate that several native prairie sites have been invaded to varying extents by nonnative species, such as leafy spurge, Kentucky bluegrass, and alfalfa (*Medicago sativa*), and several are subject to intense grazing or early haying (Royer and Royer 2012b, pp. 5–6, 7–10, 13–16, 18–19, 22–23; Royer 2012, in litt.).

Dakota skipper populations in the Sheyenne National Grasslands complex have experienced intensive grazing, leafy spurge (*Euphorbia esula*) invasion, and the effects of herbicides used to control leafy spurge and grasshoppers (Royer 1997, pp. 15 and 27). For example, McCabe (1979, p. 36) cited the McLeod Prairie in the Sheyenne Grasslands in southeastern North Dakota as the best site for Dakota skippers in North Dakota. Since then, however, leafy spurge invasion has significantly modified the habitat and the Dakota skipper is now extirpated from the site (Royer 1997, p. 14). Swengel and Swengel (1999, p. 286) did not find Dakota skippers at eight survey sites in the Sheyenne grasslands during 1988–1997, although Royer did observe a few isolated Dakota skippers in the Sheyenne National Grasslands during this period (e.g., Royer 1997, pp. 14–15). Dakota skippers were recorded at one new site (Gregor) in the Sheyenne National Grasslands in 2001 (Spomer 2004, pp. 14–15). The status of Dakota skipper at the Gregor site is currently

unknown, since the species was not observed during the 2002 survey (Royer and Royer 2012a, pp. 3–4). Orwig (1996, p. 3) suggested that Brown's Ranch in Ransom County, owned by The Nature Conservancy, had potential to support a metapopulation (groups of local populations interconnected by dispersal habitat) in the Sheyenne River watershed. More recently, however, Spomer (2004, p. 36) found that the population there was not doing well, and Royer failed to find the species in 2012 (Royer and Royer 2012a, p. 3). Therefore, the status of the species at the Brown Ranch site is unknown. Royer (1997, pp. 15 and 27) claimed that, throughout the Sheyenne Grasslands, both public and private lands have been so heavily grazed and altered by grasshopper and leafy spurge control that extirpation of Dakota skippers from the area is almost certain to occur. The population at Venlo Prairie, for example, deteriorated from good/fair in 2001 to poor in 2003 due to intense grazing and disappearance of flowers (Spomer 2004, pp. 9, 12); the species is now considered to be extirpated at that site.

In 2002, experts ranked all sites outside of the two complexes discussed above as threatened or vulnerable; most were small and isolated populations threatened by conversion and invasive species (Cochrane and Delphey 2002, pp. 66–67). Most of these sites are now considered extirpated or possibly extirpated. Today, only 4 sites outside of the Towner-Karsruhe Complex and Sheyenne National Grasslands complexes are thought to have extant (present) Dakota skipper populations, including Garrison Training Center in McLean County. In addition to the Towner-Karsruhe Habitat Complex sites in McHenry County, only 2 of the 25 sites surveyed by Royer in 2012, both in northern McKenzie County, may have ''viable populations'' (Royer 2012b, pers. comm.), although only one individual was observed at each site in 2012 (Royer and Royer 2012b, pp. 16–17).

In summary, North Dakota contains approximately 21 percent (N= 53) of all known historical locations of the species rangewide; however, the current occupancy status of the Dakota skipper is unknown at 12 sites, and it is considered to be extirpated or possibly extirpated from at least 23 of the 53 known sites in the state (Table 1). The species is considered to be present at only 18 sites in the State. North-central North Dakota may hold hope for the species' long-term conservation. Dakota skipper was detected at 13 of the 25 sites surveyed during 2012 (23 of the sites had previous Dakota skipper records); average encounter frequencies observed across the State in 2012 (9.4 encounters per hour), however, were lower than during the 1996–1997 statewide surveys (ND state average = 17.4 encounters per hour).

Although only a small fraction of all grassland in North Dakota has been surveyed for Dakota skippers, a significant proportion of the un-surveyed area is likely not suitable for Dakota skipper. The species was never detected at approximately 135 additional locations in North Dakota that were surveyed for the species from 1991–2012 (USFWS 2013, unpubl. geodatabase). Many of these sites have been surveyed multiple times over multiple years (USFWS 2013, unpubl. geodatabase). Surveys for the Dakota skipper are typically conducted only in areas where floristic characteristics are indicative of their presence. New potential sites surveyed are generally focused on prairie habitat that appear suitable for the species and have a good potential of finding the species, in other words, sites are not randomly selected across the landscape. Therefore, these sites have a higher likelihood of detecting the species than at sites randomly selected across the landscape. Based on these surveys, the likelihood that significant numbers of undiscovered Dakota skipper populations occur in North Dakota is low. Moreover, data available from the numerous sites that have been surveyed are likely to be representative of areas that have not been surveyed—that is, population trends and the nature and extent of stressors that may impact the populations in un-surveyed areas can reasonably be inferred by analyzing data collected from the sites that have been surveyed.

South Dakota

South Dakota historically contained approximately 33 percent of all known locations of Dakota skippers rangewide (Table 1). Since the earliest known record of Dakota skipper (1905) of the species in South Dakota, 85 sites have been documented across 11 counties in the State, but recent surveys indicate that the species is declining in the State (Service 2013, unpubl. geodatabase). Of the 85 historical sites, Dakota skipper is presumed extirpated from 15 sites and 2 counties (Brown and Moody), and is possibly extirpated from 10 additional sites. Dakota skipper is considered present at 14 sites and the status of the species is unknown at 46 sites. Twenty-six sites in South Dakota with previous Dakota skipper records were surveyed in 2012; the species was detected at 9 of those sites (Service 2013, unpubl. geodatabase). Eight additional sites within the species' historical range were surveyed during the 2012 flight period, which resulted in the discovery of two new nearby Dakota skipper sites (Service 2013, unpubl. geodatabase; Skadsen 2012a, pers. comm.). The proportion of positive surveys at known sites has fluctuated over time; however, the 2012 surveys had the lowest positive detection rate (35 percent) for the last 16 years (since 1996), much less than comparable survey years (years with 10 or more sites surveyed) in South Dakota.

While there are some sites with earlier records, most South Dakota sites were initially documented during extensive surveys conducted during 1996 to 1998. Forty-eight locations without previous records were surveyed during 2002–2004, which resulted in the discovery of 20 new Dakota skipper sites in northeastern South Dakota (Skadsen 2003, p. 8; Skadsen 2004, pp. 3–6), but due to more recent negative surveys, the occupancy of the species is currently unknown or extirpated at many of these sites (Skadsen 2011, p. 5; Skadsen 2012, pp. 4–5; Skadsen, 2012, pers. comm.; Skadsen 2003, p. 10; Skadsen 2004, p. 2;; Skadsen 2006a, p. 2, 10; Skadsen 2006b, p. 5; Skadsen 2007, p. 3; Skadsen 2008, p. 3, 12; Skadsen 2009, p. 3). Additional survey effort resulted in the discovery of nine new sites between 2005 and 2012, with a maximum of three new sites discovered in 2006 (Skadsen 2010a, p. 6; Skadsen 2012, pp. 4–5; Skadsen 2012, pers. comm.; Skadsen 2005, pp. 5–6, Skadsen 2006a, p. 12; Skadsen 2006b, p. 5; Skadsen 2007, p. 3; Skadsen 2008, p. 9; Skadsen 2009, p. 2). Eight additional sites without previous documentation of the species were surveyed in 2012, which resulted in the discovery of two nearby sites (Service 2013, unpubl. geodatabase). To summarize, new sites have been discovered in South Dakota during most survey years since 2002, however, the number of new sites discovered each year has been low recently; 2 or 3 new sites have been discovered each survey year since 2005 (3 sites in 2005, 2 sites in 2006, 2 sites in 2007, zero sites in 2010, and 2 sites in 2012). The rate that known sites are becoming extirpated is higher than the rate of new discovery—the occupancy of the species at many sites is now unknown or extirpated due to more recent negative surveys.

The species has never been documented in Clark County, but because few surveys have been conducted there, the county may contain undiscovered populations (Skadsen 2006b, p. 1). Skadsen (2012b,

pers. comm.) doubts the existence of public lands with suitable Dakota skipper habitat in Clark County and has not received permission to survey a few possible suitable locations that are privately owned.

Although only a small fraction of all grassland in eastern South Dakota has been surveyed for Dakota skippers (*e.g.,* Dakota skipper surveys have been conducted on less than approximately 30,000 acres (12,140 ha) in South Dakota within the species range (Service 2013, unpubl. geodatabase)), a significant proportion of the un-surveyed area is likely not suitable for the Dakota skipper. For example, there is an estimated 1,620,549 acres (ac) (655,813 hectares (ha)) of unbroken (untilled) grasslands (excluding Conservation Reserve Program (CRP) grasslands, which generally do not provide habitat for the Dakota skipper (Larson 2013, pers. comm.)) in the 9 counties where the Dakota skipper is considered be present or to have unknown occupancy in South Dakota (HAPET 2012, unpubl. data). Additional areas of unbroken prairie were estimated in three other counties where the species may have occurred historically (HAPET 2012, unpubl. data). While these lands represent unbroken grassland in South Dakota, the models used to identify unbroken grassland are not able to identify plant species, plant species composition, floristic quality, or presence of invasive species (Loesch 2013 pers. comm.). Therefore, these unbroken grasslands may not contain the specific native prairie plants that the Dakota skipper requires (as discussed in detail in the Background section of this proposed rule) and, therefore, may not equate to suitable habitat for the species.

The species was never detected at approximately 73 additional locations in South Dakota that were surveyed from 1991 through 2012 (USFWS 2013, unpubl. geodatabase). Several of these sites have been surveyed multiple times in one year or during multiple years (USFWS 2013, unpubl. geodatabase). Surveys for Dakota skipper are typically conducted only in areas where floristic characteristics are indicative of their presence. For example, in South Dakota, Skadsen (1997, p. 2) selected for surveys dry-mesic prairie that supported purple coneflower and wet-mesic prairie that supported wood lily and mountain deathcamas based on searches for these sites by car and reports from resource managers. New potential sites surveyed are generally focused on prairie habitat that appear suitable for the species and have a good potential of finding the species, in other words, sites are not randomly selected across the landscape. Therefore, these sites have a higher likelihood of detecting the species than at sites randomly selected across the landscape. Based on these surveys, the likelihood that significant undiscovered Dakota skipper populations occur in South Dakota is low. Moreover, data available from the numerous sites that have been surveyed are likely to be representative of areas that have not been surveyed—that is, population trends and the nature and extent of stressors that may impact the populations in un-surveyed areas can reasonably be inferred by analyzing data collected from the sites that have been surveyed.

Since there is little long-term quantitative data for sites in South Dakota, we examined presence-absence (non-detection) data over time. The percent of sites surveyed each year with positive detections of the species remained relatively stable from 1985 to 2010, with an average positive detection rate of 63 percent for all survey years with more than one site surveyed (excluding new sites for the first year of discovery), an average positive detection rate of 60 percent for survey years with at least 5 sites surveyed, and an average positive detection rate of 71 percent for survey years with at least 10 sites surveyed. One exception to the high detection rates was during the 1991 survey year when none (0 of 7 sites) of the sites surveyed in 1991 resulted in positive detections of the species, excluding 3 new sites that were discovered that year. Another exception was in 1996, when 2 of the 8 sites with previous records surveyed had a positive detection; however, 6 new sites were discovered that year. The detection rate remained relatively stable until 2010, when the percent of sites with positive detections fell from 89 percent (8 of 9 sites) in 2010, to 46 percent (5 of 11 sites) in 2011, and 35 percent (9 of 26 sites) in 2012 (Figure 2). These types of fluctuations had been observed in prior years; therefore, it is difficult to determine a clear trend in the data using positive detections—the last two survey years may fall within the normal range of variation.

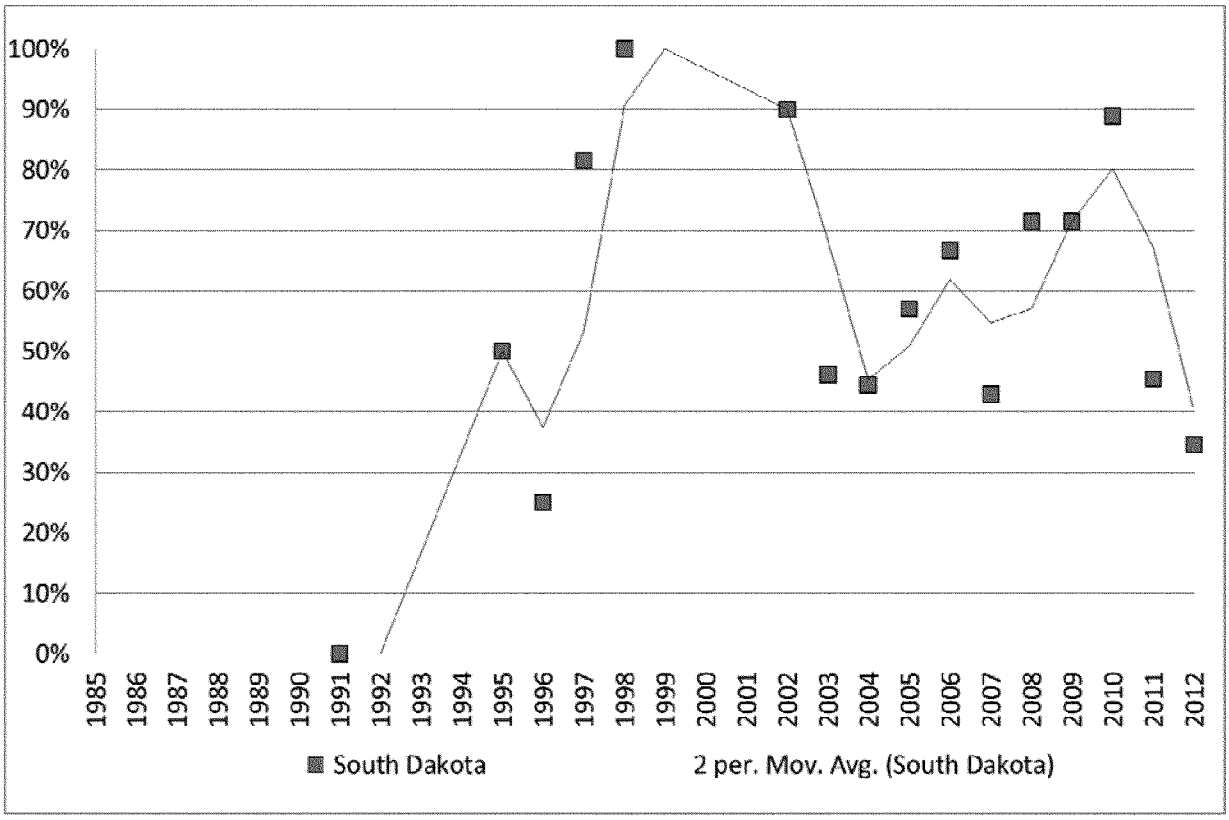


Figure 2: Percent of surveyed sites with positive detections of Dakota skipper for years with at least 5 surveys in South Dakota since 1985 with line showing the moving average over time. These data exclude new sites in the first year of discovery as well as sites that were surveyed, but where the species has never been found (null sites).

The Outer Coteau des Prairies subsection of the North Central Glaciated Plains section of Bailey's Eco-regions is thought to be a stronghold for Dakota skipper, since nearly 40 percent of the total documented Dakota skipper sites are within that subsection (83 of the 259 documented sites—Service 2013, unpubl. geodatabase). Most of these Outer Coteau des Prairie sites are in South Dakota; 73 of the 85 Dakota skipper sites in South Dakota are within the Outer Coteau des Prairies subsection (Service 2013, unpubl. geodatabase). Dakota skipper is considered to be present at only 10 of those 73 sites—the species status is unknown at 41 of those sites, possibly extirpated at 8 sites, and extirpated at the remaining 13 sites within that ecoregion subsection in South Dakota (Service 2013, unpubl. geodatabase).

In summary, South Dakota historically contained approximately 33 percent of all known locations of the species rangewide. The current occupancy status of the Dakota skipper is unknown at 46 sites and it is considered to be extirpated or possibly extirpated from at least 25 of the 85 known sites in the State, although large areas of grasslands remain in South Dakota and substantial additional populations of Dakota skipper would be expected to be found if more surveys were conducted. Furthermore, downward trends and threats impacting populations at known sites are also likely occurring at potentially undiscovered sites. The species is considered to be present at 14 of the 85 documented sites in the State. Twenty-six sites in South Dakota with previous Dakota skipper records were surveyed in 2012; the species was detected at nine of those sites; eight sites with no previous records for the species were surveyed during the 2012 flight period, which resulted in the discovery of two nearby sites. The proportion of positive surveys at known sites has fluctuated over time; however, the 2012 surveys had the lowest positive detection rate (35 percent) for the last 16 years (since 1996)—much less than comparable survey years in South Dakota.

Manitoba

Manitoba historically contained approximately 14 percent (N = 36) of the known locations of the Dakota skipper rangewide. The Dakota skipper is considered present at 1 isolated site and 30 sites split between 2 distinct complexes, 14 sites near Griswold and 16 sites along Lake Manitoba. The 14 sites near Griswold are located approximately 200 km (124 mi) southwest of the populations along Lake Manitoba (at 16 sites) and about 125 km (78 mi) northeast of the nearest population in Saskatchewan (Webster 2003, pp. 5–6; Webster 2007, p. 4). The species is presumed extirpated or possibly extirpated from five sites in Manitoba, including from the Tallgrass Prairie Preserve, where it has not been found in the seven most recent survey years (Webster 2003, p. 5; Westwood *et al.* 2012, p. 1; Westwood 2007, pers. comm.; Hamel *et al.* 2013, pp. 8–16)—(the later surveys were focused on Poweshiek skipperlings, but other species were recorded) and one site that was converted to a flaxseed field (Webster 2003, p. 7). Population

estimates and trends at these sites have not been examined quantitatively; however, the population appears to be stable at two sites with repeated survey years. Numbers observed during searches at a site near Griswold in 2007 did not appear to change appreciably since 2002 surveys, when the population was estimated (non-quantitatively) to be approximately 750 individuals (Webster 2003, p. 5; Webster 2007, p. 4). A total of 273 adults were observed during a 3.3-hour survey at the second site, where the population was estimated non-quantitatively to be about 2,000 individuals (Webster 2007, p. 4).

Dakota skipper was first recorded near Miniota in 1944 and then at two additional sites in the early 1990s. In 2002, the species was observed at 19 sites near Lundar, within about 25 km (16 mi) east of Lake Manitoba (Webster 2003, p. 4); however, most of these sites have not been surveyed since. In 2007, researchers surveyed 16 sites for the Dakota skipper near Griswold, Manitoba (Webster 2007, p. 4) and found Dakota skippers at 14 of the 16 sites; 12 of these represent new sites for the species in Manitoba (Webster 2007, p. 4). Several additional areas were examined for potential Dakota skipper habitat in 2007, including areas east of Hwy 21, within the Lauder Sandhills Wildlife Management Area, north of Oak Lake and near Tilston, Sinclair, Cromer, and Brandon, as well as other locations. Most of the areas examined were under row crop agriculture, were heavily grazed, were dry scrub prairies or were otherwise habitats unsuitable for Dakota skipper (Webster 2007, p. 6). The areas near Brandon and the high ground within the wetland complexes near Oak Lake may still contain suitable habitat (Webster 2007, p. 6).

The nearest known extant (present) population of Dakota skippers in Manitoba is approximately 120 km (75 mi) from the closest extant (present) population in North Dakota and about 200 km (125 mi) from the closest Saskatchewan population. Britten and Glasford (2002, pp. 367, 372) suggested that Manitoba populations are genetically distinct from a group of populations in Minnesota and South Dakota, although populations in additional intervening locations should be sampled to confirm this hypothesis (Runquist 2012b, pers. comm.).

Saskatchewan

Saskatchewan historically contained approximately 5 percent (N= 14) of all known records of Dakota skippers rangewide. In Saskatchewan, the Dakota skipper is restricted to undisturbed or lightly grazed, steep, south-facing hills near the Souris River (Webster 2007, p. ii). The Dakota skipper was first recorded south of Oxbow, Saskatchewan, in 2001 where three males were collected (Hooper 2003, p. 124) on an ungrazed knoll within a patch of mixed-grass prairie that was approximately one ha (2 ac) in extent. Dakota skippers were found at three additional sites during 2002 surveys (Webster 2003, pp. 6–7). In 2007, researchers surveyed 16 sites in southeastern Saskatchewan and found Dakota skippers at 10 of these sites (including Oxbow); 8 of these represent new sites for the species in Saskatchewan (Webster 2007, p. i). During 2007 surveys, which were conducted late in the flight period, only a few individuals were observed at each site where the species was present (Webster 2007, p. ii). Nine of these sites where the species was found in 2007 were surveyed along an approximate 50-km (31-mi) stretch of steep hillsides along the ridgeline north of Souris River; distances between sites range from 1 to 28 km (0.8 mi to 17 mi). We consider Dakota skipper to be present at all 14 sites in Saskatchewan, although 3 of those sites have not been surveyed since 2002. The nearest known extant population of Dakota skippers in Saskatchewan is approximately 111 km (69 mi) from the closest extant (present) population in North Dakota and 200 km (125 mi) from the closest Manitoba population.

Poweshiek skipperling

Species Description

The Poweshiek skipperling (*Oarisma poweshiek*) is a member of the skipper family, Hesperiidae, and was first described by Parker (1870, pp. 271–272). Parker (1870, pp. 271–272) provided the original description of this species from his type series collected near Grinnell, Iowa. It was named for the county in which it was found (Poweshiek County), but it was misspelled, Powesheik, in the original description. This spelling was retained by most early authorities (Lindsey 1922, p. 61; Holland 1931, p. 360). Miller and Brown (1981, p. 31) used the corrected spelling, Poweshiek, but then Miller and Ferris (1989, p. 31) changed it back in their supplement. Current usage is mixed, with many authorities retaining the original spelling (e.g., Miller 1992, p. 20), while others have opted for the corrected spelling (Layberry *et al.* 1998, p. 48; Opler *et al.* 1998, p. 363; Glassberg 1999, p. 167; Brock and Kaufman 2003, p. 306). Layberry *et al.* (1998, p. 48) state ''. . . since it is a clear case of an original incorrect spelling it can be corrected [rule 32(c)ii of the International Code of Zoological Nomenclature].''

Poweshiek skipperlings are small and slender-bodied, with a wingspan generally ranging from 2.3 to 3.0 cm (0.9 to 1.2 in). The size of Poweshiek skipperlings appears to vary somewhat across their range (Royer and Marrone 1992b, p. 3). North Dakota and South Dakota specimens tend to be slightly smaller than the 2.9 to 3.2 cm (1.1 to 1.3 in) range given by Parker (1870) for the type specimens from Grinnell, Iowa (Royer and Marrone 1992b, p. 3). A sample of Richland County, North Dakota, specimens from Royer's collection had an average wingspan of 2.8 cm (1.1 in) for males and 3.0 cm (1.2 in) for females. South Dakota specimens in Marrone's collection had an average wingspan of 2.6 cm (1.0 in) for males and 2.7 cm (1.1 in) for females. The upper wing surface is dark brown with a band of orange along the leading edge of the forewing. Ground color of the lower surface is also dark brown, but the veins of all but the anal third of the hindwing are outlined in hoary white, giving an overall white appearance to the undersurface.

The Poweshiek skipperling is most easily confused with the Garita skipperling (*Oarisma garita*), which can be distinguished from Poweshiek skipperling by their smaller size, quicker flight, and overall golden-bronze color (Royer and Marrone 1992b, p. 3). Another distinguishing feature is the color of the anal area of the ventral hindwing (orange in Garita; dark brown in Poweshiek). The Garita skipperling generally occurs west of Poweshiek skipperling range, although there are records of both species from two counties in southeastern North Dakota and two counties in northwestern Minnesota (Montana State University—Big Sky Institute 2012, Butterflies of North America *http://www.butterfliesandmoths.org/* Accessed 5/14/12; Minnesota Department of Natural Resources (DNR) 2012, Rare features database. Accessed 5/14/12).

McAlpine (1972, pp. 85–92) described Poweshiek skipperling eggs as pale yellowish green, mushroom shaped with a flattened bottom, a slightly depressed micropyle (pore in the egg's membrane through which the sperm enter) and smooth surfaced. They were 0.8 millimeters (mm) (0.01 in) long, 0.7 mm (0.03 in) wide and 0.5 mm (0.02 in) high. The overall color of the head and body of the larvae is pale grass green, with a distinctive darker green mid-dorsal stripe and seven cream-colored stripes on each side. First instars were 1.8 mm (0.07 in) at hatching, and the

lone 7th instar survivor was 23.6 mm (1.0 in) near the end of that stage. McAlpine did not have any observations past the 7th instar (the stage between successive molts, the first instar being between hatching and the first molt) (McAlpine 1972, pp. 85–93).

General Life History

Poweshiek skipperlings lay their eggs near the tips of leaf blades and overwinter as larvae on the host plants (Bureau of Endangered Resources in Swengel and Swengel 1999, p. 285, Borkin 2000a, p. 7). McAlpine (1972, pp. 85–92) described the various life-history stages of Poweshiek skipperling. McAlpine (1972, pp. 85–93) observed hatching of larvae Poweshiek skipperling after about nine days. McAlpine's records were incomplete, and he did not have any observations past the 7th instar, but he believed that there should have been one or two additional instars, followed by the chrysalis (pupa) and then the imago (adult) stages (McAlpine 1972, pp. 85–93). After hatching, Poweshiek skipperling larvae crawl to the base of grasses, but unlike Dakota skippers, Poweshiek skipperling do not form shelters underground (McAlpine 1972, pp. 88–92; Borkin 1995a, p. 9; Borkin 2008, pers. comm.). Poweshiek skipperling are not known to form shelters, instead the larvae overwinter up on the blades of grasses and on the stem near the base of the plant (Borkin 2008, pers. comm.; Dana 2008, pers. comm.). Borkin (2008, pers. comm.) observed larvae moving to the tips of grass blades to feed on the outer and thinner edges of the blades, with later movement down and among blades.

Food and Water

For the Poweshiek skipperling, preferred nectar plants vary across its geographic range. Smooth ox-eye (*Heliopsis helianthoides*) and purple coneflower were noted as the favored nectar plants in Iowa, Minnesota, and North Dakota (Swengel and Swengel 1999, p. 280). Other nectar species used, in descending order of number of observations, were stiff tickseed (*Coreopsis palmata*), black-eyed Susan, and palespike lobelia (*Lobelia spicata*) (Swengel and Swengel 1999, p. 280). On drier prairie habitats in Iowa and Minnesota, purple coneflower is used almost exclusively, and the emergence of the adults corresponds closely to the early maturity of this species' disk florets (Selby 2005, p. 5). On the wetter prairie habitats of Canada and the fen habitats of Michigan, favored nectar plants are black-eyed Susan, palespike lobelia, sticky tofieldia (*Triantha glutinosa*), and shrubby cinquefoil (*Dasiphora fruticosa ssp. floribunda*) (Nielsen 1970, p. 46; Holzman 1972, p. 111; Catling and Lafontaine 1986, p. 65; Bess 1988, p. 13; Summerville and Clampitt 1999, p. 231). In addition to nutrition, the nectar of flowering forbs provides water for Poweshiek skipperling, which is necessary to avoid desiccation during flight activity (Dana 2013, pers. comm.).

Until recently, the larval food plant was presumed to be elliptic spikerush (*Eleocharis elliptica*) or sedges, but this was based on limited observations, primarily from the Michigan populations (e.g, Holzman 1972, p. 113). More recent observations show that the preferred larval food plant for some populations of Poweshiek skipperling is prairie dropseed (*Sporobolus heterolepis*) (Borkin 1995b, p. 6); larvae have also been observed feeding on little bluestem (*Schizachyrium scoparium*) (Borkin 1995b, pp. 5–6) and sideoats grama (*Bouteloua curtipendula*) (Dana 2005a, pers. comm.). Poweshiek skipperling have been observed laying eggs (ovipositing) on mat muhly (*Muhlenbergia richardsonis*) (Cuthrell 2012a, pers. comm.), a grass in Michigan's prairie fens (Penskar and Higman 1999, p. 1).

In southwestern Minnesota dry hill prairies, Poweshiek skipperling oviposition was observed on prairie dropseed, little bluestem, big bluestem (*Andropogon gerardii*), porcupine grass (*Hesperostipa spartea*), and a couple unidentified species; a larva was observed feeding on sideoats grama (Dana 2005a, pers. comm.). Poweshiek skipperlings were observed to oviposit on big bluestem in Wisconsin (Borkin 2012a, pers. comm.), although indiscriminate oviposition on unsuitable larval plants has been observed during high summer temperatures (Borkin 1995a, p. 6). Dana (2005b, pers. comm.) noted that larvae and ovipositing females prefer grasses with ''very fine, threadlike structures'' and hypothesized that Poweshiek skipperling lack a specific host and may adapt to acceptable plant species at a site.

Dispersal

Poweshiek skipperlings are also not known to disperse widely; the species was evaluated among 291 butterfly species in Canada as having relatively low mobility; experts estimated Poweshiek skipperling to have a mean mobility of 2 (standard deviation = 1.4) on a scale of 0 (sedentary) to 10 (highly mobile) (Burke *et al.* 2011, p. 2279; Fitzsimmons 2012, pers. comm.). A maximum dispersal distance of 1.6 km (1.0 mi) is estimated to be a reasonable and likely distance for male Poweshiek skipperling to travel between patches of prairie habitat separated by structurally similar habitats (*e.g.,* perennial grasslands but not necessarily native prairie). The species, however, will not likely disperse across habitat that is not structurally similar to native prairies, such as certain types of row crops or anywhere not dominated by grasses (Westwood 2012a and 2012b, pers. comm; Dana 2012b, pers. comm.). In Manitoba, Poweshiek skipperling have been observed avoiding dispersal over short distances, even to suitable habitat, if a barrier such as a road exists between suitable prairie habitat or nectar sources (Westwood *et al.* 2012, p.18). Since experts estimated Dakota skippers to have a mean mobility of 3.5 (standard deviation = 0.7) on a scale of 0 (sedentary) to 10 (highly mobile), which is higher than the estimate for Poweshiek skipperling (mean mobility of 2) (Burke *et al.* 2011, p. 2279; Fitzsimmons 2012, pers. comm.), a more conservative estimated dispersal distance would be that of the Dakota skipper, approximately 1 km (0.6 mi) (Cochrane and Delphey 2002, p. 6).

In summary, dispersal of Poweshiek skipperling is very limited due in part to its short adult life span and single annual flight. Therefore, the species' extirpation from a site is likely permanent unless it is within about 1 km (0.6 mi) of a site that generates a sufficient number of emigrants or is artificially reintroduced to a site; however, the capability to propagate the Poweshiek skipperling is currently lacking.

Habitat

Poweshiek skipperling habitats include prairie fens, grassy lake and stream margins, moist meadows, and wet-mesic to dry tallgrass prairie. McCabe and Post (McCabe and Post 1977a, p. 38) describe the species' habitat in North Dakota as ''. . . high dry prairie and low, moist prairie stretches as well as old fields and meadows.'' Royer and Marrone (1992b, p. 12) describe Poweshiek skipperling habitat in North Dakota and South Dakota as moist ground in undisturbed native tallgrass prairies. Poweshiek skipperling habitat throughout Iowa and Minnesota is described as both ''high dry'' and ''low wet'' prairie (McCabe and Post 1977a, p. 38). The only documented Illinois record was associated with high rolling prairie (Dodge 1872, p. 218); the only documented Indiana record was from marshy lakeshores and wetlands

(Blatchley 1891, p. 398; Shull 1987, p. 29).

Southern dry prairies in Minnesota are described as having sparse shrub cover (less than 5 percent) composed primarily of leadplant, with prairie rose, wormwood sage, or smooth sumac present and few, if any, trees (Minnesota DNR 2012a, p. 1). Southern mesic prairies also have sparse shrubs (5–25 percent cover) consisting of leadplant and prairie rose with occasional wolfberry (*Symphoricarpos occidentalis*) and few, if any, trees (Minnesota DNR 2012b, p. 1).

The disjunct populations of Poweshiek skipperlings in Michigan have more narrowly defined habitat preferences, variously described as wet marshy meadows (Holzman 1972, p. 114), bog fen meadows or carrs (Shuey 1985, p. 181), sedge fens (Bess 1988, p. 13), and prairie fens (Michigan Natural Features Inventory 2011, unpubl. data; Michigan Natural Features Inventory 2012, unpubl. data); prairie fen is the currently accepted name for this habitat type. Bess (1988, p. 13) found the species primarily in the drier portions of Liberty Fen, Jackson County, dominated by ''low sedges'' and an abundance of nectar sources. Summerville and Clampitt (1999, p. 231) noted that the population was concentrated in areas dominated by spikerush and that only 10–15 percent of the fen area was occupied despite the abundance of nectar sources throughout. Poweshiek skipperling have been described as occupying peat domes within larger prairie fen complexes in areas either dominated by mat muhly or prairie dropseed (Cuthrell 2013a, pers. comm.). A few prairie fens in Michigan also contain other rare butterflies, such as Mitchell's satyr and swamp metalmark (Cuthrell 2013a, pers. comm.).

Poweshiek skipperling populations in Wisconsin are also disjunct from the population to the west and are associated with areas that contain intermixed wet-mesic, and dry-mesic prairie habitats (Borkin 1995b, p. 6). The dry-mesic habitats contain ''extensive patches of prairie dropseed and little bluestem grasses'' (Borkin 1995b, p. 7). Survival in wetter areas, which tend to burn cooler and less completely, coupled with low recolonization rates, or the disproportionate loss of wet versus dry prairie could give the false impression that the wet areas were their preferred habitat (Borkin 1995b, p. 7). Like Dakota skipper, Poweshiek skipperling larvae may be vulnerable to desiccation during dry summer months (Borkin 2012a, pers. comm.) and require movement of shallow groundwater to the soil surface or wet low areas to provide relief from high summer temperatures or dry conditions (Royer *et al.* 2008, pp. 2, 16; Borkin 2012a, pers. comm.). Humidity may also be an essential factor to larval survival during winter months since the larvae cannot take in water during that time and depend on humid air to minimize water loss through respiration (Dana 2013, pers. comm.). Royer (2008, pp. 14–15) measured microclimalogical (climate in a small space, such as at or near the soil surface) levels within ''larval nesting zones'' (between the soil surface and 2 cm deep) at six known Poweshiek skipperling sites, and found an acceptable rangewide seasonal (summer) mean temperature range of 18 to 21 °C (64 to 70 °F), rangewide seasonal mean dew point ranging from 14 to 17 °C (57 to 63 °F), and rangewide seasonal mean relative humidity between 73 and 85 percent

Canadian populations of Poweshiek skipperlings are restricted to a single 2,300-ha (5,683-ac) area in southeastern Manitoba (COSEWIC 2003, p. 5). The wet to mesic tallgrass prairie in this area is characterized by low relief (1–2 m (3–7 ft)), with alternating lower, wetter areas and higher, drier prairie; Poweshiek skipperlings tend to be concentrated on or near the edge of the higher, drier prairie (COSEWIC 2003, p. 8). Spikerush is frequent in the wetter areas, and prairie dropseed, black-eyed Susan, and palespike lobelia are frequent in the drier areas (COSEWIC 2003, pp. 7–8).

Prairie fen habitat soils in Michigan are described as saturated organic soils (sedge peat and wood peat) and marl, a calcium carbonate ($CaCO_3$) precipitate (MINFI Web site accessed August 3, 2012). In other states, soil textures in Poweshiek skipperling habitats are classified as loam, sandy loam, or loamy sand (Royer *et al.* 2008, pp. 3, 10); soils in moraine deposits are described as gravelly, except the deposits associated with glacial lakes.

Population Distribution and Occupancy

The Poweshiek skipperling is historically known from eight states, ranging widely over the native wet-mesic to dry tallgrass prairies from eastern North and South Dakota (Royer and Marrone 1992b, pp. 4–5) through Iowa (Nekola and Schlicht 2007, p. 7) and Minnesota (Minnesota DNR, Division of Ecological Resources, unpubl. data), with occurrences also documented in northern Illinois (Dodge 1872, p. 218), Indiana (Blatchley 1891, p. 898), Michigan (Holzman 1972, p. 111; McAlpine 1972, p. 83), and Wisconsin (Borkin 2011, in litt.; Selby 2010, p. 22). The relatively recent discovery of Poweshiek skipperling populations in the Canadian province of Manitoba further extends its known historical northern distribution (Westwood 2010, pp. 7–22; Dupont 2010, pers. comm.). Additional historical accounts of Poweshiek skipperling from the States of Montana, Colorado, and Nebraska are likely misidentifications of its western congener, the Garita skipperling.

Once common and abundant throughout native prairies in eight states and at least one Canadian province, the Poweshiek skipperling and its habitat have experienced significant declines. The species is considered to be present at a few native prairie remnants in two states and one location in Manitoba, Canada. The species is presumed extirpated from Illinois and Indiana, and the status of the species is uncertain in four of the six states with relatively recent records (within the last 20 years). The historical distribution of Poweshiek skipperling may never be precisely known because ''much of tallgrass prairie was extirpated prior to extensive ecological study'' (Steinauer and Collins 1994, p. 42), such as butterfly surveys. Destruction of tallgrass and mixed-grass prairie began in 1830 (Sampson and Knopf 1994, p. 418), but significant documentation of the ecosystem's butterfly fauna did not begin until about 1960. Therefore, most of the decline of the Poweshiek skipperling probably went unrecorded. Poweshiek skipperling dispersal is very limited due in part to its short adult life span and single annual flight. Therefore, the species' extirpation from a site is likely permanent unless it is within about 1 km (0.6 mi) of a site that generates a sufficient number of emigrants or is artificially reintroduced to a site.

Recent survey data indicate that Poweshiek skipperling has declined to zero or to undetectable levels at 87 percent of sites where it has ever been recorded. Until about 2003, Poweshiek skipperling was regarded as the most frequently and reliably encountered prairie-obligate skipper butterfly in Minnesota, which contains nearly 50 percent of all known Poweshiek skipperling locations rangewide. Numbers and distribution dropped dramatically in subsequent years, however, and the species has not been seen in Minnesota since 2007. In Iowa, the Poweshiek skipperling was found at 2 of 33 sites with previous records surveyed in 2007; the species was last observed at one site in 2008. Iowa contains about 14 percent of documented sites rangewide. Unidentified threats to the species have acted to extirpate or sharply diminish

populations at all or the vast majority of sites in Iowa and Minnesota (Dana 2008, p. 16; Selby 2010, p. 7).

South Dakota historically contained about 24 percent of the rangewide sites with documented presence of Poweshiek skipperling, although recent surveys in that State also suggest an emergent and mysterious decline. The species was last observed in South Dakota in 2008, at three sites. North Dakota historically contained about six percent of the rangewide sites with documented presence of Poweshiek skipperling; the species was last observed in North Dakota in 2001. Survey efforts in North Dakota have been minimal between 1998 and 2011, but surveys conducted in 1997 documented more than 10 Poweshiek skipperlings at 1 site; 6 individuals were counted at 1 site, and 0 were detected at 6 other sites. Surveys conducted during the 2012 flight season resulted in zero detections of the species.

Seven Michigan sites were recently ranked as having good or better ''viability'', a habitat-based element occurrence rank assigned by the Michigan Natural Features Inventory (2011); however, the number of individuals observed at a few of those sites has declined in recent years and the species is presumed extirpated from one of those sites. Currently, four of the ten extant occurrences of Poweshiek skipperling in Michigan are considered to have good or better viability (Michigan Natural Features Inventory (2011, unpubl. data). Each of those faces threats of at least low to moderate magnitude, and the State contains only about 6 percent of all known historical Poweshiek skipperling records. There is one population of Poweshiek skipperling in Wisconsin with fairly consistent numbers observed over the last 5 years (17 to 63 individuals counted, no consistent measure of effort) and one population in Manitoba with fairly consistent numbers (typically hundreds of individuals observed each year). To summarize, of the 296 documented sites, there are 14 sites where we consider the Poweshiek skipperling to be present, 131 sites with unknown status, 98 possibly extirpated sites, and 53 where we consider the species to be extirpated (Table 2). The distribution and status of Poweshiek skipperling in each state of known historical or extant occurrence are described in detail below.

TABLE 2—NUMBER OF HISTORICALLY DOCUMENTED POWESHIEK SKIPPERLING SITES WITHIN EACH STATE AND THE NUMBER OF SITES WHERE THE SPECIES IS THOUGHT TO BE PRESENT, UNKNOWN, POSSIBLY EXTIRPATED, OR EXTIRPATED

State	Present	Unknown	Possibly extirpated	Extirpated	Total	Percent of the total number of historical sites by state
Illinois	.....	.....	.....	3	3	1
Indiana	.....	.....	.....	1	1	0.3
Iowa	.....	4	24	13	41	14
Michigan	10	1	.....	6	17	6
Minnesota	.....	67	68	7	142	48
North Dakota	.....	10	6	1	17	6
South Dakota	.....	48	.....	22	70	24
Wisconsin	3	1	.....	.....	4	1
Manitoba	1	.....	.....	.....	1	0.3
Total Number of Historically Documented Sites	14	131	98	53	296	.....
Percent of the Total Number of Historical Sites by Occupancy	5%	44%	33%	18%	.....	.....

Illinois

The Poweshiek skipperling historically occurred in Illinois, although only one historical occurrence is supported (Table 2). In the early 1870s, Dodge (1872, p. 218) reported abundant Poweshiek skipperling occupying ''the high rolling prairie that forms the divide between the Illinois and Rock rivers'' in Bureau County, Illinois. In addition to Bureau County, the Web site *Butterflies and Moths of North America* lists Poweshiek skipperling historical occurrences for Lake and Mason Counties, which were submitted to the Web site before the date field was required, so a default date of January 1, 1950, was assigned, which is outside of the typical flight period (*http://www.butterfliesandmoths.org/species/Oarisma-poweshiek;* accessed August 16, 2012). The Web site maintains a verifiable database on species occurrences, but there is no accessible supporting data for the Lake and Mason Counties records (Lundh 2012, pers. comm.). Poweshiek skipperling is, therefore, presumed to be extirpated from Illinois.

Indiana

There is one supported historical occurrence of Poweshiek skipperlings in Indiana (Table 2). Blatchley (1891, p. 898) reported small numbers of Poweshiek skipperlings near Whiting, Indiana; Shull (1987, p. 49) expressed confidence that this record is authentic. The Poweshiek skipperling is considered extirpated from Indiana.

Iowa

Iowa historically contained approximately 14 percent (N= 41) of all known records of Poweshiek skipperlings rangewide (Table 2). The Poweshiek skipperling was historically known to occur at 38 sites in 13 counties in Iowa (Nekola 1995, p. 8; Saunders 1995, pp. 27–28; Selby 2005, p. 18; Nekola and Schlicht 2007, p. 7; Selby 2010, p. 6); however, this number may vary slightly (up to 41 sites) depending on how one divides sites along the Little Sioux River in the Freda-Cayler area (Selby 2012a, pers. comm.). Early reports from Parker (1870, p. 271) described Poweshiek skipperling as abundant on a prairie slope at Grinnell, Iowa, while Lindsey (1917, p. 352; 1920, p. 320) noted additional rare occurrences in Story, Dickinson,

Poweshiek, and Woodbury Counties, Iowa—among these, habitat has long since been destroyed in all but Dickinson County.

In 1993–1994, 65 sites were surveyed in 17 counties where Dakota skipper or Poweshiek skipperling had been previously recorded or where prairie and butterfly surveys or infra-red photography suggested the presence of Poweshiek skipperling habitat (Saunders 1995, pp. 7–8). Among the 65 sites surveyed, Poweshiek skipperlings were found at 29 sites in 10 counties (Saunders 1995, p. 27). In 2000, Poweshiek skipperlings were found at six sites surveyed in and near Cayler Prairie and Freda Haffner Kettlehole state preserves in Dickinson County (Selby 2000, p. 19). Followup surveys of this complex in 2004, 2005, and 2007, however, produced no confirmed sightings (Selby 2010, p. 6). Extensive surveys were conducted in 2007, and included 32 of the 38 sites in the State with post-1990 records (Selby 2008, pp. 4, 6). Poweshiek skipperlings were found at 2 of the 38 sites surveyed—Hoffman Prairie State Preserve in Cerro Gordo County and Highway 60 Railroad Prairie in Osceola County (Selby 2008, pp. 6–7). Five of the six sites not included in the 2007 surveys had very little quality prairie (Selby 2012a, pers. comm.). Supplementary surveys conducted further west along U.S. Highway 18 in Hancock County also produced no confirmed sightings (Selby 2010, p. 7). No surveys were conducted at previously known Poweshiek skipperling sites in the State during the 2012 flight season.

The Poweshiek skipperling is presumed extirpated or possibly extirpated from all but four of the known sites in Iowa. The status of the Poweshiek skipperling is unknown at four sites: Highway 60 Railroad Prairie, Floete Prairie in Dickinson County, Florenceville Prairie, and Hayden Prairie in Howard County. There have been no surveys at Highway 60 Railroad Prairie since the species was observed there in 2007 (Selby 2012a, pers. comm.). The last observation of Poweshiek skipperling at Floete Prairie was in 1994 and the habitat ''did not appear to be very good quality'' in 2007, although the site was not surveyed for butterflies that year (Selby 2012a, pers. comm.) or in subsequent years. The Poweshiek skipperling was last observed at the Florenceville Prairie in 1994 (Saunders 1995, p. 27), but not during the 2007 survey year (Selby 2010, pp. 8–11). The species was last observed at Hayden Prairie in 2005, but not during surveys conducted in 2007 (Selby 2010, p. 10). Four Poweshiek skipperlings were found at Hoffman Prairie in Cerro Gordo County in 2008 (Selby 2009b, p. 3), but none were found during surveys in 2009 (Selby 2009b, p. 7) and 2010 (Selby 2010, p. 7). We initially assigned an unknown status to Hoffman Prairie site because the species had not been seen in the last two survey years; however, Selby believes that the species may be extirpated from this site (Selby 2012a, pers. comm.), so we have assigned a status of extirpated to this site.

To summarize, Poweshiek skipperling was historically documented in 41 sites in Iowa. The species occupancy is unknown at 4 of those sites and the species is considered to be extirpated or possibly extirpated at 13 and 24 sites, respectively (Table 2). The species is not considered to be present at any of the sites in Iowa.

Michigan

Michigan historically contained approximately 6 percent (N=17) of all known records of Poweshiek skipperlings rangewide (Table 2). Poweshiek skipperling has been historically documented at 17 sites in 6 counties in Michigan. The species was first recorded in Michigan in 1893 at Lamberton Lake near Grand Rapids in Kent County (Holzman 1972, p. 111) and then at nearby Button Lake Fen (also known as Emerald Lake Fen) in 1944 (McAlpine 1972, p. 83). Shrubs have invaded both sites, however, and no Poweshiek skipperlings have been found at either of these two western Michigan sites since 1944 and 1968, respectively (Michigan Natural Features Inventory 2011, unpubl. data). Holzman (1972, p. 111) documented Poweshiek skipperling in Oakland County in 1970, and the species has since been found at a total of 15 locations in eastern Michigan.

The Poweshiek skipperling is currently considered to be present at ten sites (Table 2) in four counties in Michigan: Jackson, Lenawee, Oakland, and Washtenaw. The species has been observed very recently (2007–2012) at most of those sites, except at the Liberty Bowl Fen in Jackson County, which has not been surveyed since one individual was observed in 1996. The status of the species is unknown at one site; Bullard Lake in Livingston County, where Poweshiek skipperling were last seen in 2007, but not in subsequent surveys in 2008 and 2009 (Cuthrell 2012a, pers. comm.). The species is presumed extirpated from six sites including the only two sites in Kent County and three sites in Oakland County; Rattalee Road, Fenton Road, and Rattalee Lake Fen (Call C Burr Preserve) fens. The species has not been observed at the Rattalee Road and Fenton Road sites since 1970 and 1973, respectively (Michigan Natural Features Inventory 2011, unpubl. data). Four Poweshiek skipperlings were seen in 2009 at the Rattalee Lake Fen (Calla C Burr Preserve), but none were observed during surveys conducted in 2010, 2011, and 2012 (Cuthrell 2012a, pers. comm.; Michigan Natural Features Inventory 2011, unpubl. data). The Michigan Natural Features Inventory (MNFI) also considers the two sites in Kent County to be extirpated due to habitat loss and destruction, Lamberton Lake and Button Lake (also known as Emerald Lake); the species has not been observed at either site since 1968 and 1944, respectively. The species is presumed to be extirpated at Whalen Lake Fen in Livingston County, where the species has not been observed since 1998 despite three subsequent years of surveys (Michigan Natural Features Inventory 2011, unpubl. data).

Four of Michigan's ten extant (present) Poweshiek skipperling occurrences are considered to have at least good viability (Michigan Natural Features Inventory 2011, unpubl. data). Three of these sites (Buckthorn Lake (also known as Big Valley), Brandt Road Fen (also known as Holly Fen) and Long Lake Fen) are within 20 km (12 mi) of one another in Oakland County; all with relatively large numbers (61–389) of the species recorded in 2010–2012 surveys (Michigan Natural Features Inventory 2011, unpubl. data; Cuthrell 2012a, pers. comm.). The largest extant (present) Poweshiek skipperling population in Michigan is at Long Lake Fen, where 225 individuals (1.3/hr.) were counted during 2012 surveys, down from 389 individuals (2.2/hr.) observed in the previous survey year with similar sampling effort. Long Lake Fen is likely the largest population of Poweshiek skipperling in the United States, and is subjected to intense development pressure. The fourth site, Grand River Fen (also known as Liberty Fen) in Jackson County, is approximately 100 km (62 mi) from the other three sites. In 2010, researchers counted 54 (0.3/hr.) Poweshiek skipperling at Grand River Fen, and 114 (0.6/hr.) in 2011 (Michigan Natural Features Inventory 2011, unpubl. data; Cuthrell 2012a, pers. comm.). This number fell to 14 (0.1/hr.) in 2012 (Cuthrell, 2012a, pers. comm.; 2012b, pers. comm.).

Small populations, immediate threats that have significant impacts on the species, or both limit the viability of the remaining five sites where we consider Poweshiek skipperling to still be present

in Michigan. In 2010, eight (0.1/hr.) Poweshiek skipperling were recorded at Park Lydon in Washtenaw County; 12 individuals were counted in 2011 (0.1/hr.), and 22 were counted in 2012 (0.2/hr.) (Cuthrell 2012a, pers. comm.). Two individuals (0.02/hr.) were recorded at Goose Creek Grasslands (also known as Little Goose Lake Fen) in Lenawee County in 2010, nine (0.07/hr.) were seen in 2011 (Cuthrell 2012a, pers. comm.; Cuthrell 2012b, pers. comm.). Only one Poweshiek skipperling was seen during a 15-minute 3-person survey in 2007 at the Snyder Lake site. Fourteen individuals were observed during 2008 surveys at Halstead Lake Fen (Michigan Natural Features Inventory 2011, unpubl. data), and 18 were observed in 2012 (Cuthrell 2012a, pers. comm.); neither survey year had units of effort associated with the counts at this site. One individual was counted at Bullard Lake fen in 2007, but the species was not observed in the two most recent survey years (2008 and 2009); therefore, the status is unknown at that site. We have only one year of data from Liberty Bowl Fen, where the species was recorded in 1996. The Eaton Road Fen is thought to be fairly viable, where 15–20 individuals were observed on multiple occasions in 2005 and a high of 68 individuals were observed in 2011 (Cuthrell 2013b, pers. comm.). The Eaton Road site is approximately 1 mi (0.6 km) from the Long Lake Fen site and is considered a sub-site within Long Lake Fen (Cuthrell 2013b, pers. comm.), but we consider it to be a separate site for the purposes of this rule.

To summarize, Poweshiek skipperling was historically documented in 17 sites in Michigan (Table 2). The species is considered to be present at 10 of the sites. The occupancy is unknown at 1 site, and the species is considered to be extirpated at 6 sites.

Minnesota

Minnesota historically contained approximately 48 percent (N=142) of all known records of Poweshiek skipperlings rangewide (Table 2). There are approximately 189 historical Poweshiek skipperling occurrence records in 32 counties in Minnesota [Minnesota Natural Heritage Inventory (MN NHI) database accessed June 19, 2013, plus additional surveys]. Clusters of records occur within five general areas from the State's southwest corner to near the Canadian border in the north. Based on the proximity of some occurrences to one another (*e.g.,* overlapping or occurrences in close proximity to one another in one general location), there appear to be approximately 142 distinct historical site records in the State (Dana 2012d, pers. comm; Service 2013, unpubl. geodatabase). Poweshiek skipperling are presumed extirpated or possibly extirpated from at least 75 of these known sites. The status of the species is unknown at 67 sites, although 31 of those locations have not been surveyed since 2003, and the species has undergone a sharp decline in the State since then.

Until about 2003, the Poweshiek skipperling was regarded as ''the most frequently and reliably encountered prairie-obligate skipper in Minnesota'' (Dana 2008, p. 1). Signs of the species' decline in Minnesota were noted in 2003 when Selby (2005, p. 20) found sharply lower numbers in and near Glacial Lakes State Park (Selby 2005, p. 20) compared to those observed in 2001 (Skadsen 2001, pp. 22–24). For example, numbers recorded along four transects that were surveyed in both years decreased from 104 to 2 individuals (Selby 2006b, Appendix 2, p. ii). In 2004 and 2005, Selby (2006b, Appendix 2, p. 2) did not record a single Poweshiek skipperling on any of these transects in and around the park during 11 separate surveys.

An extensive survey effort was conducted in 2007 and 2008 throughout most of the species' known range in the State (Selby 2009a, entire). Sites with previous Poweshiek skipperling records that were considered to have the greatest conservation importance to the species (large, high-quality prairie remnants) were surveyed, as well as sites with no previous records that appeared likely to support the species (Selby 2009a, p. 2). In 2007, 70 sites in 15 counties were surveyed, including 26 sites with previous Poweshiek skipperling records (Selby 2009a, pp. 1, 6). In 2008, 58 sites were surveyed in 13 counties, including 22 sites with prior records (Selby 2009a, pp. 1, 6). A total of 34 sites with previous Poweshiek skipperling records were surveyed in both years combined. Poweshiek skipperling presence was recorded on only three of the 70 surveyed sites in 2007; each of these three sites had just one confirmed individual (Selby 2009a, p. 1). The 2008 surveys documented no Poweshiek skipperling records on any of the 58 sites surveyed (Selby 2009a, p. 1).

An extensive survey effort was also completed in 1993 and 1994 (Schlicht and Saunders 1994, entire; Schlicht and Saunders 1995, entire). During those surveys, Poweshiek skipperlings were found in 11 of 19 sites on which it had been previously recorded and in 13 new sites, for a total of 25 of 63 surveyed prairie sites; the species was present at 30 and 39 percent of the sites in 1993 and 1994, respectively (Schlicht and Saunders 1995, pp. 5–7). These results contrast sharply with those from the surveys conducted in 2007 and 2008, when the species was found at four and zero percent of sites, respectively. Although the species was apparently more common in 1993 and 1994, numbers of Poweshiek skipperling found during surveys were typically low. Large numbers were observed at only three sites (Schlicht and Saunders 1995, p. 4). At one of these sites, Glynn Prairie, 25 Poweshiek skipperling were recorded during a 50-minute survey in July 1993 (Schlicht and Saunders 1995, data sheet); no Poweshiek skipperling were observed at this site during the 2007 survey despite good survey conditions (Selby 2009a, p. xxxv).

In 2007, multiple transect surveys were conducted in four sites with previously well-documented Poweshiek skipperling populations—transects totaling 52,985 m (33 mi) were surveyed without observing a single Poweshiek skipperling (Dana 2008, p. 5). About half of these transects (totaling 20,959 m (13 mi)) were in Prairie Coteau Scientific and Natural Area (SNA), where in 1990 Selby recorded 116 Poweshiek skipperlings during the flight peak (Selby and Glenn-Lewin 1990, pp. 19–20) along a total of about 6,250 m (4 mi) of transects (Dana 2008, p. 16). No Poweshiek skipperling were observed during surveys of the Prairie Coteau SNA in 2012 (Runquist 2012, pp. 9–10).

Additional surveys were conducted in 2012, however, Poweshiek skipperling were not observed at any of the 18 sites with relatively recent records (Runquist 2012, pp. 4–25; Selby 2012, p. 2; Selby 2013, p. 2; Dana 2012c, pers. comm.; Runquist 2012a, pers. comm.; Olsen 2012a, pers. comm.). Fifteen additional prairie sites with potential habitat or records of other skippers were surveyed in 2012, but no Poweshiek skipperling were observed (Runquist 2012, pp. 4–25; Selby 2012, p. 2; Selby 2013, p. 2; Dana 2012c, pers. comm.; Runquist 2012a, pers. comm.; Olsen 2012a, pers. comm.).

Nearly half (approximately 48 percent) of all documented Poweshiek skipperling sites rangewide are in Minnesota, thus the apparent collapse of large numbers of Poweshiek skipperling populations across the State may pose a significant challenge for the long-term existence of this species. Although the possibility remains that the species is extant at some sites where recent (2007, 2008, or 2012) surveys were negative, it seems unlikely that it is present at those sites in any significant numbers. Extensive surveys in 1993 and 1994 documented the species at about 35

percent of all surveyed sites, whereas the 2007 effort found them at only about 2 percent of all sites surveyed; no Poweshiek skipperling were detected despite widespread and robust survey efforts involving multiple observers in 2008 or 2012 (Dana 2008, p. 8; Selby 2009a, p. 1; Dana 2012c, pers. comm.; Runquist 2012a, pers. comm.; Olsen 2012, pers. comm.; Runquist 2012, pp. 4–25; Selby 2012, p. 2, 2013, p. 2).

To summarize, Poweshiek skipperling was historically documented in approximately 142 sites in Minnesota (Table 2). The species is not considered to be present at any of these sites (Table 2). The occupancy is unknown at 67 sites, and the species is considered to be extirpated or possibly extirpated at 7 and 68 sites, respectively (Table 2).

North Dakota

North Dakota historically contained approximately 6 percent (N=17) of all known records of Poweshiek skipperlings rangewide (Table 2). Poweshiek skipperlings have been historically documented at 17 sites (Table 2) in 7 North Dakota counties (Selby 2010, p. 18; Service 2013, unpubl. geodatabase): Cass, Dickey, LaMoure, Ransom, Richland, and Sargent in the southeastern corner of the State and Grand Forks County in the Northeast. Poweshiek skipperling are now considered extirpated or possibly extirpated from seven sites and four counties (Cass, Dickey, LaMoure, and Grand Forks) in North Dakota. The status of the species is unknown at 10 sites, where the species was last observed between 1996 and 2001, but not during the most recent 1–2 year(s) surveyed. The status of the species is also unknown at one site where the species was observed in 1996 with no recent surveys for the species, but the habitat was recently rated as poor (Service 2013, unpubl. geodatabase). Four sites with fairly recent Poweshiek skipperling records were surveyed in 2012; Poweshiek skipperling were not found at any of those sites (Royer and Royer 2012b, pp. 21–24; Royer and Royer 2012a, p. 6). One additional site was surveyed, which had the potential for Poweshiek skipperling presence because of its proximity to a known site for the species; however, no Poweshiek skipperling were found (Royer and Royer 2012b, pp. 18–19; Royer and Royer 2012a, p. 6; Royer 2012b, pers. comm.).

The Poweshiek skipperling was known from seven North Dakota sites across six counties in the 1990s; however, only two of those sites were considered to have extant populations at that time; three records were represented by incomplete or ambiguous locality data and the species was assumed to be extirpated at one site (Royer and Marrone 1992b, pp. 8–11). Surveys conducted in the State after 1992 documented additional populations, but the most recent surveys at these sites were mostly negative. Orwig discovered eight new populations of Poweshiek skipperling (six in Richland County and two in Sargent County) during three years of survey work (1995–1997) in southeast North Dakota (Orwig 1995, pp. 3–4; Orwig 1996, pp. 4–6, 9–12; Orwig 1997, p. 2). The species was found at two of the eight sites surveyed in 1997 (Orwig 1997, p. 2) and at two additional sites in 1996 (Spomer 2004, p. 11).

Once abundant at several known sites in North Dakota, Poweshiek skipperlings have experienced a dramatic decline over the last few decades. In 1977, McCabe and Post (1977a, p. 38), for example, found Poweshiek skipperling to be abundant at McLeod Prairie in Ransom County, stating that they could ''be collected two at a time on the blossoms of Long-headed coneflower…'' In six years of subsequent monitoring (1986–1991), however, Royer failed to find a single Poweshiek skipperling at the site after it was converted to a cattle-loading area (Royer and Marrone 1992b, p. 10). Royer and Marrone (1992b, pp. 10–11) assumed the species had been extirpated at this site. Similarly, the number of Poweshiek skipperlings recorded during surveys at the West Prairie Church site along the boundary of Cass and Richland counties, fell from hundreds in 1986, to four in 1990 and zero in 1991 and 2012 (Royer and Marrone 1992b, p. 8; Royer and Royer 2012b, p. 21). Poweshiek skipperlings are unlikely to persist at this small and isolated site (Royer and Royer 2012b, p. 21; Royer 2012c, pers. comm.).

The last observation of a live Poweshiek skipperling in North Dakota was in 2001, at a new site discovered by Spomer (2001, p. 9) in Ransom County. Poweshiek skipperlings were not found in subsequent surveys at this site in 2002, 2003, and 2012 (Spomer 2001, p. 2; Spomer 2002, p. 3; Spomer 2004 p. 36; Selby 2010, p. 18; Royer and Royer 2012b, p. 22), although the 2012 survey may have been conducted too late in the year to detect the species at that site (Royer 2012b, pers. comm; Royer 2012d, pers. comm.). Therefore, the status of the species at this site is unknown.

To summarize, Poweshiek skipperling was historically documented in 17 sites in North Dakota (Table 2). The species is not considered to be present at any of these sites (Table 2). The occupancy is unknown at 10 sites, and the species is considered to be extirpated or possibly extirpated at 1 and 6 sites, respectively (Table 2).

South Dakota

South Dakota historically contained approximately 24 percent (N=70) of all known records of Poweshiek skipperlings rangewide (Table 2). The Poweshiek skipperling has been historically documented at approximately 70 sites (Table 2) across 10 counties in South Dakota (Selby 2010, p. 19). Based on expert review and additional survey and habitat information, the status of the species was determined to be unknown at 48 sites and presumed extirpated at the remaining 22 sites (Table 2); at least 8 of the extirpated sites have been destroyed by conversion, gravel mining, loss of native vegetation, flooding, or heavy grazing (Skadsen 2012c, pers. comm.).

The Poweshiek skipperling was not detected at any site that was surveyed between 2009 and 2012: 6 sites in 2009, 10 sites in 2010, 1 sites in 2011, and 10 sites in 2012 (Skadsen 2009, p. 12; Skadsen 2011, p. 5; Skadsen 2010, pers. comm.; Skadsen 2012a, pers. comm.; Skadsen 2012, p. 3). The 2009 to 2012 results are in marked contrast to surveys conducted in 2002 when the species was recorded at 23 of 24 sites surveyed (Skadsen 2003, pp. 11–45). Cool and wet weather may have depressed butterfly populations, in general, in eastern South Dakota and west-central Minnesota in 2009 as it apparently did in 2004 (Skadsen 2004, p. 2; Skadsen 2009, p. 2).

Wisconsin

Wisconsin historically contained approximately 1 percent (N=4) of all known records of Poweshiek skipperlings rangewide (Table 2). Naturalists reported Poweshiek skipperling to be common to abundant on prairies in southeastern Wisconsin in the late 1800s (*e.g.,* in Milwaukee and Racine Counties), although exact localities are unknown (Borkin 2011, in litt.; Selby 2010, p. 22). By 1989, however, the species was listed as State endangered (Borkin 2011, in litt.). The Poweshiek skipperling is considered to be present at three sites in Wisconsin (Table 2); two sites are within the Southern Unit of the Kettle Moraine State Forest in Waukesha County. The third site, Puchyan Prairie State Natural Area (SNA), is approximately 100 km (62 mi) to the northwest of the Kettle Moraine State Forest in Green Lake County. The status of the species is unknown at another site within the

Kettle Moraine State Forest. An additional 2010 record of a butterfly was incorrectly identified as a Poweshiek skipperling at Melendy's Prairie Unit of the Scuppernong Prairie SNA (Borkin 2012b, pers. comm.).

The two occurrences of Poweshiek skipperling in the Kettle Moraine State Forest inhabit small areas that were once part of a larger prairie complex, which was fragmented by conversion to agriculture, other human development, and encroachment of woody vegetation (Borkin 2011, in litt.). The larger of the two populations at Kettle Moraine State Forest inhabits a 6-ha (15-ac) prairie remnant on Scuppernong Prairie SNA, which had record counts exceeding 100 individuals in 1994, 1995, 1998, and 1999 (Borkin 1995a, p. 10; Borkin 1996, p. 7; Borkin 2000b, p. 4; Borkin 2011, in litt.). Four were found in 2007 (Borkin 2008, in litt., p. 1), although these data were collected during a single transect survey that may have been early in the flight season and are, therefore, not comparable to other survey years (Borkin 2012a, pers. comm.). A maximum count of 42, 17, 63, and 45 were counted in 2009, 2010, 2011, and 2012, respectively (Borkin 2011a, pers. comm.; Borkin 2012c, pers. comm.). There was some concern that a controlled burn in late March of 2012 may correlate with lower numbers observed during the 2012 flight (Borkin 2012a, pers. comm.); however, this difference is within the range of variation observed over the previous four years (Wisconsin DNR 2012, in litt.).

After brush was cleared from the area in 2002, a small number of Poweshiek skipperlings were discovered the following year in a small isolated prairie remnant patch at a second site in the Kettle Moraine State Forest, (Borkin in litt. 2008). Once the intervening woody growth was removed, individuals presumably dispersed from the Scuppernong SNA remnant prairie to a small habitat patch about 200 ft (61 m) away (Borkin 2012a, pers. comm.). Surveys at each habitat patch have consistently yielded counts of less than 10 (Borkin 2008, in litt.), with a combined high count of 11 to 15 individuals in 2011. A total of six individuals, with a high single day count of three, were observed in eight surveys during 2012 (Borkin 2012c, pers. comm.; Borkin 2012a, pers. comm.).

The status of the Poweshiek skipperling is unknown at a third and much larger fragment of Kettle Moraine State Forest, the Kettle Moraine Low Prairie SNA, which is adjacent to the Wilton Road site. The Kettle Moraine Low Prairie SNA was overgrown by shrubs including willows (*Salix spp.*), quaking aspen (*Populus tremuloides*), and glossy buckthorn *(Frangula alnus*) and has been managed with a series of controlled burns, in addition to a 1975 wild fire (Borkin 2011, in litt; Borkin 2012a, pers. comm.; Wisconsin DNR 2012, in litt). The highest number recorded at the Kettle Moraine Low Prairie SNA was 28 on July 8, 1995 (Borkin 2012a, pers. comm.). Preliminary attempts in 2000 to 2003 to augment the population with adults from Scuppernong SNA and captive-reared larvae were not successful (Borkin 2012a, pers. comm.). A single Poweshiek skipperling was sighted there on July 2, 2004, but none were found in surveys conducted in 2007–2009 and 2011–2012 (Borkin 2011b, pers. comm.; Borkin 2012a and 2012c, pers. comm.). Two Poweshiek skipperlings were recorded in 2010 at this site (Wisconsin DNR2012, in litt.); however, there were no photographs or voucher specimens to confirm the sighting. This site was surveyed less intensively than Scuppernong Prairie, because of the species' relatively low density and abundance at Kettle Moraine Low Prairie SNA (Borkin 2012a, pers. comm.). Extensive brush cutting, additional burns, and restoration of the hydrology have been undertaken in recent years (Borkin 2012a, pers. comm.).

Poweshiek skipperlings are present at a third site in Wisconsin, Puchyan Prairie SNA, in Green Lake County, although this population is small and declining (Borkin 2009, pers. comm.). The Poweshiek skipperling was first discovered at Puchyan Prairie in 1995, and 6 to 30 individuals have been recorded in subsequent surveys (Borkin 2008, in litt.; Swengel 2012, pers. comm). In 2012, Swengel (2012, pers. comm.) found a maximum of three individuals, despite several hours of searching over three days.

Additional sites in eight counties (Crawford, Grant, Iowa, Jefferson, Monroe, Rock, Sauk, and Walworth) have been surveyed in an attempt to find undiscovered Poweshiek skipperling populations. Four of the eight sites surveyed in 1998 and 1999 seemed to have adequate host plants, nectar resources, and size typical of Poweshiek skipperling habitat, but Poweshiek skipperling were not present at any of the sites (Borkin 2000b, pp. 5–7).

To summarize, Poweshiek skipperling was historically documented in 4 sites in Wisconsin (Table 2). The species is considered to be present at three sites and the occupancy is unknown one site (Table 2).

Manitoba

Manitoba historically contained less than 1 percent (N=1) of all known records of Poweshiek skipperlings rangewide (Table 2); however, multiple Poweshiek skipperling historical records occur in one general location—a complex of several nearby small sites within the Tallgrass Prairie Preserve—in far southern Manitoba, near the United States border. Poweshiek skipperlings were first recorded in Canada near Vita, Manitoba, in 1985 at each of seven prairies surveyed, and populations were described as abundant but localized (Catling and Lafontaine 1986, p. 63). Poweshiek skipperlings were found at 15 of 18 locations surveyed within the same area in 2002 (COSEWIC 2003, p. 5).

The Poweshiek skipperling is currently present at one location in Canada, The Nature Conservancy's Tall Grass Prairie Preserve near Vita, Manitoba (Westwood 2010, p. 2; Westwood *et al.* 2012, p. 1; Hamel *et al.* 2013, p. 1). Poweshiek skipperlings were historically moderately common in areas of the preserve (Klassen *et al.* 1989, p. 27). In 2002, Webster (2003, p. 5) counted approximately 150 individuals, and in 2006, approximately 126 individuals were sighted across 10 sites (Westwood 2010, p. 3). Surveys of 10 sites in 2008 and 2009 yielded 281 and 79 Poweshiek skipperlings, respectively (Dupont 2010, pers. comm.). Poweshiek skipperling numbers in the preserve declined sharply after a 647-ha (1,600-ac) wildfire in fall 2009 burned much of the species' habitat, including areas that likely contained the largest and highest density populations (Westwood 2010, p. 2); surveys of comparable effort to the 2008 and 2009 surveys yielded only 13 Poweshiek skipperlings on the preserve in 2010 (Westwood 2010, pp. 7–22). Surveys of 45 sites within the Tall Grass Prairie Reserve during 2011 resulted in 13 sites with positive sightings, 9 of which were new sites (Westwood *et al.* 2012, p. 11; Dupont 2011, pers. comm.). The average number of Poweshiek skipperlings found at each site ranged from 10 to 15 per hour. These numbers are up considerably from 2010, but not as high as observed in 2008 (Dupont 2011, pers. comm.). In 2012, a total of 50 individuals were observed, which was ''low when compared to historic densities'' (Hamel *et al.* 2013, p. 17). The preserve has detailed management recommendations to facilitate recovery of the Poweshiek skipperling (Westwood 2010, p. 5).

Following an assessment and status report completed in 2003 under the Committee on the Status of Endangered Wildlife in Canada (COSEWIC), the Poweshiek skipperling was listed under the Species at Risk Act as Threatened in Canada in July 2005 (COSEWIC 2003). A recovery strategy is now in place for the species in Canada (Environment Canada 2012), which includes critical habitat designations within and adjacent to the Tall Grass Prairie Preserve (Environment Canada 2012, p. ii).

Summary of Factors Affecting the Species

Section 4 of the Act (16 U.S.C. 1533), and its implementing regulations at 50 CFR Part 424, set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. Under section 4(a)(1) of the Act, we may list a species based on any of the following five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; and (E) other natural or manmade factors affecting its continued existence. Listing actions may be warranted based on any of the above threat factors, singly or in combination. Each of these factors is discussed below.

We evaluated the level of impact to the population at each site of stressors at 170 Dakota skipper sites where the occupancy status of the site is considered to be present or unknown, as defined in the Background section of this rule. These 170 sites are found across the current range of the species in Minnesota, North Dakota, and South Dakota. Two Dakota skipper sites with an unknown or present occupancy were not evaluated. To determine the levels of impact to the population at each site, we used the best available and most recent information for each site, including reports, discussions with site managers, information from natural heritage databases, etc. (Service 2012, unpubl. data; Service 2013, unpubl. geodatabase). We only evaluated a stressor to the population at any one site if we had sufficient information to determine if the level of impact was high, medium, or low as defined for each stressor below; therefore, the number of sites evaluated varies with each stressor.

We evaluated the level of impact to the species from stressors at 68 Poweshiek skipperling sites where the occupancy status of the site is considered to be present or unknown, as defined in the Background section of this proposed rule. Although we did not evaluate every stressor at all 145 Poweshiek skipperling sites with present or unknown occupancy, the 68 sites that were evaluated are representative of all those sites in terms of geography (sites in Iowa, Michigan, Minnesota, North Dakota, South Dakota, and Wisconsin were evaluated), ownership, and management. To determine the levels of impact to the population at each site, we used the best available and most recent information, including reports, discussions with site managers, and information from natural heritage databases (Service 2012, unpubl. data; Service 2013, unpubl. geodatabase). We only evaluated a particular stressor at any one site if we had sufficient information to determine if the level of impact was high, medium, or low (as defined below); therefore, the number of sites evaluated varies with each stressor.

Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

Habitat quality is a powerful determinant of extinction probability in butterflies such as the Dakota skipper and Poweshiek skipperling (Thomas *et al.* 2001, p. 1795). Among butterfly species in the United Kingdom, for example, equilibrium density of butterflies at sites with optimum habitat are from 25 to more than 200 times greater than those for occupied sites with suboptimal, yet suitable, habitat (Thomas 1984, cited in Thomas *et al.* 2001, p. 1794). Consistently good habitat quality is especially important for Dakota skipper and Poweshiek skipperling isolated populations, which would not be naturally recolonized if they were extirpated. Protection or restoration of habitat quality at these isolated sites is critical to the survival of both species, although stochastic events still pose some risk, especially for smaller populations and at small sites.

The Poweshiek skipperling and Dakota skipper depend on a diversity of native plants endemic to tallgrass prairies and, for the Poweshiek skipperling in Michigan, prairie fens. When nonnative or woody plant species become dominant, Poweshiek skipperlings and Dakota skippers decline due to insufficient sources of larval food and nectar for adults. For example, at Wike Waterfowl Production Area in Roberts County, South Dakota, the extirpation of Poweshiek skipperling is attributed to the deterioration of native vegetation, in particular, the loss of nectar sources for adult butterflies due to invasive species encroachment (Skadsen 2009, p. 9).

Destruction of native tallgrass and mixed-grass prairie began in 1830 (Samson and Knopf 1994, pp. 418–419). Extant populations of Dakota skipper and Poweshiek skipperling are restricted to native prairie remnants and prairie fens; native prairies have been reduced by 85 to 99.9 percent of their former area throughout the historical range of both species (Samson and Knopf 1994, pp. 418–419). Degradation and destruction of habitat occurs in many ways, including but not limited to: conversion of native prairie to cropland or development; ecological succession to woody vegetation; encroachment of invasive species; past and present fire, haying, or grazing management that degraded or destroyed the species' habitats; flooding; and, groundwater depletion, alteration, and contamination, which are discussed in further detail below.

We evaluated the level of impact to the population at each site of several habitat-related stressors at 170 Dakota skipper sites where the occupancy status of the site is considered to be present or unknown, as defined in the Background section of this proposed rule (Table 3). These 170 sites are found across the current range of the species in Minnesota, North Dakota, and South Dakota. Two sites with an unknown or present occupancy were not evaluated. To determine the levels of impact to the population at each site, we used the best available and most recent information for each site, including reports, discussions with site managers, information from natural heritage databases, etc. (Service 2012, unpubl. data; Service 2013, unpubl. geodatabase). We only evaluated a stressor to the population at any one site if we had sufficient information to determine if the level of impact was high, medium, or low as defined for each stressor below. Similarly, the level of impact to the population was evaluated at 68 Poweshiek skipperling sites with present or unknown status (Table 4). Although we did not evaluate Factor A stressors at all 145 Poweshiek skipperling sites with present or unknown occupancy, the 68 sites that were evaluated are representative of all the present or unknown Poweshiek skipperling sites in terms of geography (range of the species, *i.e.,* sites in Iowa, Michigan, Minnesota, North Dakota, South Dakota, and Wisconsin were evaluated), ownership, and management. Many sites for both species (59 sites for Dakota skipper and 32 sites for Poweshiek skipperling) experience at least two habitat-related

stressors at a medium or high level of impact (Tables 3 and 4).

TABLE 3—NUMBER OF DAKOTA SKIPPER SITES WITH EACH LEVEL OF IMPACT AND THE TOTAL NUMBER OF SITES THAT WERE RATED FOR EACH TYPE OF STRESSOR—A TOTAL OF 170 DAKOTA SKIPPER SITES WITH EITHER PRESENT OR UNKNOWN STATUS WERE EXAMINED; ONLY SITES WITH SUFFICIENT DATA FOR A PARTICULAR STRESSOR WERE RATED AS HIGH, MEDIUM, OR LOW (SERVICE 2012 UNPUBL. DATA; SERVICE 2013, UNPUBL. DATA)

Stressor	High level of impact	Medium level of impact	Low level of impact	Total number of rated sites
Destruction & Conversion (Agricultural & Nonagricultural Development)	3	87	60	150
Wind Development	1	0	8	9
Flooding	0	6	6	12
Invasive Species	13	31	18	62
Fire	9	4	6	19
Grazing	10	29	14	53
Haying & Mowing	2	11	27	40
Lack of Management	10	5	3	18
Size/Isolation	50	35	58	143
Herbicide and/or Pesticide Use	5	2	9	16

TABLE 4—NUMBER OF POWESHIEK SKIPPERLING SITES WITH EACH LEVEL OF IMPACT AND THE TOTAL NUMBER OF SITES THAT WERE RATED FOR EACH TYPE OF STRESSOR—A TOTAL OF 68 POWESHIEK SKIPPERLING SITES WITH EITHER PRESENT OR UNKNOWN STATUS WERE EXAMINED; ONLY SITES WITH SUFFICIENT DATA FOR A PARTICULAR STRESSOR WERE RATED AS HIGH, MEDIUM, OR LOW (SERVICE 2012 UNPUBL. DATA; SERVICE 2013, UNPUBL. DATA)

Stressor	High level of impact	Medium level of impact	Low level of impact	Total number of rated sites
Destruction & Conversion (Agricultural & Nonagricultural Development)	1	13	40	54
Wind Development	0	0	6	6
Flooding/Hydrology	2	4	14	20
Invasive Species	9	30	12	51
Fire	7	3	14	24
Grazing	7	14	2	23
Haying & Mowing	0	3	7	10
Lack of Management	5	6	2	13
Size/Isolation	25	24	19	68
Herbicide and/or Pesticide Use	3	1	6	10

Destruction and Conversion of Prairies

Destruction and Conversion of Prairies to Agricultural Land

Conversion of prairie for agriculture may have been the most influential factor in the decline of the Poweshiek skipperling and Dakota skipper since Euro-American settlement, but the threat of such conversion to extant populations is not well known and may now be secondary to other threats. By 1994, tallgrass prairie had declined by 99.9 percent in Illinois, Iowa, Indiana, North Dakota, Wisconsin, and Manitoba; and by 99.6 percent in Minnesota; and 85 percent in South Dakota (Samson and Knof 1994, p. 419). Samson and Knof (1994, p. 419) did not provide a figure for the decline of tallgrass prairie in Saskatchewan, but mention an 81.3 percent decline in mixed grasses from historical levels. By 1994, mixed-grass prairie had declined from historical levels by 99.9 percent in Manitoba and 71.9 percent in North Dakota (Samson and Knof 1994, p. 419). Destruction of tallgrass and mixed-grass prairie began in 1830, but significant documentation of the ecosystem's butterfly fauna did not begin until about 1960. Therefore, most of the decline of the Dakota skipper and Poweshiek skipperling probably went unrecorded.

Since about 1980, observers have documented the extinction of several populations of the Dakota skipper and Poweshiek skipperling due to habitat conversion to agricultural use in the United States and Canada. For example, four Dakota skipper sites in North Dakota were converted to irrigated potato fields, and one in South Dakota was converted for crop production (Royer and Marrone 1992a, p. 17). The Fannystelle site in Manitoba, where the Dakota skipper was last recorded in 1991, was subsequently converted for row-crop agriculture (Webster 2003, p. 7). In North Dakota, further conversion is a threat to Dakota skippers in the important Towner-Karlsruhe complex (Royer and Royer 1998, p. 22; Lenz 1999b, p. 13), where the flat topography and high water table facilitate conversion to irrigated crop production. Populations of Dakota skipper in Manitoba typically occupy flat terrain that may be vulnerable to conversion to cropland, although soil conditions may be unsuitable for row crops at some of these sites (Webster 2003, p. 10). Similarly, conversion of native prairie to cropland continues to be a threat to Poweshiek skipperling habitat throughout its range (Royer and Marrone 1992b, p. 17).

The Dakota skipper, and until recently, the Poweshiek skipperling, have largely persisted in areas that are relatively unsuitable for row crop agriculture because of their steep terrain (*e.g.,* in the Prairie Coteau of South Dakota) or where soils are too wet or rocky for row-crop agriculture (McCabe 1981, pp. 189–190, Webster 2003, p. 10). Densely spaced, large glacial rocks, for example, may have deterred cultivation

at the Chippewa Prairie in Minnesota and ''spared Chippewa Prairie in Minnesota from the plow'' (Dana 2012, pers. comm.). In areas where Poweshiek skipperling and Dakota skipper habitat persists but is adjacent to agriculture, added nutrients from agricultural runoff affects groundwater and additional nutrients in the system contribute to the dominance of invasive plants (Fiedler and Landis 2012, p. 51: Michigan Natural Features Inventory 2012, p. 4).

In summary, conversion for agriculture on lands suitable for such purposes is a current, ongoing stressor of high level of impact to the Poweshiek skipperling and Dakota skipper populations in areas where such lands still remain. Advances in technology may also increase the potential of conversions in areas that are currently unsuitable for agriculture.

We rated the level of impact to the populations of the stressor posed by habitat destruction or conversion for both agriculture and nonagricultural purposes (except for conversion for wind energy development, which was analyzed separately) at 150 Dakota skipper and 54 Poweshiek skipperling sites with present or unknown status (see Tables 3 and 4) where we had sufficient information to evaluate the stressor. In our evaluation of this stressor, we combined agricultural and nonagricultural impacts—our analyses are discussed below (see *Destruction and Conversion of Prairies due to Nonagricultural Development*).

Destruction and Conversion of Prairies to Nonagricultural Development

Conversion of prairie for nonagricultural land uses, such as energy development, gravel mining, transportation, and housing are stressors to both Poweshiek skipperling and Dakota skipper populations. For example, a site where the Dakota skipper and Poweshiek skipperling were recorded in 1997 (Skadsen 1997, pp. 15–16, B–1) in the Bitter Lake area of Day County, South Dakota, is now a gravel pit, and the species' habitat no longer exists there (Skadsen 2003, pp. 47–48).

Almost all prairie remnants with Poweshiek skipperling and Dakota skipper populations are associated with gravelly glacial till soils (Service 2013, unpubl. geodatabase); therefore, gravel mining is a potential stressor to populations at a large number of sites. Gravel mining is a stressor to Poweshiek skipperling and Dakota skipper populations at several sites in Minnesota (Dana 1997, p. 15). For example, gravel mining is a threat in at least three of the five sites that comprise the Felton Prairie complex (Cochrane and Delphey 2002, pp. 16–17); however, the Clay County Stewardship Plan (Felton Prairie Stewardship Committee 2002) may have reduced the likelihood of the gravel mining stressor to populations at this complex. On at least seven sites in Minnesota, Dakota skippers inhabit northern dry prairie plant communities, which are generally impacted by gravel mining due to the predominance of gravel soils (Minnesota DNR 2006, p. 221). Gravel mines are considered a stressor with a high level of impact to populations of both species because, where it occurs, the habitat is completely destroyed.

Energy development (oil, gas, and wind) and associated roads and facilities result in the loss or fragmentation of suitable prairie habitat (Reuber 2011, pers. comm.). Much of the Dakota skipper's range and some of the Poweshiek skipperling's range overlaps with major areas of oil and gas development, which have been increasing rapidly in parts of both species' ranges. North Dakota, for example, is now one of the top two oil-producing states in the United States, and new development is occurring rapidly (MacPherson 2012, p. 1; North Dakota Petroleum Council 2012, p. 1). The number of drilling permits in North Dakota nearly doubled between 2007 and 2008, from 494 permits issued in 2007 to 946 in 2008 (North Dakota Petroleum Council 2009, p. 2). Permits dropped to 627 in 2009 (North Dakota Petroleum Council 2010, p. 2), but increased dramatically to 1,676 in 2010 (Ogden 2011, p. 1). While much of the oil activity is currently occurring in areas of native prairie overlaying the Bakken and Three Forks formations to the west of known locations for both species, mineral exploration has occurred in all but one county in North Dakota (North Dakota Petroleum Council 2012, p. 1). McKenzie County falls in the center of this development and McHenry County is also within these formations (Mueller 2013, pers. comm.). The oil development on the Bakken formation in North Dakota, for example, is a future stressor to Dakota skipper populations in McKenzie County (Royer and Royer 2012b, p. 16). Oil company officials anticipate that production will continue to expand at record levels (MacPherson 2012, p. 1; MacPherson 2010, entire).

Native prairie habitat would be destroyed in the footprint of an oil and gas well pad, but the pads are relatively small. However, each oil and gas well pad requires new road construction, and evidence suggests that Poweshiek skipperlings may avoid crossing roads (Westwood *et al.* 2012, p. 18). Oil and gas development can double the density of roads on range lands (Naugle *et al.* 2009, pp. 11, 46), increase pipelines, and increase the number of gravel pits to accommodate the increased road construction (Mueller 2013, pers. comm.). In areas with ranching, tillage agriculture, and oil and gas development, 70 percent of the developed land was within 100 m (109 yards (yd)), and 85 percent of the developed land was within 200 m (218 yd), of a human structure (Naugle *et al.* 2009, p. 11). Researchers estimated that in those areas, every square km (0.39 square miles) of land may be both bounded by a road and bisected by a power line (Naugle *et al.* 2009, p. 11). The habitat fragmentation associated with oil and gas development may amplify other threats to both species, such as the effects of population isolation and the impacts of stochastic events.

Energy development has additional undesirable and potentially significant cumulative impacts on wildlife. Catastrophic events, such as oil and brine spills, could cause direct mortality of Dakota skipper or Poweshiek skipperling larvae that are in shelters at or below the soil surface. Such spills may also cause the loss of larval host and nectar plants in the spill path. Additional plants may be lost during spill response, particularly if the response involves burning. No such spills are known to have occurred in the region, however, and the likelihood of spills occurring on the small fraction of land that remains native tallgrass prairie in North Dakota (less than one percent according to Samsom and Knoff 1994, p. 419) is low.

Wind energy turbines and associated infrastructure (*e.g.,* maintenance roads) are likely stressors to Dakota skipper and Poweshiek skipperling populations, particularly on private land in South Dakota (Skadsen 2002, p. 39; Skadsen 2003, p. 47; Skadsen 2012d, pers. comm.). Similar to oil and gas development, wind development would destroy native prairie habitat in the footprint of the structure, add access roads and other infrastructure that may further fragment prairies, and could be catalysts for the spread of invasive species. Further, it is unknown if the noise and flicker effects associated with wind turbines may impact Dakota skipper or Poweshiek skipperling populations beyond direct impacts from the turbines and/or infrastructure. Other wildlife species, such as birds, have shown significant avoidance of grasslands where wind development has occurred (Pruett *et al.* 2009, p. 1256;

Shaffer *et al.* 2012, p.). Wind development was assessed at nine Dakota skipper sites and six Poweshiek skipperling sites where we had sufficient information. The level of threat was considered to be low at most sites because although the site may be in an area with the potential for wind development, there are no specific plans or proposals to develop wind power on the site. Wind development is considered a stressor of high level of impact to populations at sites where development is proposed and there are no actions or plans to mitigate impacts to the species. For example, a wind facility was recently proposed at a Dakota skipper site in South Dakota (Skadsen 2012d, pers. comm.), which poses a high-level threat for the species at that site because there are no plans to mitigate impacts of habitat destruction. Although wind power development currently poses a high level of impact to the population at only one site, the extent of this threat will likely increase in the future, due to the high demand for wind energy and the number of Dakota skipper and Poweshiek skipperling sites that are conducive to wind development (*e.g.,* Skadsen 2003, pp. 47–48). Furthermore, power distribution lines may be developed in order to accommodate the added power of wind farms, for instance, a new power line is currently being planned in the Prairie Coteau in South Dakota for that purpose (Mueller 2013, pers. comm.).

Housing construction has likely contributed to the loss of at least two Poweshiek skipperling populations in Michigan, and the largest extant population in Michigan is located in an area under intense development pressure (Michigan Natural Features Inventory 2011, unpubl. data). Residential wells and drainage disrupt prairie fen hydrology by reducing water levels and thus, facilitating rapid growth of woody vegetation. In addition, nutrients added to the groundwater from leaking septic tanks contribute to the dominance of invasive plants, such as narrow-leaved cattail (*Typha angustifolia*) and red canary grass (*Phalaris arundinacea*) (Michigan Natural Features Inventory 2012, p. 4).

Road construction impacts Poweshiek skipperling and Dakota skipper habitat because it increases the demand for gravel, and as a result of routine maintenance (*e.g.,* broadcast herbicide applications, early mowing, and cleaning out ditches), improvements (*e.g.,* widening roads or converting two-lane highways to four-lane highways), or new construction. Poweshiek skipperling habitat was destroyed or degraded on at least two private properties in Roberts County, South Dakota, for example, in association with the widening of U.S. Highway 12 (Skadsen 2003, p. 47). Roadside prairie remnants can help support populations of both species and serve as dispersal corridors between larger remnants; therefore, loss of these areas to road expansion or construction further reduces and fragments remaining habitat.

In summary, nonagricultural development, such as gravel mining, activities associated with energy development, or housing and road development, poses a current stressor of moderate to high impact to populations on those lands that are not protected from destruction or conversion through a conservation easement or fee title ownership by a conservation agency. This type of development may become more widespread as such practices increase in the future.

As discussed above in *Destruction and Conversion of Prairies to Agricultural Land,* we rated the level of impact to the populations of the stressor posed by habitat destruction or conversion for both agriculture and nonagricultural purposes combined (except for conversion for wind energy development, which was analyzed separately) at 150 Dakota skipper sites with present or unknown status (see Table 3) where we had sufficient information to evaluate the stressor. The level of impact of each stressor to the population at each site is high at three of those sites, due to ongoing destruction of the native prairie or there was a high likelihood of conversion because it is located close to other converted areas and the land is conducive for agriculture. The level of threat is high at 3 sites, moderate at 87 sites, and 60 sites are protected from destruction or conversion through a conservation easement or fee title ownership by a conservation agency (Table 3). This stressor occurs across the range of the Dakota skipper; the stressor has a medium to high level of impact to Dakota skipper populations in Minnesota, North Dakota, South Dakota, Manitoba, and Saskatchewan. The level of impact was considered to be low if the site is protected from destruction or conversion by fee title ownership by a governmental conservation agency, nongovernmental conservation organization (*e.g.,* The Nature Conservancy), or educational institution (*e.g.,* South Dakota State University). Similarly, 54 Poweshiek skipperling sites with present or unknown status were assessed that had sufficient information: The level of threat was high at one site and moderate at 13 sites, and 40 sites are protected from destruction or conversion through a conservation easement or fee title ownership by a conservation agency (Table 4). At least 5 of the 14 sites where the Poweshiek skipperling is considered to still be present have a medium risk of conversion. This stressor occurs across most of the Poweshiek skipperling range; the stressor has a medium to high level of impact to Poweshiek skipperling populations in Iowa, Michigan, Minnesota, and South Dakota; the level of impact is low for the species at the Manitoba location.

Fluctuating Water Levels

Flooding is a threat to Poweshiek skipperlings and Dakota skippers at sites where too much of the species' habitat is flooded or where patches are flooded too frequently. Poweshiek skipperlings and Dakota skippers must either survive flooding events in numbers sufficient to rebuild populations after the flood or recolonize the area from nearby areas that had not flooded. In addition, the return interval of floods must be infrequent enough to allow for recovery of the populations between floods. Changes in hydrology resulting from wetland draining and development may permanently alter the plant community and, therefore, pose a threat to Poweshiek skipperling and Dakota skipper due to loss of larval food and nectar sources.

The Dakota skipper and Poweshiek skipperling are presumed extirpated from several sites due to flooding or draining. For example, one Dakota skipper site was lost to flooding due to rising water levels at Bitter Lake, South Dakota (Skadsen 1997, p. 15). At Whalen Lake Fen in Michigan, dredging and channelization disrupted the hydrology of the site and the fen has since been invaded by glossy buckthorn and narrow leaf cattail; Poweshiek skipperlings are presumed to be extirpated from the site (Michigan Natural Features Inventory 2011, unpubl. data).

Fluctuating water levels are a current stressor to populations across both species' ranges. Loss of habitat or direct mortality due to fluctuating water levels, such as permanent flooding or wetland draining is a current stressor to populations in at least 12 Dakota skipper sites with present or unknown status and 20 Poweshiek skipperling sites with present or unknown status. For example, one of the three sites with present or unknown status of Poweshiek skipperling in Wisconsin, Puchyan Prairie, is subject to flooding—the entire prairie portion of the site was

submerged in 1993 (Hoffman 2011, pers. comm.; Wisconsin DNR 2012, in litt). The number of Poweshiek skipperling observed at that site is consistently low. Flooding is a likely factor that has contributed to the low numbers observed in at least part of this site (Borkin 2012c, pers. comm.).

Conversely, groundwater disruption and draining is a stressor at all 10 of the Michigan prairie fen Poweshiek skipperling sites where the species is present and one with unknown occupancy (Service 2013, unpubl. data). Interrupted groundwater flow-through fens can reduce water levels and facilitate woody vegetation establishment and growth (Michigan Natural Features Inventory 2012, p. 4). Agricultural and residential drains and wells can lower the groundwater table, thereby reducing the supply of calcareous seepage, which is an essential underlying component of prairie fen hydrology (Michigan Natural Features Inventory 2012, p. 4). Furthermore, nutrient additions associated with drain fields can contribute to invasive species encroachment. For instance, if groundwater flow to prairie wetlands is severed, fen habitats may convert from native grasses and flowering forbs to habitats dominated by invasive species or woody vegetation (Fiedler and Landis 2012, p. 51, Michigan Natural Features Inventory 2012, p. 4). The site with the highest number of Poweshiek skipperlings in Michigan, for instance, is partially bordered by residential areas and is under intense development pressure (Michigan Natural Features Inventory 2011, unpubl. data). At least 8 of the 11 fen sites with present or unknown status are at least partially unprotected from development, and at least 7 of those are closely bordered by roads, agriculture, or residential developments (Michigan Natural Features Inventory 2011, unpubl. data; Service 2013, unpubl. geodatabase). The status of Poweshiek skipperling is unknown at one fen site where the hydrology was likely disrupted by roads and extensive residential development in close proximity to the fen (Michigan Natural Features Inventory 2011, unpubl. data).

The level of impact to populations due to flooding was assessed at 12 Dakota skipper sites with present or unknown status that had sufficient information to evaluate the stressor (Table 3); this evaluation only included sites in North and South Dakota. Flooding is a stressor of moderate-level impact to populations at 6 of the sites, where there is evidence of recent or pending decrease in the quality or extent of suitable habitat at the site due to a change in wetland vegetation, wetland hydrology, or flooding—all of these sites occur in North Dakota (Service 2012 unpubl. data; Service 2013, unpubl. data). Similarly, we assessed 20 Poweshiek skipperling sites with present or unknown occupancy for the level of impact to populations due to water fluctuations (*e.g.,* flooding or draining) where we had sufficient information to evaluate the stressor (Table 4). Flooding is a stressor with moderate impact to the populations at 3 Poweshiek skipperling sites (including a site in Wisconsin—one of the 14 Poweshiek skipperling sites with a present status), and changes to hydrology is a stressor of moderate- to high-level impact to populations at all 11 Michigan sites (including 10 of 14 Poweshiek skipperling sites that have a present status) and 1 site in North Dakota (Service 2012 unpubl. data; Service 2013, unpubl. data).

In summary, fluctuating water levels is a current and ongoing stressor of moderate level of impact to populations where the habitat may be temporarily lost due to intermittent flooding and is a threat of high severity where a change in hydrology may completely degrade the habitat quality of a site, particularly prairie fens.

Invasive Species and Secondary Succession

Poweshiek skipperlings and Dakota skippers typically occur at sites embedded in agricultural or developed landscapes, which make them more susceptible to nonnative or woody plant invasion. Nonnative species including leafy spurge, Kentucky bluegrass, alfalfa, glossy buckthorn, smooth brome, purple loosestrife (*Lythrum salicaria*), Canada thistle (*Cirsium arvense*), reed canary grass, and others have invaded Poweshiek skipperling and Dakota skipper habitat throughout their ranges (Orwig 1997, pp. 4, 8; Michigan Natural Features Inventory 2011, unpubl. data; Skadsen 2002, p. 52; Royer and Royer 2012b, pp. 15–16, 22–23). Leafy spurge and Kentucky bluegrass have been cited as one of the major threats to native prairie habitat at several public and privately owned Dakota skipper sites in North Dakota (Royer and Royer 2012b, pp. 15–16, 22–23; Royer 2012, pers. comm.). Once these plants invade a site, they replace or reduce the coverage of native forbs and grasses used by adults and larvae of both butterflies. Leafy spurge displaces native plant species, and its invasion is facilitated by actions that remove native plant cover and expose mineral soil (Belcher and Wilson 1989, p. 172). The seasonal senescence patterns (timing of growth) of grass species as they relate to the larval period of Dakota skippers determine which grass species are suitable larval host plants. Exotic cool season grasses, such as Kentucky bluegrass and smooth brome, are not growing when Dakota skipper and Poweshiek skipperling larvae are feeding, thus a prevalence of these grasses reduces food availability for the larvae.

The stressor from nonnative invasive herbaceous species is compounded by the encroachment of woody species into native prairie habitat. Glossy buckthorn and gray dogwood encroachment, for example, is a major stressor to Poweshiek skipperling populations at the Brandt Road Fen in Michigan, which supports the second largest population of Poweshiek skipperlings in the State (Michigan Natural Features Inventory 2011, unpubl. data). Invasion of tallgrass prairie and prairie fens by woody vegetation such as glossy buckthorn reduces light availability, total plant cover, and the coverage of grasses and sedges (Fiedler and Landis 2012, pp. 44, 50–51). This in turn reduces the availability of both nectar and larval host plants for Poweshiek skipperlings and Dakota skippers. If groundwater flow to prairie wetlands is disrupted (*e.g.,* by development) or intercepted (*e.g.,* digging a pond in adjacent uplands or installing wells for irrigation or drinking water), it can quickly convert to shrubs or other invasive species (Fiedler and Landis 2012, p. 51; Michigan Natural Features Inventory 2012, p. 4). For example, roads and residential development likely disrupted the hydrology of a prairie fen where the Poweshiek skipperling was last observed in 2007 and where 2008 and 2009 surveys for Poweshiek skipperlings were negative (Michigan Natural Features Inventory 2011, unpubl. data). Furthermore, on some sites, land managers intentionally facilitated succession of native-prairie communities to woody vegetation or trees, such as Ponderosa pine (*Pinus ponderosa*) or spruce (*e.g.,* Dana 1997, p. 5). This converts prairie to shrubland, forest, or semi-forested habitat types and facilitates invasion of adjacent native prairie by exotic, cool-season grasses, such as smooth brome. Moreover, the trees and shrubs provide perches for birds that may prey on the butterflies (Royer and Marrone 1992b, p. 15; 1992a, p. 25).

We rated the level of impact to populations of invasive species at 62 Dakota skipper sites and 51 Poweshiek skipperling sites that had sufficient information to evaluate the stressor (Table 3 and Table 4; Service 2012

unpubl. data; Service 2013, unpubl. data). This stressor is considered to have a low level of impact to the populations if there was either no information to indicate a stressor or management was ongoing to control invasive species using methods that are unlikely to cause adverse effects to Dakota skippers or Poweshiek skipperlings (*e.g.,* spot-spraying or hand-pulling). Sites were assigned a moderate level of impact to populations if invasive species are typically a primary driver of management actions and make it difficult for managers to specifically tailor management to conserve Dakota skipper or Poweshiek skipperling habitat. The site was assigned a high level of impact to populations if one or more nonnative invasive plant species are abundant or increasing and management activities are not being implemented to control their expansion; or if necessary management actions cannot be implemented without themselves causing an additional stressor to the Dakota skipper or Poweshiek skipperling populations at the site.

Invasive species are a current and ongoing stressor with high levels of impact to Dakota skipper and Poweshiek skipperling populations on sites where land management is conducive to their invasion or expansion or where they have become so pervasive that even favorable management may not be quickly effective. Succession is a current and ongoing stressor of moderate-level impact to populations at sites where management is insufficient. The stressor of invasive species to populations on small and isolated sites (*e.g.,* Big Stone NWR) is a current and ongoing stressor of high level of impact to populations, because Dakota skipper and Poweshiek skipperling populations have little resilience to the resulting habitat degradation and to the often aggressive management needed to control the invasive plants. Loss of habitat or degradation of the native plant community due to encroachment of invasive species or woody vegetation is considered a high level of impact to populations at 13 of the 62 assessed Dakota skipper sites, a moderate level of impact to populations at 31 sites, and low impact to populations at 18 sites. Sites with high and moderate level of impact occur throughout the species range in Minnesota, North and South Dakota (Service 2012 unpubl. data; Service 2013, unpubl. data). Similarly, invasive species are a stressor of high level of impact to populations at 9 of the 51 evaluated Poweshiek skipperling sites, moderate of level impact to populations at 30 sites, and low level of impact to populations at 12 sites—sites with high and moderate levels of impact are throughout the range of the species in Iowa, Minnesota, Michigan, North Dakota, South Dakota, Wisconsin, and Manitoba and include at least 11 of the 14 sites where the species is still present (Service 2013, unpubl. data).

Fire

Dakota skipper and Poweshiek skipperling populations existed historically in a vast ecosystem maintained in part by fire. Due to the great extent of tallgrass prairie in the past, fire and other intense disturbances (*e.g.,* locally intensive bison grazing) likely affected only a small proportion of the habitat each year, allowing for recolonization from unaffected areas during the subsequent flight period (Swengel 1998, p. 83). Fire can improve Poweshiek skipperling (Cuthrell 2009, pers. comm.) and Dakota skipper habitat (*e.g.,* by helping to control woody vegetation encroachment), but it may also kill most or all of the individuals in the burned units and alter entire remnant prairie patches, if not properly managed (*e.g.,* depends on the timing, intensity, etc.). Accidental wildfires also may burn entire prairie tracts (Dana 1997, p. 15) and may hamper plans to carefully manage Dakota skipper and Poweshiek skipperling habitat. A human-set wildfire in late fall 2009 and another extensive fire in 2011, for example, burned considerable amounts of good prairie habitat in Manitoba's Tall Grass Prairie Preserve (Hamel *et al.* 2013, p. 1; Westwood 2010, pers. comm.), which is the only location in Canada where Poweshiek skipperlings are present; Dakota skippers are extirpated from the site. The fires at the Tall Grass Prairie Preserve may have killed overwintering larvae, and the population of Poweshiek skipperling in Canada ''may have been greatly reduced as a result of these fires'' (Hamel *et al.* 2013, p. 1).

Intentional fires, without careful planning, may also have significant adverse effects on populations of Dakota skippers and Poweshiek skipperlings, especially after repeated events (McCabe 1981, pp. 190–191; Dana 1991, pp. 41–45, 54–55; Swengel 1998, p. 83; Orwig and Schlicht 1999, pp. 6, 8). In systematic surveys of Minnesota tallgrass prairies, for example, Dakota skippers were less abundant on sites that had been burned, compared with otherwise similar hayed sites (Swengel 1998, p. 80; Swengel and Swengel 1999, pp. 278–279). Similarly, Schlicht (1997b, p. 5) counted fewer Dakota skippers per hour in burned than on grazed sites in Minnesota. Orwig and Schlicht (1999, p. 8) speculated that inappropriate use of prescribed burning eliminated Dakota skippers from the last known occupied site in Iowa, a 65-ha (160-ac) preserve. At Prairie Coteau Preserve in Minnesota, Schlicht (2001a, pp. 9–10) found greater flower abundance on regularly burned than rarely burned sites, but Dakota skipper abundance showed the greatest decline on the burned sites.

The effects of fire on prairie butterfly populations are difficult to ascertain (Dana 2008, p. 18), but the apparent hypersensitivity of Poweshiek skipperlings and Dakota skippers indicates that it is a threat to both species in habitats burned too frequently or too broadly. The Poweshiek skipperling and Dakota skipper are not known to disperse widely (Swengel 1996, p. 81; Burke *et al.* 2011, p. 2279); therefore, in order to reap the benefits of fire to habitat quality, Poweshiek skipperlings and Dakota skippers must either survive in numbers sufficient to rebuild populations after the fire or recolonize the area from a nearby unburned area. In addition, the return interval of fires needs to be infrequent enough to allow for recovery of the populations between burns. Therefore, fire is a threat to Poweshiek skipperlings and Dakota skippers at any site where too little of the species' habitat is left unburned or where patches are burned too frequently.

Panzer (2002, p. 1306) identified four life-history traits of duff-dwelling insects such as the Dakota skipper and Poweshiek skipperling that were good predictors of a negative response to fire: (1) Remnant dependence (occurring as small, isolated populations); (2) upland inhabitance (dry uplands burn more thoroughly than wetter habitats); (3) nonvagility (low recolonization rate); and (4) univoltine (slower recovery rates for species with only one generation per year). Species exhibiting all four traits should be considered ''hypersensitive'' to fire (Panzer 2002, p. 1306). The Poweshiek skipperling and Dakota skipper meet all of Panzer's criteria for hypersensitivity (Panzer 2002, p. 1306) and have additional life history traits that further suggest hypersensitivity to fire. Panzer (2002) observed mean declines of 67 percent among fire-negative species, although actual mortality was likely higher due to some immigration into experimental areas after the burn. When all or large portions of prairie remnants are burned, many or all prairie butterflies may be eliminated at once. Complete

extirpation of a population, however, may not occur after a single burn event (Panzer 2002, p. 1306) and the extent of effects would vary depending on time of year and fuel load.

Poweshiek skipperlings lay their eggs near the tips of leaf blades, and they overwinter as larvae on the host plants (Borkin 2000a, p. 2), where they are exposed to fires during their larval stages. If larvae are on prairie dropseed or little bluestem, which occur in dry prairie, rather than spike-rush or sedges, which typically occur in wet prairie, then the larvae are even more vulnerable to fire (Selby 2005, p. 36). Unlike Dakota skippers, Poweshiek skipperlings do not burrow into the soil surface (McAlpine 1972, pp. 88–92; Borkin 1995b, p. 9), which makes them more vulnerable to fire (and likely more vulnerable to chemicals such as herbicides and pesticides)) throughout their larval stages. Species whose larvae spend more time above ground, such as Poweshiek skipperlings, are likely more vulnerable to fire than species that form underground shelters. As the spring progresses, however, the vulnerability of Dakota skippers to fire increase as larvae shift from buried shelters to horizontal shelters at the soil surface (Dana 1991, p. 16).

Studies of all life-stages may be necessary to fully evaluate these species' response to fire. Early spring burns may be less likely to harm Dakota skipper populations than late spring burns, due to larval phenology and differences in subsurface soil temperatures during the fire; however, studies have not conclusively linked the relationship of mortality risk to the timing of spring burns. Experiments to evaluate the effects of early spring versus late spring fires and of different fuel levels on Dakota skipper mortality found that, despite higher ambient temperatures during the early spring burn, temperatures at the average depth of buried Dakota skipper shelters (Dana 1991, p. 11), were 10 °C (50 °F) higher during the late-spring burn (Dana 1991, p. 41). Fuel load was positively related to subsurface soil temperature (Dana 1991, pp. 41–43). Fuel loads that were clearly associated with lethal subsoil temperatures, however, were more typical of mesic tallgrass prairie, which had about twice the fuel loads of the dry-mesic habitats inhabited by Dakota skippers on the site (Dana 1991, pp. 41, 54). Although Dana's study was inconclusive in quantifying the risk of mortality in relation to the timing of spring burns, he was able to conclude that a late-spring burn in ''moderate'' fuels (430–440 g/m^2) would have a devastating effect on Dakota skipper populations, and that early spring burning would afford some amelioration (Dana 1991, p. 55).

Rotational burning may benefit prairie butterflies by increasing nectar plant density and by positively affecting soil temperature and near-surface humidity levels due to reductions in litter (Dana 1991, pp. 53–55; Murphy *et al.* 2005, p. 208; Dana 2008, p. 20). Purple coneflower and little bluestem, for example, occurred more frequently on burned areas than on unburned areas in mixed-grass prairie at Lostwood National Wildlife Refuge in northwestern North Dakota (Murphy *et al.* 2005, pp. 208–209). An increase in purple coneflower, an important nectar source for Dakota skippers and Poweshiek skipperlings, may last for 1–2 years after early spring fires and females may preferentially oviposit near concentrations of this nectar source (Dana 2008, p. 20).

Although fire tends to increase native plant diversity in prairies (Murphy *et al.* 2005, pp. 208–209), several years may be necessary for Dakota skipper and Poweshiek skipperling populations to recover after a burn. Few studies have documented recovery times for prairie butterflies after a burn, and even fewer have measured the relationships between species abundance in tallgrass prairies and time since burn. One such study, however, found lower relative abundances of Dakota skippers and Poweshiek skipperlings in burned units than in otherwise similar hayed units even four years after burns (Swengel 1996, p. 83). Poweshiek skipperling had the most negative initial response to fire among six species of prairie-obligate butterfly species (Swengel 1996, p. 83). Numbers were still lower than expected one year post-fire, exceeded expectations after two years, and declined slightly after three years (Swengel 1996, p. 83). In habitats that had not been burned for four or more years, Poweshiek skipperling abundance was about as low as in habitats sampled less than one year after being burned (Swengel 1996, p. 83).

Swengel's (1996, p. 83) observations are consistent with other findings. That is, Poweshiek skipperling numbers decline in burned areas for 1–2 years after the burn then rebound, but may decline again if management does not maintain the habitat (Skadsen 2001, p. 37; Webster 2003, p. 12). In general, recovery times of 1–5 years post burn have been predicted (Swengel 1996, pp. 73, 79, 81; Panzer 2002, pp. 1302–1303); however, Vogel *et. al* (2010, p. 671) found that habitat-specialist butterfly abundance recovery time was approximately 50 months after prescribed fires. Recent survey results in some areas, most notably, Iowa and Minnesota, indicate that other factors are acting independently (Dana 2008, p. 18) or in concert with fire to forestall the typical post-fire rebound.

We assessed the stressor posed by fire at 19 Dakota skipper sites with present or unknown status and 24 Poweshiek skipperling sites with present or unknown site status where we had sufficient information to evaluate the stressor (Tables 3 and 4; Service 2012 unpubl. data; Service 2013, unpubl. data). We considered fire a stressor of high level of impact to populations at 9 of the 19 evaluated Dakota skipper sites and 7 of the 24 Poweshiek skipperling sites. Sites that face a high level of impact to populations were primarily those with a high proportion of Dakota skipper or Poweshiek skipperling habitat that may be burned in a single year or where all of the species' habitat is burned with no likely source of immigrants to sustain the population. This type of fire management is a documented cause of extirpation (Selby 2000, p. 19). Sites with a moderate level of impact to populations from fire management were those where the habitat is divided into at least three burn units and no unit is burned more frequently than once every three years; or, habitat is divided into two or more burn units, each unit is burned no more frequently than once every three years, but the entirety of the species' habitat is never burned in the same year and the species is present at another site that is less than 1 km (1.6 mi) away. Fire is considered to be a threat of moderate severity at 4 of the 19 evaluated Dakota skipper sites and 3 of the 24 Poweshiek skipperling sites. Fire presents a low level of impact to populations at sites where the species' habitat is divided into at least four burn units and no unit is burned more frequently than once every four years; or, the species' habitat is divided into three or more burn units, at least three units are burned no more frequently than once every four years, and the site contains more than 140 ha (346 ac) of native prairie or where the site is separated from another occupied site by less than 1 km (1.6 mi). Fire is considered to be a stressor with a low level of impact to populations at 6 of the 19 evaluated Dakota skipper sites and 14 of the 24 Poweshiek skipperling sites.

In summary, fire may be an important management tool for these butterflies, if carried out appropriately. However, where managers burn without ensuring a sufficient amount of contiguous or nearby habitat from which immigrants can re-inhabit burned areas or if not

conducted with conservation of prairie invertebrates as a primary objective, it is a current stressor that can have moderate impacts on populations. Uncontrolled wildfires may also have high or moderate levels of impacts to populations, and would also depend on the timing, intensity, and extent of the burn. Poweshiek skipperlings may be among the most sensitive of prairie butterflies to fire, and thus, coordination between habitat managers and butterfly experts is necessary to ensure that it is not implemented in a manner that degrades population viability. Fire is a current and ongoing stressor of high level of impact where burns occur without ensuring there is a sufficient amount of contiguous or nearby habitat from which immigrants can re-inhabit burned areas. Fire is an ongoing stressor rangewide for both species and has been documented at a high or moderate level of impact to populations at several sites in North Dakota, South Dakota, Minnesota, Wisconsin, and the Tallgrass Prairie Preserve in Manitoba.

Grazing

As with fire management, grazing may maintain habitat for the Poweshiek skipperling and Dakota skipper, but as with any management practice, appropriate timing, frequency, and intensity are important. The level of impact of grazing on Dakota skipper and Poweshiek skipperling populations also depends on the type of habitat that is being grazed. Furthermore, in contrast to the permanent habitat destruction and larval mortality caused by plowing or mining, for example, some habitats can remain suitable for Dakota skipper when grazed (Dana 1991, p. 54, Schlicht 1997, p. 5, Skadsen 1997, pp. 24–29) and native plant diversity in tallgrass prairie may recover from overgrazing if it has not been too severe or prolonged. In addition, grazing is one of the primary treatments for controlling smooth brome and enhancing native plant diversity in prairies that have been invaded by this nonnative grass species (Service 2006, p. 2; Smart *et al.* in prep.).

Grazing may benefit the Dakota skipper and Poweshiek skipperling under some management scenarios (*e.g.,* adaptive management to adjust grazing prescriptions according to their effects on essential features of the prairie ecosystem). In some habitats, Dakota skippers benefit from light grazing that minimizes the area dominated by tall grasses (*e.g.,* big bluestem and indiangrass) (Dana 1991, p. 54). Schlicht (1997b, p. 5) found that the Dakota skipper was relatively abundant on prairies subjected to light grazing regimes, but absent on nearby idle prairies that were no longer used for grazing; moreover, he observed more Dakota skippers per hour on the lightly grazed prairies than on nearby habitat managed with fire (Schlicht 1997b, p. 5). Similarly, in eastern South Dakota, Dakota skipper populations were deemed secure at some sites managed with rotational grazing light enough to maintain plant species diversity (Skadsen 1997, pp. 24–29), but the species was since extirpated at one site where a change in ownership resulted in significant overgrazing (Skadsen 2006b, p. 5). The economic benefit of grazing to ranchers may also benefit the species at some sites by deterring conversion of remnant prairies to row crop agriculture.

Bison (*Bison bison*) grazed at least some Dakota skipper and Poweshiek skipperling habitats historically (McCabe 1981, p. 190; Bragg 1995, p. 68; Schlicht and Orwig 1998, pp. 4, 8; Trager *et al.* 2004, pp. 237–238), but cattle (*Bos taurus*) are now the principal grazing ungulate in both species' ranges. Bison and cattle both feed primarily on grass, but have some dissimilar effects on prairie habitats (Damhoureyeh and Hartnett 1997, pp. 1721–1725; Matlack *et al.* 2001, pp. 366–367). Cattle consume proportionally more grass and grasslike plants than bison, whereas bison consume more browse and forbs (flowering herbaceous plants) (Damhoureyeh and Hartnett 1997, p. 1719). Grasslands grazed by bison may also have greater plant species richness and spatial heterogeneity than those grazed by cattle (Towne *et al.* 2005, pp. 1553–1555). Both species remove forage for larvae (palatable grass tissue) and adults (nectar-bearing plant parts), change vegetation structure, trample larvae, and alter larval microhabitats. Livestock grazing was identified as a stressor to populations on most of the privately owned sites and some public sites on which Dakota skippers occurred in 2002 (Cochrane and Delphey 2002, pp. 62–69). Swengel and Swengel (1999, p. 286), for example, noted that at the Sheyenne National Grassland in North Dakota, grazing appeared to be unfavorable for the Poweshiek skipperling and Dakota skipper.

Reduced availability of nectar resources and larval food plants is likely the primary factor leading to declines in Poweshiek skipperling and Dakota skipper populations on heavily grazed sites. In South Dakota, for example, Higgins (1999, p. 15) found lower plant diversity on privately owned prairies, which were mostly grazed, than on publicly owned prairies, which were almost all idle (no grazing or fire management). McCabe (1981, p. 189) observed that grazing eliminated Dakota skippers on North Dakota wet-mesic prairies; nectar plants such as yellow sundrops and bluebell bellflower rapidly diminished with light grazing, and heavy grazing eliminated upright prairie coneflower and purple coneflower.

The intensity at which grazing occurs may dictate the level of impact to the Dakota skipper and Poweshiek skipperling. Grazing reduces Dakota skipper numbers in direct proportion to its intensity, due to the reduction in flowers that provide nectar and perhaps by influencing adult behavior (Dana 1997, p. 4). Dana (1997, p. 5) predicted that privately owned pastures in Minnesota's Hole-in-the-Mountain complex, for example, will likely only support low densities of skippers if they continued to be heavily grazed and sprayed with herbicides. Surveys at this habitat complex in 2007, 2008, and 2012 failed to record any Poweshiek skipperlings (Dana 2008, p. 8; Selby 2009a, pp. xxxi–xxxii; Runquist 2012a, pers. comm.; Runquist 2012, pp. 13–14, 18–20) and Dakota skippers were not detected in 2012 surveys (Runquist 2012, pp. 13–14, 18–20; Runquist 2012a, pers. comm.).

While most references to grazing impacts on prairie butterflies are based on ancillary observations made during research focused on other management impacts, one Minnesota study (Selby 2006b) focused on the effects of grazing on all life stages of the Dakota skipper, and also included data for the adult stage of the Poweshiek skipperling. Both species were too scarce to collect data adequate to test the hypotheses (Selby 2006b, p. 2), but observations based on two years (2003 and 2004) of surveys suggested that numbers in the lightly to moderately grazed pasture were similar to those in the best portions of nearby ungrazed habitats (Selby 2006b, p. 30). Poweshiek skipperlings were almost absent from the study sites (Selby 2006b, pp. iii–xxiii). Within the grazed study area, the number of Dakota skippers declined with increasing grazing intensity; Dakota skippers were absent from the most heavily grazed areas (Selby 2006b, p. 16). Skadsen (2001, p. 55) found that forb diversity was poor on the grazed lands and predicted the extirpation of both species unless management practices were changed. The Dakota skipper is now extirpated at one of these sites, and its status is unknown at the other; Poweshiek skipperling status is unknown at both sites (Service 2013, unpubl. geodatabase). Spomer (2004, p. 4) found that larval host plants and

nectar sources were missing from heavily grazed pastures at Sheyenne National Grassland, North Dakota.

Grazing intensity combined with varying habitat type may also affect the level of grazing impacts. On wet-mesic habitat in North Dakota, for example, Dakota skippers and Poweshiek skipperlings tolerate little to no grazing (McCabe and Post 1977b, p. 36; Royer and Marrone 1992a, pp. 10, 17, 28; Royer and Marrone 1992b, pp. 17–18; Royer and Royer 1998, p. 22). Webster (2003, pp. 7–8) described very similar Dakota skipper habitats in Manitoba and, although grazing generally does not occur in these habitats that are occupied by Dakota skipper, they may be as sensitive to grazing as similar habitats in North Dakota; in a later report, he described the conversion of lands from haying to grazing as a major threat to Dakota skipper in the wet-mesic habitats of Manitoba (Webster 2007, pp. i–ii, 6). In the drier and hillier habitats that the species inhabits, grazing may benefit Dakota skipper depending on its intensity. For example, in eastern South Dakota, Dakota skipper populations were deemed secure at some sites managed with rotational grazing that was sufficiently light to maintain native plant species diversity (Skadsen 1997, pp. 24–29), and grazing may also benefit Dakota skippers by reducing the area dominated by tall native grasses, such as big bluestem and Indiangrass (Dana 1991).

Proximity of nearby populations or contiguous habitat may alleviate some of the negative impacts of grazing. Royer and Marrone (1992b, p. 29; 1992a, p. 18) stated that heavy grazing was a threat to Dakota skippers and Poweshiek skipperlings, but that occasional light grazing is not a long-term threat in some habitats as long as there are areas of contiguous habitat that remain ungrazed. At Chekapa Creek Ridge and Knapp Pasture in South Dakota, heavy grazing apparently extirpated both the Poweshiek skipperling and Dakota skipper (Skadsen 2002, p. 38; 2004, p. 7; 2006a, p. 11). Due to its proximity to other Poweshiek skipperling populations and a return to fall haying in 2005, the Poweshiek skipperling recolonized Chekapa Creek Ridge in 2006 (Skadsen 2006a, p. 12), but more recent surveys indicate that the Poweshiek skipperling has again been extirpated from this site due to habitat degradation because of a change from haying to grazing (Skadsen 2012a, pers. comm., Skadsen 2012c, pers. comm.).

As with fire, Dakota skipper and Poweshiek skipperling populations may persist through intense grazing episodes or be restored afterwards, if sufficient numbers survive and reproduce in lightly grazed patches or if nearby habitats provide sufficient numbers of immigrants to reestablish the population after habitat quality is restored. Years of grazing without rest, however, may preclude recovery from the effects of intense grazing, although the capacity for restoration of suitable plant community and other habitat features may be highly variable among sites. On some sites, plant diversity may not be restored when grazing pressure declines (Dana 1997, p. 30; Jackson 1999, pp. 134–135; Spomer 2004, p. 4). Grazing intensely (where a high proportion of plant biomass is removed) or for long duration leads to native plants being replaced with exotic, cool-season European forage grasses and legumes that are tolerant of continuous grazing (Jackson 1999, p. 128, Minnesota DNR 2006, p. 232). In overgrazed native prairie in Minnesota, for example, the prairie is dominated by exotic grasses with a low native forb species diversity and abundance, and foliage height is less than 10 cm (4 in) (Dana 1997, p. 3); these prairies lack the native plants necessary to sustain adult and larval prairie butterflies. In comparison, sites less disturbed by grazing have a high native forb (nectar) species diversity and abundance foliage height is generally more conducive to perching and reproductive activities (between 25 and 40 cm (10 and 16 in)) (Dana 1997, p. 2).

Land managers also frequently use herbicides, often through broadcast application, to control weeds and brush on grazed remnant prairies, which further reduces native forb diversity and abundance (Dana 1997, p. 3; Stark *et al.* 2012, pp. 25, 27) necessary for adult nectar sources. Skadsen (2006, p. 11), for example, documented the likely extirpation of Dakota skippers at Knapp Ranch in South Dakota after a July 2006 application of broadleaf herbicide in concert with heavy grazing. Herbicide and pesticide use is discussed further under *Factor E* of this proposed rule.

While reduced availability of nectar resources and larval food plants may be the primary factors leading to declines in Poweshiek skipperling and Dakota skipper populations on heavily grazed sites, changes in vegetation structure may also be important. For example, grazing prairie each year during mid-summer eliminates nectar plants, such as purple coneflower, and native warm-season grasses that function as larval host plants (Skadsen 2007, pers. comm.). In South Dakota, vegetation height and litter depth were lower on prairie remnants that were mostly grazed (Higgins 1999, pp. 27–29). Grazing also causes direct mortality of larvae due to trampling and altering larval microhabitats (Royer *et al.* 2008, pp. 10–15). In North Dakota, grazing can compact soils in wet-mesic prairie inhabited by Dakota skippers and Poweshiek skipperlings, altering vertical water movement in the soil, which may lead to larval desiccation (Royer *et al.* 2008, p. 16). Cattle may also kill larvae by trampling them, particularly in wet-mesic prairies (McCabe 1981, p. 189).

Livestock grazing is the predominant use of privately owned tallgrass prairie remnants in South Dakota (Higgins 1999, p. 15) and was identified by the Service as a threat on most of the privately owned sites on which Dakota skipper occurred when the species was identified as a candidate species in 2002 (Cochrane and Delphey 2002, pp. 62–69). The presence and density of purple coneflower may serve as an indicator of grazing impacts to Dakota skippers and Poweshiek skipperlings where the species occur in dry-mesic prairie (Skadsen 2006a, p. 2); grazing from mid-June through July may reduce purple coneflower abundance (Skadsen 2007, pers. comm.)—as discussed in the Background section of this rule, purple coneflower has been identified as a primary source of nectar for both species, particularly in dry prairie habitats.

Britten and Glasford (2002, p. 373) recommended minimizing disturbance of Dakota skipper habitat during the flight period (late June to early July) to maximize genetically effective population sizes (the number of adults reproducing) to offset the effects of genetic drift of small populations (change in gene frequency over time due to random sampling or chance, rather than natural selection). Therefore, a large portion of the habitat of any Dakota skipper population should remain ungrazed or only lightly grazed during the flight period, and similar precautions should be taken for the Poweshiek skipperling.

We assessed the level of impact to populations from grazing at 53 Dakota skipper sites and 23 sites currently occupied by Poweshiek skipperling with present or unknown status that had sufficient information to evaluate the stressor (Tables 3 and 4; Service 2012 unpubl. data; Service 2013, unpubl. data). This analysis was conducted differently for different habitat types. For Type A habitat (Royer *et al.* 2008, pp. 14–16) where stocking rates (number of cattle or bison over a given area) have little or no evidence of grazing effects on Dakota skipper or Poweshiek skipper habitat quality, we found the level of impact to populations of grazing to be low. For Type B habitat

(Royer *et al.* 2008, p. 14), we assumed that the level of impact of grazing to populations would be low if the dry-mesic slopes were grazed only before June 1 with at least one year of rest between rotations and if the pasture were only spot-sprayed with herbicides when and where necessary, or, the best available information does not indicate that grazing practices are degrading habitat quality for the species (*i.e.,* no apparent diminishment of nectar plant density and diversity and habitat is good or excellent for Dakota skipper).

At grazed sites where extirpation of the local population is not imminent, but habitat quality is fair to poor and the relative abundance of Dakota skippers or Poweshiek skipperlings is often low, we found the level of impact of grazing to populations to be moderate. Sites with a moderate level of impact to populations due to grazing may be lightly grazed for less than 4 months or less than 25 percent of the above-ground biomass of native grasses and forbs is consumed (Smart *et al.* 2011, pp. 182–183), are grazed after June 1, or are not given a year of rest between grazed years. At sites where grazing is conducted season-long, or for more than four months during the year, or more than 50 percent of the above-ground biomass of native grasses and forbs is consumed and herbicide use is frequent; we found the level of impact of grazing to populations to be high. At sites where grazing is a high-level threat, extirpation of the population is likely imminent and habitat quality is poor. On public lands inhabited by the species, grazing is typically used to control nonnative cool-season grasses and invasive species. Cattle are often removed by July 1 to minimize adverse impacts to warm-season grasses, but this type of management minimizes the density of nectar species that are important to the Dakota skipper and Poweshiek skipperling. Invasive species are often present at grazed sites, which often lead to further management actions (see Invasive Species and Secondary Succession).

Of the 53 Dakota skipper sites assessed, we found the level of impact to Dakota skipper populations from grazing to be high at 10 sites, moderate at 29 sites, and low at 14 sites (Service 2012 unpubl. data; Service 2013, unpubl. data). Moderate- to high-level impacts to populations were primarily at South Dakota sites (N=28)—other sites with moderate- to high-level impacts were in Minnesota (N=7), North Dakota (N=3), and Manitoba (N=1). As described above as part of our assessment of grazing, we examined the habitat quality ratings that were primarily assigned by researchers during surveys for the species, during separate habitat assessments, or that were available from state heritage databases or other sources of scientific data. The habitat quality was rated as poor at 7 of the 10 sites where grazing poses a high level of impact to Dakota skipper populations. At each of the 14 sites where grazing pressure is low, habitat quality was good or excellent, with two exceptions where habitat was rated as fair to good. Among the 29 sites where grazing is a moderate level of impact to Dakota skipper populations, 6 had habitat rated good or excellent.

Of the 19 Poweshiek skipperling sites for which we had sufficient information to assess grazing, the level of impact to populations from grazing is high at 7 sites, moderate at 14 sites, and low at 2 sites—all but 2 of these sites were in South Dakota. No sites in Wisconsin or Michigan were assessed for grazing impacts to populations, where the grazing does not occur. Among the 14 sites where grazing is a moderate level of impact to Poweshiek skipperling populations, 10 have habitat rated as fair to excellent. The habitat quality was rated as poor at 3 of the 6 sites where grazing is having a high level of impact to Poweshiek skipperling populations.

In summary, grazing may benefit Dakota skippers and Poweshiek skipperlings in native tallgrass prairie by increasing native plant diversity and patchiness of fires (Minnesota DNR 2006, p. 232). The economic benefit of grazing to ranchers may also be a benefit to the species by deterring conversion of remnant prairies to row crop agriculture. Grazing is a stressor to these species, however, if it is not managed with the goal of conserving native-prairie vegetation that comprises suitable habitat for Dakota skipper and Poweshiek skipperling. Dakota skippers and Poweshiek skipperlings may benefit when prairie habitat is rested from grazing for at least a part of each growing season, if livestock are precluded from removing too much plant material (*e.g.,* are moved when stubble heights are 6–8 in (15–20 cm) (Skadsen 2007, pers. comm.), and if the timing of grazing for each field varies from year to year (Skadsen 2007, pers. comm.).

Conversely, Dakota skipper and Poweshiek skipperling populations may be reduced or extirpated when too much plant material is removed, when fields are not rested for some portion of the growing season, or fields are grazed during the same period each year. Grazing poses a current and ongoing stressor of moderate to high level of impact to populations where its intensity is such that Dakota skippers and Poweshiek skipperlings are unlikely to thrive or even persist. Grazing poses a likely future stressor where current management is conducive to Dakota skipper or Poweshiek skipperling conservation, but where landowners may allow excessive grazing in the future, for example, where management may change as a result of the changing market prices of agricultural products. Unsuitable grazing is an ongoing stressor throughout much of the range of the Dakota skipper and Poweshiek skipperling (primarily in flat wet prairies of Minnesota, North Dakota, and South Dakota); grazing is not a documented stressor at the Poweshiek skipperling sites with present or unknown status in Wisconsin, Michigan, and Iowa or at most Dakota skipper sites in Canada.

Haying

As with grazing and fire, haying (mowing grasslands and removing the cuttings) may maintain habitat for the Poweshiek skipperling and Dakota skipper, but as with any management practice, appropriate timing, frequency, and intensity are important. Poweshiek skipperling habitat at Scuppernong Prairie in Wisconsin, for example, would have succeeded to shrubby or forested habitat if it had not been hayed each fall (Borkin 2011, in litt.)—it is now one of the few sites in Wisconsin that are occupied by the Poweshiek skipperling. Nearly all of the Dakota skipper sites in Canada where the species is present are privately owned, fall hayed prairies (Westwood 2013, pers. comm.).

Haying generally maintains prairie vegetation structure, but it may favor expansion of invasive species such as Kentucky bluegrass. If done during the adult flight period, haying may kill the adult butterflies or cause them to emigrate, and if done before or during the adult flight period, it may reduce nectar availability (McCabe 1979, pp. 19–20; McCabe 1981, p. 190; Dana 1983, p. 33; Royer and Marrone 1992a, p. 28; Royer and Marrone 1992b. p. 14; Swengel 1996, p. 79; Webster 2003, p. 10). Royer and Marrone (1992b, p. 14), for example, ascribed the loss of a North Dakota Poweshiek skipperling population to June and July haying. Several years of July haying may have led to the Poweshiek skipperling's extirpation at Wakidmanwin Prairie in South Dakota (Skadsen 2006b, p. 13). The Dakota skipper was observed at the Wakidmanwin Prairie in 2010 (Skadsen 2010, p. 6); however, it is not clear if the management has changed since the observation. Early June haying may have

eliminated Dakota skippers from at least one site in North Dakota (Royer and Royer 2012a, p. 72).

Hayed prairies are important reservoirs of native prairie plant diversity; however, long-term annual haying negatively impacts prairie plant diversity (Jog *et al.* 2006, pp. 164–165). Jog *et al.* (2006, pp. 164–165) recommended diversifying management to include, for example, periodic fire and to forego annual haying to increase plant species diversity. In a long-term study of a prairie in southeastern Wisconsin, a switch from late-season haying to fire management led to increased native plant diversity and coverage of warm-season grasses, although woody plant species also increased (Rooney and Leach 2010, p, 319).

Late-season haying may benefit Dakota skipper populations (McCabe 1981, p. 190), and Dakota skipper populations might be more common on hayed prairies than on idle (not hayed) prairies (Webster 2003, p. 10). Swengel and Swengel (1999, p. 279) observed significantly greater relative abundance of Dakota skippers on hayed tracts compared with either idle or burned tracts in Minnesota, and Skadsen (2004, p. 7) documented the extirpation of Dakota skippers from a site after its management switched from haying to intensive grazing. Some remnant Dakota skipper populations in the eastern Dakotas are found on fall-hayed prairies (Skadsen 1997, pp. 10–23; Royer and Royer 2012b) as are many of the sites in Manitoba (Webster 2003, p. 10). Webster (2003, p. 8) found ''healthy populations'' of Dakota skippers in Manitoba on sites used as hay fields, as described by the absence of standing dead grass, low numbers of shrubs, shorter bluestem grasses, and abundant and readily observable nectar flowers, as compared to un-hayed sites. Scarlet Fawn Prairie in South Dakota, which is hayed in the fall, is considered one of the highest quality prairies in that State (Skadsen 2012, pers. comm.). In the Dakotas, late-season (mid-August to October) haying appears to minimize impacts to the prairie butterflies, although annual haying may diminish the vigor of native, warm-season grasses and reduce forb density in north-central North Dakota (wet-mesic) habitats (Lenz 1999b, p. 14; Skadsen 2009, p. 8). Consistent late-season haying of Poweshiek skipperling habitat in South Dakota, appears to have facilitated the expansion of green needlegrass (*Stipa viridula*), a cool-season grass, and prevented seed development in warm-season plants (Skadsen 2009, p. 8).

We assessed the level of impact of haying to populations at 40 Dakota skipper sites and 10 Poweshiek skipperling sites with present or unknown status where we had sufficient information to assess the stressor (Tables 3 and 4; Service 2012 unpubl. data; Service 2013, unpubl. data). Haying was considered to be a stressor with a low or no negative impact on populations where it is implemented after the flight period (after approximately August 1) and when there is no reduction in the availability of native plant species. Haying was considered to be a stressor with a moderate level of impact on populations, where the timing or extent of haying was unknown, but there are: (1) One or more indications that haying is resulting in a reduction in nectar or larval food sources important to the species due to timing or frequency of mowing; (2) part of the Dakota skipper or Poweshiek skipperling habitat on the site is hayed before August 1, but a substantial proportion of habitat is not hayed and not clearly subject to other threats, such as frequent fire or grazing (*e.g.,* Smokey Lake site, North Dakota); or (3) where haying occurs before or after August 1, but the site is hayed no more frequently than once every three years (*e.g.,* Roy West Game Production Area, South Dakota).

We considered haying to be a stressor with a high level of impact on populations where the site was hayed prior to August 1 (*e.g.,* Oaks Prairie, North Dakota). At 27 of the 40 evaluated Dakota skipper sites, current haying practices are conducive (beneficial) to Dakota skipper conservation, because it is conducted after August 1 and is not reducing native plant species diversity. One or more indications that current haying practices are slowly degrading habitat quality for Dakota skippers has been documented at 13 of the 40 sites. At several sites in North Dakota, for example, Royer and Royer (2012b, pp. 15, 21, 24, 45) noted a decrease in the diversity and density of forbs at sites hayed annually. Haying is a stressor with a high level of impact on populations at 2 of the 40 Dakota skipper sites assessed and a stressor of moderate-level impacts to the populations at 11 of the 40 Dakota skipper sites assessed. Of the 10 Poweshiek skipperling sites evaluated, haying was a stressor with moderate-level impacts on populations at 3 sites and was not considered to have high-level impacts to the populations at any of the 10 sites.

In summary, haying is a current and ongoing threat of moderate to high level of impacts to Dakota skippers and Poweshiek skipperlings at the few sites where the site is normally hayed before August and where annual haying is reducing availability of larval food and adult nectar plants. However, fall haying is beneficial to both species, specifically if it is conducted after August 1, no more than every other year, and there is no indication that native plant species diversity is declining due to timing or frequency of haying. Haying is a current stressor at a small number of sites for both species; these sites occur primarily in North Dakota and South Dakota.

Lack of Disturbance

While inappropriate or excessive grazing, haying, and burning are stressors to some Poweshiek skipperling and Dakota skipper populations and have led to the extirpation of others, both species are also subject to the stress of no management practices being implemented. Prairies that lack periodic disturbance become unsuitable for Poweshiek skipperlings and Dakota skippers due to expansion of woody plant species (secondary succession), litter accumulation, reduced densities of adult nectar and larval food plants, or invasion by nonnative plant species (*e.g.,* smooth brome) (McCabe 1981, p. 191; Dana 1983, p. 33; Dana 1997, p. 5; Higgins *et al.* 2000, p. 21; Skadsen 2003, p. 52). For example, Dakota skipper numbers were reduced at Felton Prairie, Minnesota, in tracts that had not been hayed or burned for several years (Braker 1985, p. 47). Another study also observed significantly lower Dakota skipper abundance on unmanaged or idle sites, compared with hayed sites; however, Poweshiek skipperlings were significantly denser with idling (Swengel and Swengel 1999, p. 285). Skadsen (1997, pp. 10–23; 2003, pp. 8, 35, 42) reported deterioration of several unburned and unhayed South Dakota prairies in just a few years due to encroachment of woody plants and invasive species and found lower species richness of prairie-dependent butterflies and lower floristic quality at sites with no disturbance versus sites managed by grazing or fall haying (Skadsen 2006a, p. 3). For example, Dakota skippers returned to an idle site, Pickerel Lake State Park, after a burn conducted in 2007 resulted in a significant increase in forbs, particularly purple coneflower (Skadsen 2008, p. 2). In a separate study, Higgins *et al.* (2000, p. 24) found that prairie habitats left idle had lower plant diversity and quality than prairies managed with fire.

We assessed the stressor posed by lack of management for populations at 18 Dakota skipper sites and 13

Poweshiek skipperling sites with present or unknown status where we had sufficient information to evaluate the stressor (Tables 3 and 4; Service 2012 unpubl. data; Service 2013, unpubl. data). Lack of management was considered to be a stressor of moderate-level impacts to the population where the species' habitat is degraded or likely to become degraded due to secondary succession, invasive species, or both, but actions to restore habitat quality are planned or ongoing, or where the site is idle with no evident plans to initiate management (*e.g.,* fire, grazing, haying), and there are signs of ongoing or imminent secondary succession. Lack of management was considered to be a stressor with a high level of impact to the population where the habitat quality at a site is degraded or likely to become degraded due to secondary succession or invasive species, and there are no ongoing or planned actions to maintain or restore habitat quality. Lack of management was considered to be a stressor of low-level impacts to Dakota skipper or Poweshiek skipper populations at sites that are managed by grazing, haying/mowing, or fire that precludes loss of Dakota skipper or Poweshiek skipperling habitat to secondary succession and invasive species (*e.g.,* smooth brome). Ten of the 18 Dakota skipper sites assessed are under high level of impact to population due to lack of management and 5 sites are under moderate level of impact to the population. Five of the 13 Poweshiek skipperling sites assessed are under high level of impact to the population due to lack of management and 6 sites are under moderate level of impact to the population. The Dakota skipper and Poweshiek skipperling are unlikely to persist at those sites where the level of impact to the population due to lack of management is high. Sites currently under stress by lack of management occur throughout the range of both species; however, most of the present or unknown sites that lack appropriate management are in North Dakota, South Dakota, Minnesota, and Michigan. In summary, lack of disturbance is a current and ongoing stressor to Dakota skipper and Poweshiek skipperling populations where woody vegetation or invasive species expansion will reduce native prairie grasses and flowering forbs.

Summary of Factor A

We identified a number of threats to the habitat of the Dakota skipper and Poweshiek skipperling that operated in the past, are impacting both species now, and will continue to impact the species in the future. The decline of both species is the result of the long-lasting effects of habitat loss, fragmentation, degradation, and modification from agriculture, development, invasive species, secondary succession, grazing, and haying. Although efforts have been made to effectively manage habitat in some areas, the long-term effects of large-scale and wide-ranging habitat modification, destruction, and curtailment will last into the future. Invasion of the species' habitat by exotic species and woody vegetation, overgrazing, long-lasting or permanent alterations in water levels or hydrology, and too frequent or improperly timed haying remove or significantly reduce the availability of plants that provide nectar for adults and food for larvae. Fire and flooding cause direct mortality or destroy nectar and food plants if the intensity, extent, or timing is not conducive to the species' biology.

Of the 170 Dakota skipper sites for which we evaluated for one or more habitat stressors, at least 136 sites have at least one documented stressor with moderate to high levels of impact to populations—these sites are found across the current range of the species in Minnesota, North Dakota, South Dakota, Manitoba, and Saskatchewan (Service 2012 unpubl. data; Service 2013, unpubl. data). Fifty-eight sites have 2 or more documented stressors of moderate to high levels of impact to populations, and 23 sites have three or more documented stressors of moderate to high level of impact to populations. Sites with three or more stressors are found across most of the current range of the species; these sites occur in Minnesota, North Dakota, South Dakota, and Manitoba (Service 2012 unpubl. data; Service 2013, unpubl. data). Twenty-three of these sites had 3 or more documented stressors at moderate or high levels of impact. Sites with three or more stressors are found across the current range of the species in the United States; these sites occur in Minnesota, North Dakota, and South Dakota. Furthermore, concurrently acting stressors may have more intense effects than any one stressor acting independently. Therefore, based on our analysis of the best available information, present and future loss and modification of Dakota skipper habitat is a stressor that has significant impacts on populations of the species throughout all of its range. Habitat-related stressors occur at sites with Dakota skipper populations within every state and province of occurrence.

Similarly, of the 68 Poweshiek skipperling sites with present or unknown status that we analyzed for one or more habitat stressors, 55 of them have at least one stressor at moderate to high levels of impact to the population. These sites are found across the current range of the species and occur in Iowa, Michigan, Minnesota, North Dakota, South Dakota, Wisconsin, and Manitoba (Service 2013, unpubl. data). Fifty-five sites have 2 or more documented stressors that have moderate to high levels of impact to the population. These sites are found across the current range of the species and occur in Iowa, Michigan, Minnesota, North Dakota, South Dakota, Wisconsin, and Manitoba (Service 2013, unpubl. data). Thirty-seven of them have at least three documented stressors that have moderate to high levels of impact to the population. These sites are found across the current range of the species and occur in Iowa, Michigan, Minnesota, North Dakota, South Dakota, Wisconsin, and Manitoba (Service 2013, unpubl. data). Thirty-seven of these sites had 3 or more documented stressors at moderate or high levels of impact to the population for both species. These sites are found across most of the current range of the species and occur in Iowa, Michigan, Minnesota, North Dakota, South Dakota, and Manitoba (Service 2013, unpubl. data); furthermore, concurrently acting stressors may have more intense effects than any one stressor acting independently. Therefore, based on our analysis of the best available information, present and future loss and modification of Poweshiek habitat is a stressor that has significant impacts on the species throughout its range.

Conservation Efforts To Reduce Habitat Destruction, Modification, or Curtailment of Its Range

In the past, funding for conservation of rare species was primarily directed toward federally listed or candidate species, so while the Poweshiek skipperling may have benefited indirectly from conservation activities focused on species such as the Dakota skipper and Mitchell's satyr (*Neonympha mitchellii mitchellii*), it has not generally been the primary focus of those activities. As a result, survey data and incidental life-history observations have been accumulated as a part of projects focused on other species, but surveys were not necessarily focused on Poweshiek skipperling sites and detailed life-history, population, and demographic data have generally not been collected for the species. Various conservation activities directed at the Dakota skipper also indirectly benefit the Poweshiek

skipperling; these activities are summarized below.

Conservation agencies have recognized the need to address the status of prairie butterflies for more than 30 years beginning with a 1980 workshop held to initiate studies of Dakota skippers and other prairie butterflies. In June 1995, the U.S. Fish and Wildlife Service convened Dakota skipper experts to outline tasks needed to preserve enough viable populations to ensure long-term security for the species. The group outlined a plan for surveying populations and characterizing sites and habitats at priority areas, identifying and recommending management needs, monitoring, and outreach and education. In 1999, a Dakota skipper recovery strategy meeting was held in South Dakota with state, Federal, and nongovernmental biologists attending (Skadsen 1999b, entire). In 2011, researchers in Canada organized a Poweshiek Skipperling Workshop and followup conference call that brought together researchers and managers from across the range of the Poweshiek skipperling to provide updates on survey data, discuss ongoing activities, and plan future work. The workshop resulted in specific conservation action plans for the species. The Minnesota Zoo organized a followup conference during March 2013 to assess progress of the 2011 Poweshiek Skipperling Workshop Action Plans, facilitate discussion on the potential effects of management activities on prairie butterflies, identify needed information and data gaps, establish new priorities for research and a draft action plan for 2013, and facilitate networking and collaborations focused on the conservation of the Dakota skipper and Poweshiek skipperling, as well as other tallgrass prairie butterflies in the Midwest.

Research and survey work has occurred throughout the range of both species to document populations, to study the life history of both species, and to examine the effects of various management practices, such as fire and grazing, on the species and their habitat. For example, research and survey work on Dakota skippers began with Dana's (1991, entire) doctoral study on fire effects at Hole-in-the-Mountain, Minnesota, beginning in 1979 and McCabe's (1981, entire) 1979 surveys for the Garrison Diversion project in North Dakota. Additional work has been completed on characterizing habitat at important Dakota skipper sites in Minnesota (Dana 1997, entire) and North Dakota (Lenz 1999, entire, Royer and Royer 1998, entire, Royer and Royer 2012a, entire). Royer (2008, entire) assessed abiotic habitat parameters of soil in relation to management and conservation of Dakota skippers to complement prior floristic characterization of these habitats. The Minnesota DNR and the Service planned to cooperatively study the effects of grazing on the Dakota skipper and Poweshiek skipperling (Selby 2003a, entire; Selby 2003b, entire; Selby 2004b, entire, Selby 2006, entire); however, skipper numbers were too low to collect sufficient data to test hypotheses (Selby 2006, p. 30).

In the past, the Service funded some management activities intended to benefit the Dakota skipper, including habitat management at Big Stone National Wildlife Refuge, Minnesota (Olson 2000, entire), landowner contacts and education on conservation practices in South Dakota (Skadsen 1999b, entire), and prairie vegetation restoration at Chippewa Prairie in 2000 and at Twin Valley Prairie SNA, Minnesota, in 2001. The results of these efforts are varied; for instance, the prairie habitat at Twin Valley Prairie SNA was recently rated as excellent quality (Service 2013, unpubl. geodatabase), but the status of both species at that site is unknown; the last positive observation of Dakota skippers and Poweshiek skipperlings was 1993 and 1994, respectively. The Dakota skipper is extirpated from Chippewa Prairie and the status of the Poweshiek skipperling is unknown at the site; the last positive observations of the species were in 1995 and 1994, respectively (Service 2013, unpubl. geodatabase).

The Service purchases easements to prevent prairie conversion for agriculture and provide cost-share to support rotational grazing and other practices that may benefit Dakota skippers and Poweshiek skipperlings. For example, in 12 counties in South Dakota within the range of the species, the Service's grassland easement program has protected 365,193 ac (147,788 ha) of grassland that are primarily native prairie (Larson 2013, pers. comm.; HAPET 2012 unpubl. data), although it is not clear whether these lands are suitable habitat for either species. Other Service fee title lands, state lands, and Natural Resources Conservation Service easement lands may also protect areas from conversion, depending on the protections in those areas (Larson 2013, pers. comm.). If easements are near prairie butterfly habitat they can minimize the threat of conversion and may provide dispersal corridors or buffer sites from external threats (*e.g.,* pesticide drift).

Prairie easements generally prevent grasslands from being plowed or destroyed and prevent haying before July 16, but may not restrict grazing, pesticide use, or other practices that can degrade the status of Dakota skipper or Poweshiek skipperling populations. For example, one property with a Service easement was recently overgrazed to the extent that Dakota skipper was extirpated from the site (Skadsen 2006b, p. 5). Cost-share partnerships on easements and other areas, however, may further enable landowners to manage grasslands to benefit Dakota skippers and other prairie endemic species. The Service may implement such actions through the Partners for Fish and Wildlife program or in collaboration with U.S. Department of Agriculture Natural Resources Conservation Service or other agencies. Since 1990, the Service has purchased easements to prevent grassland conversion on millions of acres in Minnesota, North Dakota, and South Dakota (Larson 2013, pers. comm.). Only some of these areas include Dakota skipper or Poweshiek skipperling sites, are within the range of either species, or include suitable habitat for either species.

Conservation-interested agencies, individuals, and Tribes in South Dakota have made concerted efforts for decades to conserve native prairie within the Dakota skipper range. For example, there are approximately 54,000 ac (21,853 ha) of fee title lands in grassland that are managed by the Service in 12 of the counties within the historical or current range of the Dakota skipper and 365,000 ac (147,710 ha) protected by the Services' grassland easement program (Table 5; Larson 2013, pers. comm.). These acreages do not include an additional 4,000 ac (1,619 ha) of grass protected by acquisitions that have occurred in 2012 (Larson 2013, pers. comm.). Not all of these lands, however, may be managed in such a manner that is conducive to Dakota skipper populations.

About one-half of the present or unknown Dakota skipper sites (total number of present/unknown sites is 172) in the United States are privately owned (excluding populations on land owned by The Nature Conservancy). Twelve of these populations are on private land on which the Service has purchased conservation easements that preclude plowing and haying before July 16. Manitoba Habitat Heritage Corporation has an easement that overlaps with one Dakota skipper site in Canada (Friesen 2013, pers. comm.). Similarly, of the 70 privately owned sites where Poweshiek skipperling has

been recorded since 1985, 8 sites (all in Minnesota) have conservation easements. These easements do not prescribe grazing practices but are intended to prevent grassland conversion to cropland, which is detrimental to Dakota skippers or Poweshiek skipperlings. Additional measures on some easement properties could ensure grazing practices do not inadvertently impact either species.

The Nature Conservancy's Minnesota and Dakotas offices initiated a Prairie Coteau Coordinated Conservation Planning Effort and Plan in 1998 to facilitate conservation actions by various landowners, including private, county, state, tribal and Federal, on high biodiversity prairie sites (Skadsen 1999b, entire). Additional partners include conservation organizations, local conservation districts, and universities. The Nature Conservancy acquired a reserve in the Sheyenne Grassland area, Brown Ranch, which is a Dakota skipper site with an unknown status, and manages some of the most significant habitats for the two species in Minnesota, including the Hole-in-the-Mountain Prairie preserve. Based on intensive surveys in 2007, Dana (2008, p. 19) found ''considerable reassurance'' that the rotational burning approach used at Prairie Coteau SNA and Hole-in-the-Mountain Preserve is compatible with long-term persistence of the Dakota skipper, for example, by controlling woody vegetation encroachment. The Minnesota DNR also manages the Prairie Coteau SNA with rotational burning (Dana 2008, p. 19), which may control woody vegetation encroachment. The Clay County Stewardship Plan (Felton Prairie Stewardship Committee 2002) may have reduced the likelihood and severity of gravel mining within the Felton Prairie complex in Minnesota.

Many of the best sites for Dakota skipper and Poweshiek skipperling in South Dakota are on tribal lands managed by the Sisseton-Wahpeton Sioux Tribe (*e.g.,* Scarlet Fawn and Oak Island Prairies) (Skadsen 1997, Skadsen 2012, p. 3), with late season haying. According to Skadsen (2012, p. 3) ''. . . as in prior years, the fall hayed prairies held in trust by the Sisseton Wahpeton Oyate had the most diverse native flora and thus the largest numbers of Dakota skippers.'' Although these lands generally contain high-quality habitat for prairie butterflies in eastern South Dakota (Skadsen 2012, p. 3), a change to alternate year haying—instead of annual haying—may further improve habitat quality by ensuring that plants that flower during the Dakota skipper and Poweshiek skipperling flight periods are able to produce seed (Royer and Royer 2012, p. 15).

The Day County Conservation District, South Dakota, places a high priority on implementing prescribed grazing on rangelands known to support Dakota skippers and bordering sites in the Upper Waubay Basin Watershed (Skadsen 1999b, p. 3). Their efforts include soliciting grants and providing education on grazing management, controlled burning, and integrated pest management to control leafy spurge, through workshops and a demonstration site. There are seven Poweshiek skipperling sites in Day County with unknown occupancy and no sites where the species is considered to be present. There are a total of 14 Dakota skipper sites in Day County: 2 sites where the species is considered to be present, and 12 sites that have an unknown occupancy. It is not known how many of these sites are benefiting from these efforts and to what degree.

In South Dakota, completed management plans guide habitat restoration at Hartford Beach State Park and Pickerel Lake State Recreation Area (Skadsen 2008, pp. 4–7; Skadsen 2011, pp. 1–4). At each site, the lack of haying, grazing, or fire had allowed plant succession to degrade and reduce the extent of Dakota skipper habitat. Dakota skipper habitat at these sites is divided into 3–4 management units. A controlled burn was conducted in one unit at Hartford Beach State Park in 2008, and shrubs were removed from two of the units (Skadsen 2008, p. 4). At Pickerel Lake State Recreation Area, a controlled burn was conducted in 2007, and in 2008 the site was hayed and shrubs were removed. The Dakota skipper was present in the burned unit for the first time since 2002 after ''a dramatic increase in forbs, especially purple coneflower, occurred after the burn'' and ''apparently attracted Dakota skippers from a nearby site'' (Skadsen 2008, p. 2). The Poweshiek skipperling is extirpated from both sites, but the reasons for its disappearance are not known (Service 2012, unpubl. data). At each site, prescribed fire and brush control are implemented on a rotational basis (Skadsen 2011, pp. 1–4); at Pickerel Lake State Recreation Area, forbs were planted in 2011 to diversify nectar resources for prairie butterflies (Skadsen 2011, pp. 2–4).

A privately owned ranch with Dakota skippers in Day County, South Dakota, is managed with a patch burn grazing system in which each grazing unit is rested for a full year (Skadsen 2008, p. 10), which may be beneficial to the species. The effects of patch burn grazing at this site are being studied jointly by The Nature Conservancy and South Dakota State University (Skadsen 2008, p. 10).

In 2005, the Service's National Wildlife Refuge System in North and South Dakota adopted the Conservation Strategy and Guidelines for Dakota Skippers on Service Lands in the Dakotas, which are based on the Service's Dakota Skipper Conservation Strategy and Guidelines and on versions of the Service's conservation guidelines for Dakota skipper. The guidelines were revised in March 2013 (*http://www.fws.gov/midwest/endangered/insects/dask/DASKconservationguidelines2013.html*). In the Dakotas, the Service plans to implement the conservation guidelines on all of its lands where the Dakota skipper is known to occur—the Service owns 12 Dakota skipper sites in the Dakotas where the species is considered present or has unknown occupancy. The guidelines also suggest that the Service examine other lands under its ownership to determine whether unrecorded populations of Dakota skippers may be present and to conduct surveys in those areas or manage the site in accordance with the Dakota Skipper Conservation Strategy and Guidelines. These guidelines will be reviewed and updated to reflect new information as it is developed.

Poweshiek Skipperling

Most of the conservation initiatives discussed above were put in place to benefit the Dakota skipper, but may also benefit the Poweshiek skipperling. Conservation initiatives are also in place at several Poweshiek skipperling sites in Wisconsin and one or two sites in Michigan.

At least two sites occupied by Poweshiek skipperling in Michigan are at least partially owned and managed by the Michigan Nature Association (MNA); however, the MNA does not specifically manage for Poweshiek skipperling conservation. The State of Michigan owns part or all of four occupied Poweshiek skipperling sites; however, most of those lands are managed as state recreational areas, not for prairie butterfly conservation. Landowners at one fen site are participating in a Michigan DNR Land Incentive Program, and a portion of another occupied site is part of the Burr Memorial Prairie Plant Preserve (Michigan Natural Features Inventory 2011, unpubl. data). The Poweshiek skipperling may benefit from conservation activities in place for the federally endangered Mitchell's satyr at one Michigan site.

Poweshiek skipperling sites in Wisconsin are owned and managed by the Wisconsin DNR, who manage the land to maintain and improve prairie habitat. The Wisconsin DNR recently received a Sustain Our Great Lakes (SOGL) grant to conduct invasive species management on several SNAs, including Puchyan Prairie (Wisconsin DNR 2012, in litt.). The Scuppernong Prairie SNA, Wilton Road, and Kettle Moraine Low Prairie SNA are managed primarily through fire and invasive species control.

Furthermore, the Minnesota Zoo recently initiated a propagation research program for the Poweshiek skipperling and Dakota skipper to develop methods to propagate this and other species in the future. If this program is successful, the conservation benefit could be possible if it could facilitate reintroduction and augmentation efforts into areas where the species has declined or disappeared. Furthermore, this propagation effort may lead to knowledge of basic biology and life history of both species.

To summarize, the conservation initiatives discussed above may ameliorate one or more stressors on populations of Dakota skipper and Poweshiek skipperling at a relatively small number of sites. Approximately 12 Dakota skipper sites and 8 Poweshiek skipperling sites benefit from conservation easements; 12 Dakota skipper sites are owned by the Service and may benefit from implementation of Dakota skipper conservation guidelines; 2 sites in state parks are undergoing prairie restoration and management; approximately 5 additional Dakota skipper sites and 4 Poweshiek skipperling sites are managed to benefit prairie butterflies, such as rotational fire management. Since numerous sites have two or more stressors of moderate to high-level impacts to one or both species, all stressors are likely not completely ameliorated at many sites. Initiatives such as captive propagation and studies of the effects of various management techniques may be applied broadly and may be beneficial to each species as a whole—the timeframe for these benefits to be realized, however, will not be immediate.

Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Although its biology could make the Dakota skipper sensitive to collection at some locations, the present level of scientific collection is minimal and recreational collecting is unlikely (Royer and Marrone 1992a, p. 27). No collection threats are known or likely for the Poweshiek skipperling (Royer and Marrone 1992b, p. 16). Collection is not currently a threat to either species in Canada (COSEWIC 2003, p. 18). Scientific Collectors Permits are required in states where both species have legal protection, and permission is often required to collect specimens on protected areas. Furthermore, these species are not collected for commercial purposes; the drab coloration likely makes both species less desirable for collectors and the remoteness of occupied habitat and limited flight period would make recreational collections difficult (Borkin 2012, pers. comm.). Therefore, overutilization for commercial, recreational, scientific, or educational purposes is not currently a threat to Dakota skipper and Poweshiek skipperling.

Although recreational collection is not a threat to these species at this time, due to the few populations, small population size, and restricted range, if any recreational collecting did occur in the future, even limited collection from the remaining small and isolated populations could have deleterious effects on these species' reproductive and genetic viability.

Factor C. Disease or Predation

Diseases or parasites that are specific to the Dakota skipper or Poweshiek skipperling are not known, but some parasitism or predation likely occurs during each of the life stages. For example, 10 of 130 eggs tagged for field observation in a 1994 study of a Wisconsin Poweshiek skipperling population appeared to have suffered from predation or parasitism (Borkin 1995b, p. 5); some were punctured and had the contents extracted, and others turned black and dried up. Dana (1991, pp. 19–21) documented some parasitism of Dakota skipper and Ottoe skipper (*Hesperia ottoe*) eggs and larvae by various wasp and ant species and predation by various insects. Wolbachia, ubiquitous intercellular bacteria estimated to affect 20–70 percent of all insect species, including many butterfly species, affects the reproductive ecology of its host (Kodandaramaiah 2011, pp. 343–350). It is uncertain if Wolbachia are affecting the Dakota skipper or Poweshiek skipperling. The University of Michigan (at Dearborn) has plans to study Wolbachia bacteria on one or both of the species.

Predation by birds or insects is not considered a major component of Dakota skipper or Poweshiek skipperling population dynamics and does not likely impact the species. McCabe (1981, p. 187), however, noted three kinds of predators to Dakota skippers, including Ambush bugs (Hemiptera: *Phymata* sp.), flower spiders (Aranaea: *Misumena* spp.), and orb weavers (various Araneldae). Although flower spiders and ambush bugs are effective predators of nectar-feeding insects (McCabe 1981, pp. 187–188) and may cause mortality to some individuals, no evidence indicates that these predators have population level impacts to either the Dakota skipper or Poweshiek skipperling. Similarly, Orb weaver spiders appear to be successful predators of ''old, warn individuals'' (McCabe 1981, p. 188), but no evidence indicates that these predators have population-level impacts to the Dakota skipper and Poweshiek skipperling.

Therefore, we do not consider either disease or predation to be a significant stressor to the Dakota skipper or Poweshiek skipperling populations at this time, nor do we expect these stressors to become threats in the future.

Factor D. The Inadequacy of Existing Regulatory Mechanisms

Existing regulatory mechanisms vary by location, but generally do not mitigate for the numerous threats that the Dakota skipper and Poweshiek skipperling face.

State Regulations

The Dakota skipper is listed as threatened under Minnesota's endangered species statute. Under the Minnesota statute, a person may not take, import, transport, or sell any portion of an endangered species of wild animal or plant, or sell or possess with intent to sell an article made with any part of . . . an endangered species of wild animal or plant'' except as permitted by the Minnesota DNR (Minnesota Statutes 2012, 84.0895). The Poweshiek skipperling is listed as a species of special concern in Minnesota, which conveys no prohibitions against take of the species. The Minnesota DNR has proposed to list Poweshiek skipperling as endangered and to change the status of Dakota skipper from threatened to endangered (Minnesota DNR 2012), but it is unclear when this may go into effect. The Poweshiek skipperling is listed as threatened under state endangered species statutes in Iowa and Michigan and as endangered in Wisconsin. South Dakota has an endangered species act, but no invertebrates are currently listed. South Dakota put forth a proposal to add the Dakota skipper to the state endangered species act list, but it was not finalized. Although the Dakota skipper is not listed as threatened or endangered under South Dakota's endangered species statute, the State natural

heritage program considers the species to be imperiled because of rarity due to very restricted range and very few populations. North Dakota does not have a mechanism for conferring protection to threatened or endangered species at the State level.

State Endangered species statutes provide state natural resource or conservation agencies with the authority to regulate collection of individuals and related activities (for Poweshiek skipperling in Iowa, Michigan, and Wisconsin and Dakota skipper in Minnesota), but we have no information to suggest that collection is a stressor that impacts populations of the species. With the exception of the regulation of some incidental take in Wisconsin and Minnesota, the statutory protections afforded by these state statutes may do little to protect or mitigate Poweshiek skipperling or Dakota skipper from non-collection threats. While some threats may result in direct mortality of both species, such as ill-timed fires, most threats to the species are indirect and state laws that regulate direct harm to the species do not address these threats. In Iowa, for example, Poweshiek skipperling populations are likely now extirpated due to habitat destruction and conversion and other undetermined threats, despite its presence on the State's list of threatened species since 1994. In Wisconsin, where threats from actions that may incidentally take Poweshiek skipperlings may be addressed in conservation plans, state endangered species protections do not protect the species from stochastic events and habitat fragmentation that are threats to the State's small and isolated populations.

Federal Regulations

The U.S. Forest Service (Forest Service or USFS) has designated the Poweshiek skipperling and the Dakota skipper as sensitive species (a species identified by a Regional Forester for which population viability is a concern) in North Dakota (Forest Service 2011). The Forest Service's objectives for sensitive species benefit Dakota skipper and Poweshiek skipperling where they occur (or could occur) on USFS lands; however, the majority of populations of both species do not occur within USFS lands. The Poweshiek skipperling has been documented at two sites on the Sheyenne National Grasslands; however, it has not been observed since 2001 at one site and 1996 at the other. Therefore, these Forest Service objectives, although promising, have little ability to affect the rangewide status of the species. If Forest Service lands were to be occupied by either species in the future, these objectives may benefit the species at a local scale.

Canadian Regulations

Dakota skipper and Poweshiek skipperling are listed as threatened under Canada's Species at Risk Act (SARA) (Environment Canada 2012. Species at Risk Act Public Registry. <*http://www.registrelep-sararegistry.gc.ca/sar/index/default_e.cfm*>. Accessed February 8, 2012). Under SARA, take of both species is prohibited on Canadian Federal lands, but the Poweshiek skipperling occurs only on non-federal lands in Canada, and only four or five Dakota skipper sites are on Federal lands (Coalfields Community Pasture) in Canada. The Federal Cabinet may create an order extending SARA's powers (*e.g.,* to private lands) if a species is insufficiently protected by provincial laws; however this has not been done for either of these species. The Dakota skipper is listed as threatened under the Manitoba Endangered Species Act, and it is therefore unlawful to kill, injure, possess, disturb, or interfere with the Dakota skipper; destroy, disturb, or interfere with its habitat; or damage, destroy, obstruct, or remove a natural resource on which the species depends for its life and propagation (Manitoba Endangered Species Act <*http://www.gov.mb.ca/conservation/wildlife/legislation/endang_act.html*> Accessed February 7, 2012). The Poweshiek skipperling was recently listed as endangered in Manitoba (<*http://www.gov.mb.ca/conservation/wildlife/sar/sarlist.html*> Accessed December 28, 2012). There is no legal basis for protecting threatened or endangered invertebrates in Saskatchewan, but since both species are listed under SARA, the national government could step in to protect the species in the province if the province does not act to protect the species (Environment Canada. 2012. Species at Risk Act: A Guide. <*http://www.sararegistry.gc.ca/approach/act/Guide_e.cfm*> Accessed February 7, 2012).

To summarize, some of the regulatory mechanisms discussed above are beneficial to populations of Dakota skipper and Poweshiek skipperling at a local scale; however, most do not ameliorate stressors except for harm to individuals in certain states. With the exception of the regulation of some incidental take in Wisconsin, Minnesota, and Canada, the statutory protections afforded by these statutes may do little to protect Poweshiek skipperling or Dakota skipper from non-collection stressors.

Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence

Habitat Fragmentation and Population Isolation

As habitat specialists, habitat fragmentation has a strong negative effect on the distribution and abundance of the Dakota skipper and Poweshiek skipperling because both are dependent on remnant native tallgrass prairie or native mixed-grass prairie and, in Michigan, Poweshiek skipperling depends on native prairie fens. Habitat fragmentation reduced once extensive areas of these habitats to a collection of patches of varying quality and isolation. The probability of extinction within patches can be determined primarily by degradation of habitat quality, management techniques (*e.g.,* haying, prescribed burns), and likelihood of stochastic events, such as wildfire or floods.

Although there are no genetic studies on the Poweshiek skipperling, fragmentation of tallgrass prairie has degraded the genetic diversity of remaining Dakota skipper populations (Britten and Glasford 2002, pp. 371–372). What may have once been a single population of Dakota skippers spread across formerly extensive tallgrass and mixed-grass prairie (McCabe 1981, p. 184) is now fragmented into about 172 separate sites where the species is known to be or may still be present (sites with present (91) or unknown (81) status). The small genetic differences among seven Dakota skipper populations in the southern portion of the species' range suggest that they were formerly connected (Britten and Glasford 2002, pp. 371–372). Each Dakota skipper population is now subject to genetic drift that may erode its genetic variability over time and possesses genetic qualities indicative of inbreeding (Britten and Glasford 2002, pp. 371–372). Inbreeding lowers the capacity of local populations to adapt to environmental changes and may magnify the effect of deleterious alleles (genes with undesirable effects on individuals or populations) (Nieminen *et al.* 2001, pp. 242–243).

Poweshiek skipperlings are not wide dispersers (Burke *et al.* 2011, p. 2279; Fitzsimmons 2012, pers. comm.); species experts have estimated maximum dispersal distance to be less than 1.6 km (1.0 mi) (Westwood 2012b, pers. comm; Dana 2012b, pers. comm.). Its mobility, however, has been ranked as less than that of Dakota skipper (Burke *et al.* 2011, p. 2279; Fitzsimmons 2012, pers. comm.); therefore, a more conservative maximum dispersal

distance may be more similar to that of the Dakota skipper (less than 1 km (0.6 mi)). Most individuals may remain within a single habitat patch during their 5–7 day adult life span; therefore, local extinctions of the Poweshiek skipperling on isolated habitat fragments are likely permanent unless one or more populations located within 1.0–1.6 km (0.6–1.0 mi) are large enough to produce immigrants to reestablish populations. Furthermore, fragmentation of tallgrass prairie began in about 1830, and at least 85 to 99 percent of the original prairie is now gone across the species' ranges (Samson and Knopf 1994, p. 419). As a result, Poweshiek skipperling and Dakota skipper populations are now scattered in fragments of this once vast ecosystem. The Poweshiek skipperling may not move across barriers; for instance, in Manitoba, Poweshiek skipperlings have been observed avoiding dispersal over short distances, even to suitable habitat, if a barrier such as a road exists between suitable prairie habitat or nectar sources (Westwood *et al.* 2012, p.18). Repopulation of Poweshiek skipperling sites after extirpation has been observed (*e.g.,* after a flood) (Saunders 1995, p. 15), but source populations need to be adjacent or very close.

Similarly, Dakota skippers have a short (5- to 7-day) life span (Dana 1991, p. 32) and an estimated maximum dispersal distance to be no greater than 1 km (0.6 mi) between patches of prairie habitat separated by structurally similar habitats (Cochrane and Delphey 2002, pp. 6, 32). Therefore, Dakota skipper and Poweshiek skipperling habitat patches separated by more than 1 km (0.6 mi) are effectively isolated from one another (McCabe 1981, p. 190; Swengel 1998). Extirpation of small, isolated populations may occur over many years in some cases, but may be inevitable where immigration from nearby populations is not possible (Hanski *et al.* 1996, p. 535).

Because Dakota skipper and Poweshiek skipperling habitat is highly fragmented and because the species are subject to local extinction, their ability to disperse to reoccupy vacant habitat patches may be crucial for their long-term persistence. Patch isolation and decreased permeability of surrounding habitat acts as a dispersal barrier between patches, ultimately decreasing genetic diversity within the patch through genetic drift and inbreeding. If we assume isolation occurs when a patch is more than 1.6 km (1.0 mi) from another patch, then about 45 percent of Poweshiek skipperling locations with present or unknown status are effectively isolated, and would not be recolonized if extirpated (Service 2012 unpubl. data; Service 2013, unpubl. data). Using a more conservative maximum dispersal of 1.0 km (0.6 mi), approximately 56 percent of Poweshiek skipperling locations with present or unknown status are effectively isolated. Isolation was a factor in loss of a site at Hartford Beach State Park, South Dakota, where the Poweshiek skipperling was extirpated due to habitat succession and exotic plant invasion (Skadsen 2009, p. 4; Skadsen 2010, pers. comm.), but was located too far from a source population for natural recolonization to occur. Improved prairie management has since markedly improved habitat quality, but the species has not been detected since 2006 at Hartford Beach State Park (Skadsen 2009, p. 4; Skadsen 2012, p. 4; Service 2013, unpubl. data). For Dakota skipper, if we use a maximum dispersal distance of 1 km (0.6 miles), approximately 84 percent of Dakota skipper sites with present or unknown status are effectively isolated.

This simple analysis, however, probably underestimates the impacts of habitat fragmentation on the species. Populations of both species may only be near others that are too small to produce sufficient numbers of immigrants. This is true for the Poweshiek skipperling in Scuppernong Prairie in Wisconsin, for example, which is about 0.3 km (0.2 mi) from the Wilton Road population; fewer than 100 individuals have been counted at this site each year (See *Population Distribution and Status*). Numbers at Wilton Road are currently too small (less than 12 individuals counted each year) to produce sufficient numbers of emigrants to Scuppernong Prairie to reestablish a viable population in the event of the latter's extirpation. There is no population of Poweshiek skipperlings near the Puchyan Prairie site (which is about 100 km (62 mi) from the nearest site in Wisconsin); additionally, only a few individuals have been observed at this site each year. In North Dakota, Orwig (1997, p. 3) found that a 6 ha (15 ac) patch of Poweshiek skipperling habitat at Hartleben Prairie was connected by grassland to another Poweshiek skipperling population, but neither was considered a robust population. Only 2 of the 11 Poweshiek skipperling sites with present status in Michigan are located within 1 mi (1.6 km) of another site; the rest are completely isolated from other populations. Furthermore, most of these populations consist of few individuals (see *Population Distribution and Status*). Poweshiek skipperlings at Little Goose Lake Fen, for example, are separated from other populations by at least 8 km (5 mi)—too far for immigrants to repopulate the site. Furthermore, Little Goose Lake Fen may contain too few Poweshiek skipperlings (Michigan Natural Features Inventory 2011, unpubl. data) to generate sufficient numbers of immigrants. In addition, poor habitat quality negatively influences the number and quality of emigrants (Thomas *et al.* 2001, p. 1795; Matter *et al.* 2009, p. 1467). Isolation is not likely alleviated by connections to low-quality habitats that are not capable of producing emigrants at the numbers or frequency sufficient to reliably repopulate nearby patches.

Even with proper prairie management, extreme weather patterns or severe weather events may significantly impact Poweshiek skipperling and Dakota skipper populations, because they can occur across a large geographic area. These events include extremely harsh winters, late hard frosts following a spring thaw, severe storms, flooding, fire, or cool damp conditions. Habitats isolated as a result of fragmentation will not be recolonized naturally after local extirpations, as described above. Dakota skipper and Poweshiek skipperling numbers may decline due to the extirpation of isolated local populations where recolonization is no longer possible, even without further habitat destruction (Schweitzer 1989, unpaginated). The likelihood of population extirpation may be directly related to the size of habitat fragments. For example, in systematic surveys on Minnesota prairies, Swengel and Swengel (1997, pp. 134–137; 1999, p. 284) found no Dakota skippers on the smallest remnants (less than 20 ha (49 ac)), and significantly lower abundance on intermediate size (30–130 ha (74–321 ac)) than on larger tracts (greater than 140 ha (346 ac)). These differences were unrelated to vegetation characteristics; habitat area did not correlate significantly with vegetation type, quality, or topographic diversity (Swengel and Swengel 1999, p. 284).

We assessed the stressor of small size and isolation of habitat for 143 Dakota skipper sites and 68 Poweshiek skipperling sites with present or unknown status—many of the sites with where the species is present in Canada were not evaluated because we had little or no information on the size of sites (Service 2012 unpubl. data; Service 2013, unpubl. data). We considered small size and isolation of habitat to be a stressor with a low-level impact on populations at sites that contain more than 140 ha (346 ac) of native prairie or

the species' habitat onsite is located less than 1 km (0.6 mi) from habitat occupied by the species on another site. If the sum of native prairie on the site under review plus that on the nearby site(s) is less than 140 ha (346 ac), then this threat was considered to have a moderate or high impact on populations. We considered small size and isolation of habitat to be a stressor with moderate impacts on populations at sites where the species' habitat is greater than 1 km (0.6 mi) from any other area where the species is present, but contains more than 30 ha (74 ac) of habitat for the species; or where the species' habitat is less than 1 km (0.6 mi) from occupied Dakota skipper and Poweshiek skipperling habitat on another site, but the sum of native prairie on the site under review plus that on the nearby site(s) is less than 140 ha (346 ac) and greater than 30 ha (74 ac). Sites that contain a small area of Dakota skipper and Poweshiek skipperling habitat—no more than 30 ha (74 ac)—and that are not within 1 km (0.6 mi) estimated maximum dispersal distance of occupied Dakota skipper habitat are considered to have a stressor of high magnitude to those populations due to a combination of their small size and isolation.

Dakota skipper populations on about 35 percent of the evaluated sites (50 of 143 sites) face a high level of impact to populations due to a combination of size and isolation (Service 2012, 2013, unpubl. data). Approximately 24 percent of evaluated sites (35 sites) face a moderate level of impact to populations due to small size and isolation. About 40 percent of Dakota skipper sites (50 of the 143 evaluated sites) in the United States inhabit sites that are either sufficiently large (greater than 130 ha (346 ac)) or are close enough to other Dakota skipper populations that small size and isolation is not a stressor. Similarly, the stressor of small size and isolation has a high level of impact on Poweshiek skipperling populations on about 37 percent of rated sites (25 of 68 sites), on 24 sites (35 percent) the threat is considered to have a moderate level of impact to populations, and on 28 percent (19 of the 68 evaluated sites) of the sites, we do not consider a small size and isolation to be a stressor. In a separate analysis strictly looking at distances between Poweshiek skipperling sites where the species is present, we found that only 2 sites are within 1 km (0.6 mi) of another site where the species is present (Service 2013, unpubl geodatabase).

In summary, small, isolated populations face a current and ongoing stressor of moderate to high severity to both the Dakota skipper and Poweshiek skipperling. The stressor has a high impact to populations when isolation is combined with small habitat fragments or small populations; for example, where the population is too small to supplement nearby populations without adverse genetic consequences to the source population. Isolated populations occur throughout both species' entire ranges; only two percent of Poweshiek sites with present or unknown status are within the estimated maximum dispersal distance from one another as are about 16 percent of Dakota skipper sites with present or unknown occupancy. The small populations are subject to erosion of genetic variability leading to inbreeding, which lowers the ability of the species to adapt to environmental change. Small populations occur rangewide for both species; for example, surveyors have counted fewer than 100 individuals in all but 4 Poweshiek skipperling sites in 2011 and all but one site surveyed in 2012.

Climate Change

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). The term ''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 2007a, 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 2007a, p. 78).

Scientific measurements spanning several decades demonstrate that changes in climate are occurring, and that the rate of change has been faster since the 1950s. Examples include warming of the global climate system, and substantial increases in precipitation in some regions of the world and decreases in other regions. (For these and other examples, see IPCC 2007a, p. 30; and Solomon *et al.* 2007, pp. 35–54, 82–85). Results of scientific analyses presented by the IPCC show that most of the observed increase in global average temperature since the mid-20th century cannot be explained by natural variability in climate, and is ''very likely'' (defined by the IPCC as 90 percent or higher probability) due to the observed increase in greenhouse gas (GHG) concentrations in the atmosphere as a result of human activities, particularly carbon dioxide emissions from use of fossil fuels (IPCC 2007a, pp. 5–6 and figures SPM.3 and SPM.4; Solomon *et al.* 2007, pp. 21–35). Further confirmation of the role of GHGs comes from analyses by Huber and Knutti (2011, p. 4), who concluded it is extremely likely that approximately 75 percent of global warming since 1950 has been caused by human activities.

Scientists use a variety of climate models, which include consideration of natural processes and variability, as well as various scenarios of potential levels and timing of GHG emissions, to evaluate the causes of changes already observed and to project future changes in temperature and other climate conditions (Meehl *et al.* 2007, entire; Ganguly *et al.* 2009, pp. 11555, 15558; Prinn *et al.* 2011, pp. 527, 529). All combinations of models and emissions scenarios yield very similar projections of increases in the most common measure of climate change, average global surface temperature (commonly known as global warming), until about 2030. Although projections of the magnitude and rate of warming differ after about 2030, the overall trajectory of all the projections is one of increased global warming through the end of this century, even for the projections based on scenarios that assume that GHG emissions will stabilize or decline. Thus, there is strong scientific support for projections that warming will continue through the 21st century, and that the magnitude and rate of change will be influenced substantially by the extent of GHG emissions (IPCC 2007a, pp. 44–45; Meehl *et al.* 2007, pp. 760–764 and 797–811; Ganguly *et al.* 2009, pp. 15555–15558; Prinn *et al.* 2011, pp. 527, 529). (See IPCC 2007b, p. 8, for a summary of other global projections of climate-related changes, such as frequency of heat waves and changes in precipitation. Also see IPCC 2011(entire) for a summary of observations and projections of extreme climate events.)

Various changes in climate may 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 interactions of climate with other variables (e.g., habitat fragmentation) (IPCC 2007, pp. 8–14, 18–19). Identifying likely effects often involves aspects of climate change vulnerability analysis. Vulnerability refers to the degree to which a species (or system) is susceptible to, and unable to cope with,

adverse effects of climate change, including climate variability and extremes. Vulnerability is a function of the type, magnitude, and rate of climate change and variation to which a species is exposed, its sensitivity, and its adaptive capacity (IPCC 2007a, p. 89; see also Glick *et al.* 2011, pp. 19–22). There is no single method for conducting such analyses that applies to all situations (Glick *et al.* 2011, p. 3). We use our expert judgment and appropriate analytical approaches to weigh relevant information, including uncertainty, in our consideration of various aspects of climate change.

As is the case with all stressors that we assess, even if we conclude that a species is currently affected or is likely to be affected in a negative way by one or more climate-related impacts, it does not necessarily follow that the species meets the definition of an ''endangered species'' or a ''threatened species'' under the Act. If a species is listed as endangered or threatened, knowledge regarding the vulnerability of the species to, and known or anticipated impacts from, climate-associated changes in environmental conditions can be used to help devise appropriate strategies for its recovery.

Global climate change, with projections of increased variability in weather patterns and greater frequency of severe weather events, as well as warmer average temperatures, would affect remnant prairie habitats and prairie fen habitats and may be a threat that has significant impacts on prairie butterflies such as Dakota skippers and Poweshiek skipperling (Royer and Marrone 1992b, p. 12; Royer and Marrone 1992a, pp. 22–23; Swengel *et al.* 2011, p. 336; Landis *et al.* 2012, p. 140). For example, climatic factors, particularly precipitation and evaporation, play an important role in defining suitable Dakota skipper habitat (McCabe 1981, pp. 189–192). Larval Dakota skipper have ''hydrofuge glands'' that suggest an historical or present need of the species for protection from flooding (McCabe 1981, p. 181). Royer *et al.* (2008, p. 2) hypothesize that temperature and relative humidity at or near the soil surface may be important factors dictating larval survival, particularly since early stages live in a silken nest within a few centimeters (2–3) (0.8–1.2 in) of the soil surface during most of the summer (McCabe 1981, pp. 180–181, 189; Dana 1991, p. 16). Furthermore, both species and their habitats may experience the effects of gradual shifts in plant communities and an increase in catastrophic events (such as severe storms, flooding, and fire) due to climate change, which are exacerbated by habitat fragmentation. Isolated populations, specifically, Dakota skipper populations and Poweshiek skipperling populations that are separated by more than about 1 km (0.6 miles), are unlikely to recover from local catastrophes unless sufficient numbers are successfully reintroduced, for instance, through artificial propagation efforts.

Documentation of climate-related changes that have already occurred throughout the range of the Dakota skipper and Poweshiek skipperling (Johnson *et al.* 2005, pp. 863–871) and predictions of changes in annual temperature and precipitation in the Midwest region of the United States, such as Minnesota prairies (Galatowitsch *et al.* 2009, pp. 2017), Michigan fens (Landis *et al.* 2012, p. 140), and throughout North America (IPCC 2007, p. 9) indicate that increased severity and frequency of droughts, floods, fires, and other climate-related changes will continue in the future. Recent studies have linked climate change to observed or predicted changes in distribution or population size of insects, particularly Lepidoptera (Wilson and Maclean 2011, p. 262). Native remnant prairies have been reduced by 85 to 99.9 percent across the range of both species (Samson and Knof 1994, p. 419)—this fact, coupled with the low dispersal ability of both species, makes it unlikely that populations may expand to new areas, for example, in a northward direction, to adapt to changing climate. Climate change is a threat that has the potential to have severe impacts on the species; however, at this time our knowledge of how these impacts may play out is limited. All of the sites within the range of both species are in an area that could experience the effects of climate change.

Prairie Plant Harvesting

A potential, future threat to the Dakota skipper and Poweshiek skipperling is collection of purple coneflower (blacksamson echinacea), a predominate nectar source for both species, for the commercial herbal remedy market (Skadsen 1997, p. 30). Biologists surveying skipper habitats have not reported signs of plant collecting, but illegal or unregulated harvest could become a problem in Dakota skipper and Poweshiek skipperling habitats due to economic demand (Skadsen 1997, p. 30). Currently, prairie plant harvesting is not considered a threat that impacts the species; however, this situation may change if the demand for echinacea increases.

Management for Invasive Species and Succession

Native prairie and native prairie fens must be managed to prevent the indirect effects of invasive species and succession (processes of change in species structure to an ecological community over time; secondary succession is a disruption to succession that occurs due to an event such as fire) to Dakota skippers and Poweshiek skipperlings. If succession progresses too far, established shrubs or trees must be removed in a way that avoids or minimizes damage to the native prairie. When succession is well advanced, managers must use intensive methods, including intensive fire management, to restore prairie plant communities. If not done carefully, these actions may themselves harm local populations of the butterflies (for example, see *Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range*). For example, once smooth brome has invaded Poweshiek skipperling or Dakota skipper habitat, it is challenging to eradicate it while minimizing harm to the butterflies. Willson and Stubbendiecks (2000, p. 36) recommended burning prairie habitats, annually in some cases, to control smooth brome at the stage when the lateral shoots are elongating. In southwest Minnesota and in other parts of Dakota skipper's range, the optimum time to burn to control smooth brome may occur during the time that the adult butterflies are active. Cutting or grazing to remove smooth brome may have less intensive effects on Poweshiek skipperling and Dakota skipper larvae and could be used as an alternative to fire, although these techniques also pose a risk to both species if carried out annually at isolated sites. Puchyan Prairie is another example of a small and isolated population that is susceptible to invasive species control efforts, if they are not conducted properly (Swengel and Swengel 2012, p. 6), although the Wisconsin DNR proposed control efforts that may improve habitat by removing reed canary grass, Canada thistle, and glossy buckthorn (Wisconsin DNR 2012 in litt.; Carnes 2012, in litt.).

If not appropriately managed with fire, grazing, or haying, Poweshiek skipperling and Dakota skipper habitat is degraded due to reduced diversity of native prairie plants and eventually succeeds to shrubby or forested habitats that are not suitable for either species. At Hartford Beach State Park in South Dakota, for example, the Poweshiek skipperling was extirpated (Skadsen

2009, p. 4) after lack of management led to invasion by smooth sumac (*Rhus glabra*) and quaking aspen (*Populus tremuloides*) (Skadsen 2006a, p. 5). Lack of management may also increase the likelihood of invasion of exotic cool-season grasses, such as Kentucky bluegrass and smooth brome (Mueller 2013, pers. comm.), which do not grow when Dakota skipper and Poweshiek skipperling larvae are feeding; thus a prevalence of these grasses reduces food availability for the larvae.

As with invasive species, actions intended to reverse secondary succession may be intensive and can themselves affect Poweshiek skipperling and Dakota skipper populations. For example, Poweshiek skipperling populations failed to recover after prescribed burns were carried out at Kettle Moraine Low Prairie SNA after it had become overgrown (Borkin 2011, in litt.).

Broadcast chemical control of exotic plants such as aerial spraying of leafy spurge and application of broad-spectrum herbicides to control weeds in pastures also eliminates native forbs that are important nectar sources for both species (Royer and Marrone 1992a, pp. 10, 16, 28, 29, 33, 1992b, p. 17, Orwig 1997, p. 7). For example, invasion of native prairie by exotic species, primarily leafy spurge and Kentucky bluegrass, as well as chemical control of exotic species, are documented threats to Dakota skippers at about 12 sites in North Dakota (Royer and Royer 2012b, pp. 15–16, 22–23). In repeated surveys, Royer and Marrone (1992a, p. 33) observed a correlation between the disappearance of the Dakota skipper and the advent of chemical weed control methods in North Dakota, including the Sheyenne National Grasslands. Royer and Marrone (1992b, p. 17), cited the combination of drought and grasshopper control programs along the Red River Valley as having serious impacts on the Poweshiek skipperling. Dana (1997, p. 5) concluded that herbicide use for weed and brush control on private lands is the principal threat to the Hole-in-the-Mountain complex in Minnesota, where both butterfly species have been documented. Furthermore, herbicide or pesticide use in concert with other management types may amplify other threats to the butterflies. Skadsen (2006b, p. 11), for example, documented the likely extirpation of the Poweshiek skipperling at Knapp Ranch in South Dakota after a July 2006 application of broadleaf herbicide associated with heavy grazing. The degree and immediacy of the threat posed by broadcast application of herbicides or pesticides is not precisely understood, but may be mostly tied to the use of herbicides to control invasive species on rangelands. If broad applications of herbicides are used in ways that remove plants from rangelands that are important for Poweshiek skipperling or Dakota skipper, then this is a potential threat on all privately owned sites where broadcast applications may occur.

Indiscriminant use of insecticides for pest control on rangeland, adjacent cropland, or forests is a stressor to populations of Poweshiek skipperling and Dakota skipper. Insecticides used in agriculture, urban gardens, and forests are a suspected cause of Colony Collapse Disorder in bees by reducing resistance to parasites and pathogens and may have similar effects on other insects (Beyers 2012, p. 1). Neonicotinyl pesticides, such as the imidacloprid compound, for example, are a commonly used seed dressing that spreads to nectar and pollen of flowering crops (Whitehorn 2012, p. 1). The spread of nonnative gypsy moths (*Lymantria dispar dispar*) has increased efforts to control this damaging species and may also pose a threat, especially in the range of Poweshiek skipperling. Insecticides used in the gypsy moth suppression programs typically include Foray, a formulation of the bacterial insecticide *Bacillus thuringiensis kurstakii* (Btk), or Gypchek, a viral insecticide specific to gypsy moth caterpillars. Btk is known to be lethal to butterfly larvae (*e.g.,* Karner blue butterfly) (Carnes 2011, p. 1). In Wisconsin, the gypsy moth suppression program is managed under State Statute 26.30 and Natural Resources Board Rule number 47, and Gypchek is used when endangered or threatened moths or butterflies are present (Wisconsin DNR, *http://dnr.wi.gov/topic/ForestHealth/GypsyMothPesticides.html,* accessed May 24, 2012).

Herbicide and pesticide use was assessed at 16 present and unknown Dakota skipper sites and 10 Poweshiek skipperling sites occupied with present or unknown occupancy where we had sufficient information to evaluate the stressor (Service 2012, 2013, unpubl. data). We considered the level of impact to populations posed by herbicide and pesticide use to be low if herbicides or pesticides are used, if the site is only spot sprayed when and where necessary (Smart *et al.* 2011, p. 182) and their use is not expected to change in the future. The level of threat was considered to be moderate if the use of herbicides is likely to increase at a site (*e.g.,* in response to new or expanding invasive species), but Dakota skipper and Poweshiek skipperling habitat is unlikely to be exposed to broadcast applications. The level of impact to populations posed by herbicide and pesticide use was considered to be high at sites where herbicides are likely to be broadcast over the entire site at least once every four years, or herbicide use has significantly reduced forb or nectar plant density and diversity or is likely to in the future. The level of impact to populations posed by herbicide and pesticide use was high at 5 of the 16 assessed Dakota skipper sites (2 in North Dakota and 3 in South Dakota) and moderate at 2 sites—one in North Dakota and one in South Dakota. The level of impact to populations posed by herbicide and pesticide use was considered to be high at 3 of the 10 assessed Poweshiek skipperling sites (all 3 in South Dakota), and 1 site in North Dakota had a moderate level of impact to populations.

In summary, some efforts to manage woody encroachment and invasive species, such as herbicide use, can be a stressor to both Dakota skipper and Poweshiek skipperling populations. Invasive species management is a current and ongoing threat of low to high impact to populations, depending on the intensity and extent of the use, types of techniques, and the compounding effects that may occur from varying management. Medium- to high-level impacts of herbicide or pesticide use to Dakota skipper and Poweshiek skipperling populations have been documented in North and South Dakota. This stressor has a high impact to populations when it is combined with other stressors, such as management, that reduces or eliminates nectar food sources, or small habitat fragments that are isolated from other source populations that may replenish individuals killed by pesticides. Herbicide and pesticide use may have direct or indirect effects on Dakota skipper and Poweshiek skipperling. Although such activities occur, there is no evidence that these activities alone have significant impacts on either species, since their effects are often localized. However, these factors may have a cumulative effect on the Dakota skipper and Poweshiek skipperling when added to habitat curtailment and destruction because dramatic population declines have occurred in both species (discussed in *Factor A*). Invasive species and woody vegetation management helps to maintain prairie habitats and can also be beneficial to populations of both species, for example, when concentrated on affected areas through spot spraying.

Pharmaceuticals

The effect of pharmaceutical residues in the environment on nontarget animals is an emerging concern (Lange *et al.* 2009). Ivermectin, a widely used and persistent veterinary pharmaceutical used to treat cattle, is a chemical of emerging concern to the Dakota skipper and Poweshiek skipperling. Ivermectin is an anthelmintic (drugs that are used to treat infections with parasitic worms) that is spread to prairie environments via the dung of grazing cattle (Lange *et al.* 2009, p. 2238). Lange *et al.* (2009, pp. 2234, 2238) found that skipper butterflies are particularly vulnerable to ivermectin, due to their low dispersive capacities and habitat preferences for soil. The extirpation of the Dakota skipper in at least one South Dakota site (Sica Hollow West) is possibly due to ivermectin that has leached into the environment (Skadsen 2010, pers. comm.).

Pharmaceutical use is a stressor that has the potential to have high-level impacts on populations of the Dakota skipper and Poweshiek skipperling; however, at this time our knowledge of these impacts is limited. Sites within the range of both species could experience the effects of pharmaceuticals. Sites that experience grazing, however, are particularly vulnerable to ivermectin use; these sites are primarily in South Dakota, North Dakota, and Minnesota. The use of pharmaceuticals such as ivermectin may have a cumulative effect on the Dakota skipper and Poweshiek skipperling when added to habitat curtailment or destruction, because habitat destruction leads to population declines in populations of both species (discussed in Factor A).

Unknown Stressors Causing Population Declines

The sharp and broad declines of Poweshiek skipperling documented in Iowa, Minnesota, North Dakota, and South Dakota are indicative of a response to one or more stressors that have yet to be ascertained. These unknown factors may consist of a combination of one or more of the threats described throughout Factors A, C and E of this proposed rule, or may be something that has not yet been identified. These declines are reminiscent of the widely publicized decline of honey bees (*Apis mellifera*) in that they seem sudden and mysterious (Spivak *et al.* 2011, p. 34).

One or more unidentified stressors have strongly impacted Poweshiek skipperling populations in the western portion of its range, which contains more than 80 percent of the species' site records. Unknown stressors may be the current threat with the most significant impacts to Poweshiek skipperling in Minnesota, North Dakota, and South Dakota, where populations experienced a sudden decline to undetectable numbers after about 2003. Until about 2003, Poweshiek skipperling was regarded as the most frequently and reliably encountered prairie-obligate skipper in Minnesota, which contains nearly 50 percent of all known Poweshiek skipperling locations. Numbers and distribution dropped dramatically in subsequent years, however, and the species has not been seen in Minnesota since 2007. Similar recent dramatic declines were observed in North Dakota, South Dakota, and Iowa (See Background of this rule).

Recent declines of Dakota skippers indicate that this species may also be impacted by unknown stressors. The Dakota skipper was last detected at one site in Iowa in 1992. Only one individual was detected in Minnesota during 2012 surveys, which included 18 sites with previous records; surveys for undiscovered populations were also carried out on 23 prairie remnants without previous records for the species. Based on similar conditions in other parts of the species' range, similar trends are anticipated outside of Minnesota. Indications of recent declining trends have been observed in South Dakota and North Dakota. In South Dakota, for example, the proportion of positive surveys at known sites has fluctuated over time; however, the 2012 surveys had the lowest positive detection rate (35 percent) for the last 15 years (since 1996)—much less than comparable survey years in South Dakota (for years with more than 20 surveys). The Dakota skipper was detected at 12 of the 23 sites surveyed during 2012 in North Dakota (and 2 additional sites with no previous Dakota skipper records); average encounter frequencies observed across the State in 2012 (9.4 encounters per hour), however, were about half of those observed during the 1996–1997 statewide surveys (ND state average = 17.4 encounters per hour). Recent survey results and similar life histories suggest that the Dakota skipper can be reasonably compared to the Poweshiek skipperling in their potential rate of decline—that is, it is reasonable to assume that Dakota skipper may be vulnerable to the same unidentified factors that have caused dramatic declines in the Poweshiek skipperling, with a slight delay in timing.

In summary, the results of extensive surveys in the western portion of the Poweshiek skipperling's range have documented the species' response to unknown stressors and indicate that they are a current threat of high severity. Although to date the Dakota skipper has not experienced such dramatic declines as the Poweshiek skipperling, similar unknown stressors on Dakota skipper populations likely have affected the species in Minnesota and Iowa, where recent surveys indicate that the species may be absent or at undetectable levels.

Summary of Factor E

Based on our analysis of the best available information, we have identified several natural and manmade factors affecting the continued existence of the Dakota skipper and Poweshiek skipperling. Effects of small population size, population isolation, and loss of genetic diversity are likely threats that have significant impacts on both species. Environmental effects resulting from climatic change, including increased flooding and drought, are expected to become severe in the future and result in additional habitat losses; however, we have limited information on how this stressor may affect either species. Possibly the threat with the most significant impacts to the Poweshiek skipperling are one or more unknown stressors that have led to widespread and sharp population declines in the western portion of the species' range. These unknown stressors may also be the cause of the recent declines observed in Dakota skipper populations over much of its range. Anthropogenic factors such as insecticides, herbicide and pesticide use, and prairie plant harvest are also threats to both species. Collectively, these threats have operated in the past, are impacting both species now, and will continue to impact the Dakota skipper and Poweshiek skipperling in the future.

Conservation Efforts To Reduce Other Natural or Manmade Factors Affecting Its Continued Existence

Several of the conservation activities discussed under *Factor A.* in this rule may address some factors discussed under *Factor E,* for example life-history studies of both species, studies to examine the effects of various management strategies on the species and its habitat, and habitat restoration techniques such as controlled burns on sites divided into several management units.

The Minnesota Zoo has initiated a new program to research Poweshiek skipperling and Dakota skipper

propagation. If this program is successful, it could facilitate reintroduction and augmentation into areas where the species has declined or disappeared, to bolster the small genetic pool and small numbers. In 2012, researchers at the Minnesota Zoo and the University of Michigan initiated a genetics study of Dakota skipper and Poweshiek skipperling using specimens at some of the few sites where either species was observed in 2012, specifically a few sites in Michigan, Wisconsin, and Manitoba for the Poweshiek skipperling and sites in North Dakota, South Dakota, and Manitoba for Dakota skipper. Too few (one adult male) Dakota skipper were observed in Minnesota to obtain samples from that State in 2012. The genetics studies will help inform captive propagation and reintroduction efforts, which may help alleviate stressors associated with small and isolated populations.

In 2011, researchers collected 32 adult Dakota skippers from a combination of 4 sites in South Dakota and translocated them to Pickerel Lake State Park, where the species was last detected in 2008 (Skadsen 2011, pp. 7–9). The phenology of the adult flight period and purple coneflower blooms did not coincide, and no Dakota skippers were observed at the release site during subsequent visits in 2011 or 2012 (Skadsen 2011, pp. 8–9, Skadsen 2012, p. 4). Researchers and managers continue to develop prairie restoration and management goals for this and the Hartford Beach State Park site in South Dakota (Skadsen 2011, p. 9; Skadsen 2012, p. 7).

We are unaware of any conservation efforts that directly address the impacts of climate change to Dakota skippers or Poweshiek skipperlings. We are unaware of any conservation efforts that address the possible effects of pharmaceuticals on the Poweshiek skipperling and Dakota skipper.

Cumulative Effects From Factors A through E

Many of the threats described in this finding may cumulatively or synergistically impact the Dakota skipper and Poweshiek skipperling beyond the scope of each individual threat. For example, improper grazing management alone may only affect portions of Dakota skipper or Poweshiek skipperling habitat; however, improper grazing combined with invasive plants, herbicide use, and drought may collectively result in substantial habitat loss, degradation, or fragmentation across large portions of the species' ranges. In turn, climate change may exacerbate those effects, further diminishing habitat and increasing the isolation of already declining and isolated populations, making them more susceptible to genetic drift or catastrophic events such as fire, flooding, and drought. Further, nonagricultural development such as gravel mining or housing development not only can directly destroy habitat, but also can increase fragmentation of habitat by increasing associated road development. Additionally, draining prairie fens will increase invasive plant and woody vegetation encroachment. Numerous threats are likely acting cumulatively to further increase impacts on the already vulnerable, small and isolated populations of Poweshiek skipperling and Dakota skipper.

Proposed Determinations

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 (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. Listing actions may be warranted based on any of the above threat factors, singly or in combination.

Dakota skipper

We carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the Dakota skipper. Dakota skippers are obligate residents of undisturbed (remnant, untilled) high-quality prairie, ranging from wet-mesic tallgrass prairie to dry-mesic mixed-grass prairie. Native tallgrass prairies have been reduced by 85 to 99.9 percent of their former area and native mixed-grass prairies have been reduced by 71.9 to 99 percent of their former area in North Dakota, Manitoba, and Saskatchewan. The Dakota skipper was once a common prairie butterfly widely dispersed in five states, extending from Illinois to North Dakota, and portions of 2 Canadian provinces. However, its range is now substantially reduced such that the Dakota skipper is restricted to small patches of fragmented native prairie remnants in portions of three states and two Canadian provinces. Recent survey data indicate that the Dakota skipper has declined to zero or to undetectable levels in approximately 50 percent of sites where it had been recorded rangewide. It is presumed extirpated from Illinois and Iowa and no longer occurs east of western Minnesota—an approximately 430-mi (690-km) reduction of its range. Much of the rangewide decline in the species has been observed in the last few years. Since 1985, researchers have surveyed 10 or more sites in 27 years; the average positive detection rate for those years is 69 percent rangewide. Since 2010, the percent of surveyed sites with positive detections of the species has dropped from 80 percent in 2010, to 42 percent in 2011, and to 35 percent in 2012. While these types of lows in detections have been observed in past years, for example, in the early 1990s, the numbers of individuals observed in 2012 were the lowest ever recorded, despite extensive survey effort. Dakota skippers currently occupy sites in northeastern South Dakota, North Dakota, western Minnesota, southern Manitoba, and southeastern Saskatchewan.

Of the 259 historical locations, the species is presumed extirpated or possibly extirpated from at least 87 (34 percent) of those sites, and the occupancy of the species is unknown at approximately 81 (31 percent) sites. Of the 81 sites where the occupancy is unknown, at least 72 sites are subject to one or more threats that have a moderate to high impact on those populations—these sites are distributed across Minnesota, North Dakota, and South Dakota. The 9 sites with unknown occupancy without moderate- to high-level threats are scattered in various counties in Minnesota and South Dakota, and the skipper is thought to still be present at approximately 91 (35 percent) of the 259 historical locations, although 23 of these sites have not been surveyed since 2002. Of those 91 sites, at least 83 sites are subject to one or more threats that have a moderate to high impact on those populations, such as conversion to agriculture, lack of management, and small size and isolation. The remaining 8 sites that do not have stressors with moderate- to high-level impacts to populations occur in scattered counties in Minnesota and South Dakota. Approximately half (45 of 91) of the locations where the species is considered to be present are located on privately owned fall hayed prairies in Canada, mostly within 3 isolated complexes, and have not been surveyed since 2007. All 45 of those Canadian sites have one or more stressors of moderate to high level of impact to

populations. A fair number of populations in Canada are being managed in a manner conducive to the conservation of the Dakota skipper and the threats at those sites are not immediate. However, few (4–5 sites) of these Canadian populations are protected (on Federal land). The remaining sites where the species is considered to be present are about equally distributed among Minnesota (14 sites), North Dakota (18 sites), and South Dakota (14 sites). Sites with stressors with moderate to high level of impacts to populations occur in all three states.

Many factors likely contributed to the Dakota skipper's decline, and numerous major threats, acting individually or synergistically, continue today (see Summary of Factors Affecting the Species). Habitat loss and degradation have impacted the Dakota skipper, curtailing the ranges of the species (see Factor A). Extensive historical conversion of prairie and associated habitats, nearly complete in some areas, has isolated many Dakota skipper populations. These small and isolated populations are subject to loss of genetic diversity through genetic drift (see Factor E) and are susceptible to a variety of stochastic (*e.g.,* wildfires, droughts, and floods) and deterministic (*e.g.,* overgrazing, invasive species) factors (see Factor A) that may kill all or a substantial proportion of a population. Although much of the habitat conversion occurred in the past, the effects of the dramatic reduction and fragmentation of habitat have persistent and ongoing effects on the viability of populations; furthermore, conversion of native prairies to agriculture or other uses is still occurring today. The life history of the species exacerbates the threats caused by the fragmentation and degradation of the species' habitat (see Factors A and E) as the Dakota skipper is not likely to recolonize distant sites due to its short adult life span, single annual flight, and limited dispersal ability. Therefore, the species' extirpation from a site is likely permanent unless it is near another site from which it can emigrate. Furthermore, because the larvae are located at or near the soil surface, they are more vulnerable to fire (Factor A), herbicides, pesticides, and other chemicals (see Factor E); desiccation due to changing climate (see Factor E); or flooding (see Factor A).

Within the remaining native prairie patches, degradation of habitat quality is now the primary threat to the Dakota skipper (see Factor A). Of the various threats to Dakota skipper habitat, conversion, invasive species, secondary succession, and reduction in the diversity of native prairie plant communities have moderate- to high-level impacts to populations throughout the range of the Dakota skipper. An array of other factors including nonagricultural development, chemical contaminants, pesticides, and intensive grazing are also current and ongoing threats to the Dakota skipper and its habitat (see Factors A and E). Current and ongoing prairie management practices, such as indiscriminate use of herbicides or intensive grazing that reduces or eliminates food sources, contribute to the species' imperilment at sites throughout the range of the species (see Factors A and E). Unknown stressors may be the current threat that has the most significant impacts to the Dakota skipper in Iowa and Minnesota, where populations experienced a sudden decline to undetectable numbers in the most recent years (see *Factor E*). Based on recent data, similar conditions in other parts of the Dakota skipper's range, and the similarities in life histories between Poweshiek skipperling and Dakota skipper, similar declining trends are anticipated in other parts of the Dakota skipper's range due to unknown stressors, and may only be a few years behind those declines experienced by Poweshiek skipperling (see Factor E). Existing regulatory mechanisms vary across the species' ranges, and although mechanisms do exist that protect the species from direct take in Iowa and Minnesota, these mechanisms do not sufficiently mitigate threats to the species (see Factor D). Climate change may affect Dakota skipper, especially increased frequency of extreme climatic conditions such as flooding and drought, but there is limited information on the exact nature of impacts that these species may experience. Recent temperature and precipitation trends indicate that certain aspects of climate change may be occurring in Dakota skipper range now (see Factor E).

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 find that the Dakota skipper is likely to become endangered throughout all of its range within the foreseeable future, based on the immediacy, severity, and scope of the threats described above. These threats are exacerbated by small population sizes, the loss of redundancy and resiliency of these species, and the continued inadequacy of existing protective regulations. A few scattered populations of Dakota skipper are doing relatively well, however, and are in habitats that have low or non-immediate threats. Canada has a fair number of populations that are being managed in a manner conducive to the conservation of Dakota skipper, and the threats at those sites are not imminent. However, few of these populations are protected, many are vulnerable to changes in land use, and the sites have not been surveyed in the last 5 years. While a few new locations of Dakota skipper populations continue to be discovered in North and South Dakota, the numbers of individuals observed at those sites is generally low, and extirpation at previously known sites seems to be occurring at a faster rate than new discoveries. The decreasing numbers of sites with positive detections and the decreasing numbers of individuals observed at each site throughout its range, including known sites in North Dakota and South Dakota, is likely to continue. Therefore, on the basis of the best available scientific and commercial information, we propose listing the Dakota skipper as threatened in accordance with sections 3(6) and 4(a)(1) of the Act.

We find that an endangered species status is not appropriate for the Dakota skipper because some Dakota skipper populations still appear to be doing relatively well—primarily in North Dakota, South Dakota, Manitoba, and Saskatchewan. Canada has a fair number of populations that are being managed in a manner conducive to the conservation of Dakota skipper, and the threats at those sites are not imminent. Furthermore, we believe the species to be present in at least 8 sites that do not have documented stressors of a moderate to high level impact to populations, primarily in scattered counties in Minnesota and South Dakota. Additionally, a few new Dakota skipper sites continue to be discovered in suitable prairie habitat in North Dakota and South Dakota.

Under the Act and our implementing regulations, a species may warrant listing if it is endangered or threatened throughout all or a significant portion of its range. Threats to the survival of the Dakota skipper occur throughout the species range and are not restricted to any particular significant portion of that range. Accordingly, our assessment and proposed determination applies to the Dakota skipper throughout its range.

Significant Portion of the Range

In determining whether a species is threatened or endangered in a

significant portion of its range, we first identify any portions of the range of the species that warrant further consideration. The range of a species can theoretically be divided into portions an infinite number of ways. However, there is no purpose to analyzing portions of the range that are not reasonably likely to be both (1) Significant and (2) threatened or endangered. To identify only those portions that warrant further consideration, we determine whether substantial information indicates that: (1) The portions may be significant, and (2) the species may be in danger of extinction there or likely to become so within the foreseeable future. In practice, a key part of this analysis 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 applies only to portions of the species' range that are not significant, such portions will not warrant further consideration.

If we identify portions that warrant further consideration, we then determine whether the species is threatened or endangered in these portions of its range. Depending on the biology of the species, its range, and the threats it faces, the Service may address either the significance question or the status question first. Thus, if the Service considers significance first and determines that a portion of the range is not significant, the Service need not determine whether the species is threatened or endangered there. Likewise, if the Service considers status first and determines that the species is not threatened or endangered in a portion of its range, the Service need not determine if that portion is significant. However, if the Service determines that both a portion of the range of a species is significant and the species is threatened or endangered there, the Service will specify that portion of the range as threatened or endangered under section 4(c)(1) of the ESA.

We evaluated the current range of the Dakota skipper to determine if potential threats for the species have any apparent geographic concentration. We examined potential habitat threats from effects of habitat loss, fragmentation, degradation, and modification from agriculture, development, invasive species, secondary succession, grazing, and haying (Factor A); overutilization for scientific or recreational collection (Factor B); disease and predation (Factor C); the inadequacy of existing regulatory mechanisms (Factor D); and the effects of habitat fragmentation and small population size and isolation, climate change, pharmaceuticals, insecticides, pesticides, prairie plant harvest, and unknown stressors (Factor E). As discussed above, although the specific threats affecting the species may be different at individual sites or in different parts of the Dakota skipper's range, on the whole threats are occurring throughout the species' range. The Dakota skipper is thought to still be present at approximately 91 sites, at least 83 of which are subject to one or more threats that have a moderate to high impact on those populations. On no portions of its range are threats significantly concentrated or substantially greater than in other portions of its range; therefore, we find that impacts to the Dakota skipper are essentially uniform throughout its range, indicating that the entire range warrants a threatened status under the Act. As discussed above, our review of the best available scientific and commercial information indicates that the Dakota skipper is not in danger of extinction (endangered) but is likely to become endangered within the foreseeable future (threatened) throughout all of its range. Therefore, we find that listing the Dakota skipper as a threatened species under the Act throughout its entire range is warranted at this time.

Poweshiek skipperling

We carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the Poweshiek skipperling. Poweshiek skipperling are obligate residents of undisturbed (remnant, untilled) high-quality prairie, ranging from wet-mesic tallgrass prairie to dry-mesic mixed-grass prairie. Native tallgrass prairies have been reduced by 85 to 99.9 percent of their former area and native mixed-grass prairies have been reduced by 72 to 99 percent of their former area in North Dakota, Manitoba, and Saskatchewan. The Poweshiek skipperling was once a common prairie butterfly widely dispersed in eight states, extended from Michigan to North Dakota, and portions of Manitoba, Canada. However, its range is now substantially reduced such that the Poweshiek skipperling is restricted to small patches of fragmented native prairie remnants in portions of two states and one Canadian province. The species is presumed extirpated from Illinois and Indiana, and the status of the species is unknown in four of the six states with relatively recent records (within the last 20 years). Recent survey data indicate that the Poweshiek skipperling has declined to zero or to undetectable levels in approximately 87 percent of sites where it has ever been recorded.

A drastic decline in this species has been observed rangewide very recently. Between 1985 and 2003, researchers surveyed 10 or more sites in 7 different years (excluding new sites in the first year); the average positive detection rate for those years is 71 percent rangewide. Since 2003, the percent of surveyed sites with positive detections of the species has dropped to an average of 29 percent each year (2004–2012), with a low of 13 percent at sites surveyed in 2012. Despite recent substantial survey efforts in those states, the Poweshiek skipperling has not been recorded in Iowa since 2007, when it was observed at 1 site; in Minnesota since 2007, when it was observed at 1 site; in North Dakota since 2001, when it was observed at 1 site, nor in South Dakota since 2008, when it was observed at 3 sites. The species was not observed in North Dakota, South Dakota, or Minnesota during 2012 surveys, for example. Iowa sites were not surveyed in 2012. Poweshiek skipperling have historically been documented at approximately 296 sites; now we consider the species to be present at only 14 of those sites—one of these is considered a sub-site of a larger site.

The only confirmed extant (present) populations of Poweshiek skipperling are currently restricted to 2 small and isolated native-prairie remnants in Wisconsin, 10 small and isolated prairie fen remnants in Michigan, and a prairie complex in Manitoba. These sites represent only 5 percent of the total number of sites ever documented for the species. The numbers observed at these sites are relatively small (less than 100 at all but 2 sites), and all of these sites have at least one documented threat that have moderate to high impacts on those populations. The strongest population in the United States, a prairie fen in Michigan with relatively high and fairly consistent numbers observed each year (numbers observed per minute ranged from 1.2 to 2.2 during the last 4 survey years), for instance, is under threat from intense development pressure. The Tallgrass Prairie Preserve site in Manitoba also has relatively high numbers observed each year; however, this site is impacted by several immediate, moderate- to high-level threats, including the encroachment of invasive plants and woody vegetation, flooding, and isolation from the nearest site by hundreds of kilometers. In addition, recent unplanned fires in 2009 and 2011 affected large portions of the site. Poweshiek skipperling is

considered to have unknown occupancy at 131 sites—throughout the range of the species (Iowa, Michigan, Minnesota, North Dakota, and South Dakota), 54 of these sites were included in the threats assessment. Of the 54 sites where the occupancy is unknown that had sufficient information to assess, at least 43 sites are subject to one or more threats that have a moderate to high impact on those populations. These sites are throughout the range of the species in Iowa, Michigan, Minnesota, North Dakota, and South Dakota.

Summary

Many factors likely contributed to the Poweshiek skipperling's decline, and numerous major threats, acting individually or synergistically, continue today (see Summary of Factors Affecting the Species). Habitat loss and degradation have impacted the Poweshiek skipperling, curtailing the ranges of both species (see Factor A). Extensive historical conversion of prairie and associated habitats, nearly complete in some areas, has isolated many Poweshiek skipperling populations. These small and isolated populations are subject to loss of genetic diversity through genetic drift (see Factor E) and are susceptible to a variety of stochastic (*e.g.,* wildfires, droughts, and floods) and deterministic (*e.g.,* overgrazing, invasive species) factors (see Factor A) that may kill all or a substantial proportion of a population. Although much of the habitat conversion occurred in the past, the effects of the dramatic reduction and fragmentation of habitat have persistent and ongoing effects on the viability of populations; furthermore, conversion of native prairies to agriculture or other uses is still occurring today. The life history of the species exacerbates the threats caused by the fragmentation and degradation of its habitat (see Factors A and E) as Poweshiek skipperlings are not likely to recolonize distant sites due to their short adult life span, single annual flight, and limited dispersal ability. Therefore, the Poweshiek skipperling's extirpation from a site is likely permanent unless it is near another site from which it can emigrate. Furthermore, because the larvae are located at or near the soil surface, they are more vulnerable to fire (Factor A), herbicides, pesticides, and other chemicals (see Factor E); desiccation due to changing climate (see Factor E); or changes in hydrology (see Factor A).

Within the remaining native-prairie patches, degradation of habitat quality is now the primary threat to the Poweshiek skipperling (see Factor A). Of the various threats to Poweshiek skipperling habitat, conversion, invasive species, secondary succession, and reduction in the diversity of native-prairie plant communities have moderate- to high-level impacts to populations throughout the range of the Poweshiek skipperling. An array of other factors including nonagricultural development, chemical contaminants, pesticides, and intensive grazing are also current and ongoing threats to the Poweshiek skipperling and its habitat (see Factors A and E). Current and ongoing prairie management practices, such as indiscriminate use of herbicides or intensive grazing that reduces or eliminates food sources, contribute to the species' imperilment, particularly in North Dakota, South Dakota, and Minnesota (see Factors A and E). Unknown stressors may be the current threat that has the most significant impacts to the Poweshiek skipperling species in Iowa, Minnesota, North Dakota, and South Dakota, where populations experienced a sudden decline to undetectable numbers in the most recent years (see *Factor E*). Existing regulatory mechanisms vary across the species' ranges, and although mechanisms do exist in Iowa, Michigan, Minnesota, and Wisconsin that protect the species from direct take, these mechanisms do not sufficiently mitigate threats to the Poweshiek skipperling (see Factor D). Climate change may affect the Poweshiek skipperling, especially increased frequency of extreme climatic conditions such as flooding and drought, but there is limited information on the exact nature of impacts that the species may experience. Recent temperature and precipitation trends indicate that certain aspects of climate change may be occurring in Poweshiek skipperling range now (see Factor E).

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 find that the Poweshiek skipperling is presently in danger of extinction throughout its entire range, based on the immediacy, severity, and scope of the threats described above. These threats are exacerbated by small population sizes, the loss of redundancy and resiliency of these species, and the continued inadequacy of existing protective regulations. There are only 14 locations where we believe the species to be present, and all of those sites are subject to at least one or more ongoing and immediate moderate- to high-level threats that have moderate- to high-level effects on those populations that is ongoing and immediate. Therefore, on the basis of the best available scientific and commercial information, we propose listing the Poweshiek skipperling as endangered in accordance with sections 3(6) and 4(a)(1) of the Act.

We find that a threatened species status is not appropriate for the Poweshiek skipperling because the unknown stressors have significant impacts to the species throughout most of its range and have occurred in a short timeframe. Sharp population declines have not been detected at the few remaining sites where the species is still present, but all of these sites are currently experiencing one or more stressors that has moderate- to high-level impacts to populations. Based on recent data and similar conditions in other parts of Poweshiek skipperling range, similar declining trends are anticipated in other parts of the range of the species, and may only be a few years behind those declines experienced by the species in Iowa, Minnesota, North Dakota, and South Dakota (see Factor E). The impacts of the unknown stressors on populations are exacerbated by habitat curtailment and destruction and other factors such as the effects of small and isolated populations due to habitat fragmentation.

Under the Act and our implementing regulations, a species may warrant listing if it is endangered or threatened throughout all or a significant portion of its range. The Poweshiek skipperling proposed for listing in this rule is highly restricted in its range, and the threats occur throughout its range. Therefore, we assessed the status of the species throughout its entire range. The threats to the survival of the Poweshiek skipperling occur throughout the species' range and are not restricted to any particular significant portion of that range. Accordingly, our assessment and proposed determination applies to the Poweshiek skipperling throughout its entire range.

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 (comprising species experts, Federal and State agencies, nongovernmental organizations, and stakeholders) are often established to develop recovery plans. When completed, the recovery outlines, draft recovery plans, and the final recovery plans will be available on our Web site (*http://www.fws.gov/endangered*), or from our Twin Cities Ecological Services Fish and Wildlife 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, pursuant to section 6 of the Act, the States of Iowa, Michigan, Minnesota, North Dakota, South Dakota, and Wisconsin would be eligible for Federal funds to implement management actions that promote the protection and recovery of the Poweshiek skipperling and Dakota skipper. Information on our grant programs that are available to aid species recovery can be found at: *http://www.fws.gov/grants.*

Although the Dakota skipper and Poweshiek skipperling are only proposed for listing under the Act at this time, please let us know if you are interested in participating in recovery efforts for these species. Additionally, we invite you to submit any new information on this 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 adversely affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service.

Federal agency actions within the species habitat that may require conference or consultation or both as described in the preceding paragraph include, but are not limited to, management and any other landscape-altering activities on Federal lands such as actions within the jurisdiction of the Natural Resources Conservation Service; land management by the U.S. Forest Service; issuance of section 404 Clean Water Act permits by the U.S. Army Corps of Engineers; land management by the U.S. Fish and Wildlife Service; construction and management of gas pipeline, wind facilities and associated infrastructure, 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 land management within branches of the Department of Defense (DOD). Examples of these types of actions include activities funded or authorized under the Farm Bill Program, Environmental Quality Incentives Program, Clean Water Act (33 U.S.C. 1251 *et seq.*), Partners for Fish and Wildlife Program, and DOD construction activities related to training or other military missions.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to all endangered wildlife. The prohibitions of section 9(a)(2) of the Act, codified at 50 CFR 17.21 for endangered wildlife, in part, make it illegal for any person subject to the jurisdiction of the United States to take (includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect; or to attempt any of these), import, export, ship in interstate commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any listed species. Under the Lacey Act (18 U.S.C. 42–43; 16 U.S.C. 3371–3378), it is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to agents of the Service and State conservation agencies.

We may issue permits to carry out otherwise prohibited activities involving endangered and threatened wildlife species under certain circumstances. Regulations governing permits are codified at 50 CFR 17.22 for endangered species, and at 17.32 for threatened species. With regard to endangered wildlife, a permit must be issued for the following purposes: for scientific purposes, to enhance the propagation or survival of the species, and for incidental take in connection with otherwise lawful activities.

Our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), is 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) Introduction of nonnative species that compete with or prey upon the Dakota skipper and Poweshiek skipperling or their food sources, such as the introduction of nonnative leafy spurge, reed canary grass, or glossy buckthorn, to the State of Iowa, Michigan, Minnesota, North Dakota, South Dakota, and Wisconsin;

(3) The unauthorized release of biological control agents that attack any life stage of these species, including the unauthorized use of herbicides, pesticides, or other chemicals in habitats in which the Poweshiek skipperling or Dakota skipper is known to occur;

(4) Unauthorized modification, removal, or destruction of the prairie vegetation, soils, or hydrology in which the Dakota skipper and Poweshiek skipperling are known to occur; and

(5) Unauthorized discharge of chemicals or fill material into any wetlands in which the Poweshiek skipperling or Dakota skipper are known to occur.

Questions regarding whether specific activities would constitute a violation of section 9 of the Act should be directed to the Twin Cities Ecological Services Fish and Wildlife 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, 5600 American Blvd., West, Suite 990, Bloomington, MN (telephone 612–713–5350; facsimile 612–713–5292).

Special Rule

Under section 4(d) of the Act, the Secretary may publish a special rule that modifies the standard protections for threatened species in the Service's regulations at 50 CFR 17.31, which implement section 9 of the Act, with special measures that are determined to be necessary and advisable to provide for the conservation of the species. As a means to promote conservation efforts on behalf of the Dakota skipper, we are proposing a special rule for this species under section 4(d) of the Act. In the case of a special rule, the general regulations (50 CFR 17.31 and 17.71) applying most prohibitions under section 9 of the Act to threatened species do not apply to that species, and the special rule contains the prohibitions necessary and appropriate to conserve that species.

As discussed above, the primary factors supporting the proposed determination of threatened species status for the Dakota skipper are habitat loss and degradation of native prairies, including conversion of native prairie for agriculture or other development; ecological succession and encroachment of invasive species and woody vegetation; certain fire, haying, and grazing management that reduces the availability of certain native-prairie grasses and flowering herbaceous plants to Dakota skipper; some fire management; flooding; existing regulatory mechanisms that are inadequate to mitigate threats to the species; loss of genetic diversity; small size and isolation of remnant patches of native prairie; indiscriminate use of herbicides that reduces or eliminates nectar sources; climate conditions such as drought; and other unknown stressors.

The Act does not specify particular prohibitions, or exceptions to those prohibitions, for threatened species. Instead, under section 4(d) of the Act, the Secretary of the Interior has the discretion to issue such regulations as she deems necessary and advisable to provide for the conservation of such species. The Secretary also has the discretion to prohibit by regulation with respect to any threatened species, any act prohibited under section 9(a)(1) of the Act. Exercising this discretion, the Service has developed general prohibitions (50 CFR 17.31) and exceptions to those prohibitions (50 CFR 17.32) under the Act that apply to most threatened species. Alternately, for other threatened species, the Service develops specific prohibitions and exceptions that are tailored to the specific conservation needs of the species. In such cases, some of the prohibitions and authorizations under 50 CFR 17.31 and 17.32 may be appropriate for the species and incorporated into a special rule under section 4(d) of the Act, but the section 4(d) special rule will also include provisions that are tailored to the specific conservation needs of the threatened species and may be more or less restrictive than the general provisions at 50 CFR 17.31.

In recognition of efforts that provide for conservation and management of the Dakota skipper and its habitat in a manner consistent with the purposes of the Act, we are proposing a 4(d) special rule that outlines the prohibitions, and exceptions to those prohibitions, necessary and advisable for the conservation of the Dakota skipper. Economic and policy incentives are likely to continue to place pressure on landowners to convert native grassland from ranching to agricultural cropland (Doherty *et al.* 2013, p. 14) and a wide variety of peer-reviewed publications and government reports have documented recent loss of native grassland (Congressional Research Service (CRS) 2007, p. 5; United States Government Accountability Office (USGAO) 2007, p. 15; Stephens *et al.* 2008, p. 6; Rashford *et al.* 2011, p. 282; Sylvester *et al.* 2013, p. 13). Grassland loss in the western corn belt may be occurring at the fastest rate observed since the 1920s and 1930s and at a rate comparable to that of deforestation in Brazil, Malaysia, and Indonesia (Wright and Wimberly 2013, p. 5). Between 2006 and 2011 destruction of native grassland was mostly concentrated in North Dakota and South Dakota, east of the Missouri River, an area corresponding closely to the range of Dakota skipper (Wright and Wimberly 2013, p. 2).

As with agricultural policies (Doherty *et al.* 2013, p. 15), the prohibitions against take of Dakota skipper that would become effective if the species is listed could interact with other factors to affect the rates at which native grassland is converted in the range of the species. Less than 20 percent of the grassland in the Prairie Pothole Region of the United States is permanently protected (Doherty *et al.* 2013, p. 7), and the vast majority of remaining grassland is privately owned. The conservation of ''working landscapes'' based on ranching and livestock operations is frequently a priority of programs to conserve native grassland ecosystems in the northern Great Plains (*e.g.,* Service 2011, p. 5). We believe that allowing incidental take of Dakota skippers that may result from grazing in certain geographic areas will afford us more time to protect the species' habitats in these areas and would facilitate the coordination and partnerships needed to recover the species.

In light of the socioeconomic and policy factors that are leading to the conversion of native prairie to

agricultural cropland and because there is evidence that some grazing practices are conducive to conservation of Dakota skipper in parts of its range, we determine that it is necessary and advisable to allow take of the species caused by certain ranching activities. Whereas conversion to cropland would kill any Dakota skipper larvae present and destroy any habitat value for the species into the foreseeable future, some habitats can remain suitable for Dakota skipper when grazed (Dana 1991, p. 54; Schlicht 1997, p. 5; Skadsen 1997, pp. 24–29). In addition, grazing is one of the primary treatments for controlling smooth brome and enhancing native plant diversity in prairies that have been invaded by this nonnative grass species (Service 2006, p. 2; Smart *et al.* in prep.). However, some grazing practices are adverse for Dakota skipper; therefore, we will work with private landowners, public land managers, state and Federal conservation agencies, and nongovernmental organizations to identify, refine, and implement grazing practices that are conducive to the species' conservation.

Provisions of the Proposed Special Rule for Dakota Skipper

Section 4(d) of the Act states that ''the Secretary shall issue such regulations as [s]he deems necessary and advisable to provide for the conservation'' of species listed as a threatened species. Conservation is defined in the Act to mean ''to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the Act] are no longer necessary.'' Additionally, section 4(d) states that the Secretary ''may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1).''

The courts have recognized the extent of the Secretary's discretion under this standard to develop rules that are appropriate for the conservation of a species. For example, the Secretary may find that it is necessary and advisable not to include a taking prohibition, or to include a limited taking prohibition. See *Alsea Valley Alliance* v. *Lautenbacher,* 2007 U.S. Dist. Lexis 60203 (D. Or. 2007); *Washington Environmental Council* v. *National Marine Fisheries Service,* and 2002 U.S. Dist. Lexis 5432 (W.D. Wash. 2002). In addition, as affirmed in *State of Louisiana* v. *Verity,* 853 F.2d 322 (5th Cir. 1988), the rule need not address all the threats to the species. As noted by Congress when the Act was initially enacted, ''once an animal is on the threatened list, the Secretary has an almost infinite number of options available to him with regard to the permitted activities for those species. [S]he may, for example, permit taking, but not importation of such species,'' or [s]he may choose to forbid both taking and importation but allow the transportation of such species, as long as the measures will ''serve to conserve, protect, or restore the species concerned in accordance with the purposes of the Act'' (H.R. Rep. No. 412, 93rd Cong., 1st Sess. 1973).

Section 9 prohibitions make it illegal for any person subject to the jurisdiction of the United States to take (including harass, harm, pursue, shoot, wound, kill, trap, capture, or collect; or attempt any of these), import or export, ship in interstate commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any wildlife species listed as an endangered species, without written authorization. It also is illegal under section 9(a)(1) of the Act to possess, sell, deliver, carry, transport, or ship any such wildlife that is taken illegally. Prohibited actions consistent with section 9 of the Act are outlined for threatened species in 50 CFR 17.31(a) and (b). This proposed 4(d) special rule proposes that all prohibitions in 50 CFR 17.31(a) and (b) will apply to the Dakota skipper except in the specific instances as outlined below. The proposed 4(d) special rule will not remove or alter in any way the consultation requirements under section 7 of the Act.

Routine Livestock Operations and Maintenance of Recreational Trails

First, the Service proposes that incidental take that is caused by the routine livestock ranching and recreational trail maintenance activities described below and that are implemented on private, state, and tribal lands will not be prohibited, as long as those activities are otherwise legal and conducted in accordance with applicable State, Federal, tribal, and local laws and regulations. For the purposes of this rule, routine livestock ranching and recreational trail maintenance activities include:

(1) Fence Construction and Maintenance: Fences are an essential tool for livestock and ranch management. In addition, the strategic distribution of fencing is also necessary to implement multi-cell rotational grazing systems, which may be necessary to improve grazing management and conserve Dakota skipper habitat.

(2) Livestock Gathering and Management: The installation and maintenance of corrals, loading chutes, and other livestock working facilities that are critical to ranch operations. These activities may be carried out with only minimal impacts to Dakota skipper if carefully sited with respect to the location and distribution of important Dakota skipper habitat.

(3) Development and Maintenance of Livestock Watering Facilities: Without a suitable water source in a pasture, livestock ranching is impossible. The proper distribution of livestock watering sources is also a prerequisite to implementing improved grazing management via the use of multi-cell rotational grazing systems that may be necessary to conserve Dakota skipper on grazed sites. This activity includes both the initial development of water sources and their maintenance. Dugout ponds, for example, typically require a cleanout after 15 to 20 years.

(4) Noxious Weed Control: State and county laws require landowners to control noxious weeds on their property, and the timing of control actions is usually dependent on phenology (growth stage) of the weed species. Control of noxious weeds may also be important to protect Dakota skipper habitat because native plant diversity may decline when nonnative plant species invade tallgrass prairie (Boettcher *et al.* 1993, p. 35). Broadcast application of herbicides, however, may result in significant deterioration of habitat quality for Dakota skippers (Smart *et al.* 2011, p. 184). Therefore, incidental take of Dakota skipper that may result from spot-spraying of herbicides would be allowed.

(5) Haying: Stock cows need to be maintained through the non-growing season; thus, haying is a critical component of ranch activity. Dakota skippers occur on several native hayland sites—sites where the native-prairie vegetation is mowed for hay. For the purposes of this rule, native hayland does not include lands that had previously been plowed and were then replanted to native or nonnative vegetation. Native haylands are typically cut in August, after the needlegrass (*Hesperostipa spp.* or *Nassella viridula,* or both) awns drop. Incidental take of Dakota skippers that occurs as a result of haying no earlier than July 16 (after July 15) is allowed. Dakota skippers are unlikely to occur in replanted grasslands (grasslands replanted on formerly plowed or cultivated lands) or in tame hayland (grassland comprised primarily of nonnative grass species, such as smooth brome (*Bromus inermis inermis*)). Therefore, mowing before July 16 is allowed on replanted and tame grasslands.

(6) Mowing Rights of Way and Recreational Trails: Section line rights of way and some recreational trails need to be mowed several times during the growing season to ensure that winter snow will not catch and block vehicle access and that they are suitable for hiking and other intended recreational activities, respectively. These areas typically comprise disturbed soil that has been contoured for a roadway and are likely to contain only small proportions of Dakota skipper habitat at any affected site. Therefore, impacts to Dakota skipper populations are likely to be minimal, and any incidental take that is caused by mowing of section line rights of way and recreational trails is allowed.

(7) Livestock (*e.g.,* cattle or bison) grazing, except on lands where Dakota skipper occurs in the following states and counties: Minnesota—Kittson; North Dakota—Eddy, McHenry, Richland, Rolette, Sargent, and Stutsman. In those counties Dakota skippers inhabit relatively flat and moist habitats where they may be especially sensitive to effects of grazing (Royer *et al.* 2008, pp. 11, 16), including trampling, soil compaction, and loss of important nectar sources; haying conducted after the Dakota skipper flight period is the predominant management on sites inhabited by the species in these counties. In all other states and counties, incidental take of Dakota skippers that may result from grazing is allowed under this rule.

In the drier and hillier habitats that the species inhabits outside of the counties listed above, grazing may benefit Dakota skipper depending on its intensity. Moreover, in contrast to the permanent habitat destruction caused by plowing, mining, and certain other activities, native plant diversity in tallgrass prairie may recover from overgrazing if it has not been too severe or prolonged. In eastern South Dakota, Dakota skipper populations were deemed secure at some sites managed with rotational grazing that was sufficiently light to maintain native plant species diversity (Skadsen 1997, pp. 24–29) and grazing may also benefit Dakota skippers by reducing the area dominated by tall native grasses, such as big bluestem and Indiangrass (Dana 1991). Nevertheless, grazing can also have significant deleterious effects on Dakota skipper; for example, a strong population of the species at a grazed site in South Dakota was extirpated after a change in ownership resulted in significant overgrazing (Skadsen 2006, p. 5). Therefore, we intend to cooperate with ranchers and our state and tribal conservation partners to identify, test, and implement grazing practices that effectively conserve Dakota skipper populations. By allowing grazing in the geographic areas where the Dakota skipper primarily inhabits dry-mesic prairie, we may slow the loss of native prairie conversion for crop production and also maintain partnerships that are critical for conserving the species.

In the counties where this rule would not allow take caused by livestock grazing, Dakota skipper almost exclusively inhabits relatively flat and moist prairie habitats that are mowed for hay. These habitats, referred to as calcareous or ''alkaline prairies'' by McCabe (1979, p. 17; 1981, p. 179); ''wet mesic'' by Royer and Marrone (1992, p. 21); and, ''Type A'' by Royer *et al.* (2008, p. 14), are distinguished from other Dakota skipper habitats by relatively flat topography and certain plant community and soil characteristics (Lenz 1999, pp. 5–7; Royer *et al.* 2008, pp. 14–15). Dakota skippers appear to be generally absent from this type of habitat in North Dakota when it is grazed due to a shift away from a plant community that is suitable for the species (McCabe 1979, p. 17; 1981, p. 179). The shift in plant community composition and adverse effects to Dakota skipper populations may occur rapidly (McCabe 1981, p. 179; Royer and Royer 1998, p. 23). The conversion of similar habitats in Manitoba from haying to grazing may be a major threat to the Dakota skipper there (Webster 2007, pp. i–ii, 6). In contrast, limited or ''light rotational grazing'' of habitats on steep dry-mesic slopes in Saskatchewan may not conflict with Dakota skipper conservation (Webster 2007, p. ii).

The reduced vulnerability of habitats on dry-mesic slopes to the effects of grazing may be due, in part, to the tendency for grazing pressure to be lighter in sloped areas. The steepness of habitats occupied by Dakota skipper in Saskatchewan, for example, limits their use for grazing (Webster 2007, p. ii). Steep slopes may also play a role in reducing the adverse effects of grazing at some sites in South Dakota—at one grazed site inhabited by Dakota skipper, for example, habitat on steep slopes was ''in good condition'', whereas ''lesser slopes'' were ''moderately grazed'' and some areas were ''overgrazed'' (Skadsen 1999, p. 29).

The best available information indicates that in the counties where this rule would not allow take caused by livestock grazing the species may be extant at 19 sites and only 1 of those is currently grazed. The single grazed site is in McHenry County, North Dakota, and is owned by the State of North Dakota. The habitat at the site is described as ''marginal'' for Dakota skipper and there ''has never been a strong'' presence of the species, based on surveys of the site conducted since about 1991 (Royer 2013, pers. comm.). Since Dakota skipper was recorded there in 1998, only one survey has been conducted—in 2012 (Royer and Royer 1998, p. 9; Royer and Royer 2012, p. 3). No Dakota skippers were found there during two surveys in 2012, although they were present at a hayed site across the road (Royer and Royer 2012, p. 42). At three other sites in the counties where this rule would not allow take caused by grazing, grazing was likely the primary factor that led to the species' extirpation. At each of these sites grazing was described as ''heavy'' or ''substantial'', the habitat was degraded, and important nectar sources were lacking or depleted (Royer and Royer 2012, pp. 9, 12, 27).

The lack of any examples of sites where strong populations of Dakota skippers occur in concert with grazing indicates to us that it would not be advisable at this time to allow take caused by grazing in the counties listed above—Kittson County, Minnesota, and Eddy, McHenry, Richland, Rolette, Sargent, and Stutsman Counties in North Dakota. In these counties, Dakota skipper primarily inhabits wet-mesic prairie habitats that support plant communities that are distinct from those that occur on dry-mesic prairie elsewhere in the species' range.

The Service is committed to working with private landowners, public land managers, conservation agencies, nongovernmental organizations, and the scientific community to determine whether any grazing of Dakota skipper habitat in any of the counties may be conducted in a manner that is conducive to the species' conservation. We are seeking public comments on this topic. In the meantime, the continuation of hay production as the primary use of these habitats—with mowing occurring no earlier than July 16—is the most compatible land use activity for the Dakota skipper and would contribute substantially to the conservation of the species.

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. We have invited these peer reviewers to comment during this public comment period on our specific assumptions and conclusions in this proposed rule.

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 and Informational Meetings

Section 4(b)(5) of the Act provides for one or more public hearings on this proposal, if requested. Requests must be received within 45 days after the date of publication of this proposed rule in the **Federal Register**. Such requests must be sent to the address shown in **FOR FURTHER INFORMATION CONTACT**. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing.

We have scheduled informational meetings regarding the proposed rule in the locations specified in **ADDRESSES**. Any interested individuals or potentially affected parties seeking additional information on the public informational meetings should contact the Twin Cities Ecological Services Office (See **FOR FURTHER INFORMATION CONTACT**). The U.S. Fish and Wildlife Service is committed to providing access to this event for all participants. Please direct all requests for interpreters, closed captioning, or other accommodation to the Twin Cities Ecological Services Office (See **FOR FURTHER INFORMATION CONTACT**).

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 above in **ADDRESSES**. 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).

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.

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 Field Supervisor, Twin Cities Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this package are the staff members of the Twin Cities Field Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, and 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; 4201–4245, unless otherwise noted.

■ 2. In § 17.11(h), add entries for ''Skipper, Dakota'' and ''Skipperling, Poweshiek'' to the List of Endangered and Threatened Wildlife in alphabetical order under ''Insects'' to read as set forth below:

§ 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						
*	*	*	*	*	*		*
INSECTS							
*	*	*	*	*	*		*
Skipper, Dakota	*Hesperia dacotae* ...	U.S.A. (IL, IA, MN, ND, SD); Canada (Manitoba, Saskatchewan).	NA	T	.....	NA	17.47(b)

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*	*	
Skipperling, Poweshiek.	*Oarisma poweshiek*	U.S.A. (IL, IA, IN, MI, MN, WI, ND, SD); Canada (Manitoba).	NA	E		NA	NA
*	*	*	*	*	*	*	

■ 3. Amend § 17.47 by adding paragraph (b) to read as follows:

§ 17.47 Special rules—insects.

* * * * *

(b) Dakota skipper (*Hesperia dacotae*).

(1) *Which populations of the Dakota skipper are covered by this special rule?* This rule covers the distribution of Dakota skipper in the United States.

(2) *Prohibitions.* Except as noted in paragraph (b)(3) of this section, all prohibitions and provisions of §§ 17.31 and 17.32 apply to the Dakota skipper.

(3) *Exemptions from prohibitions.* Incidental take of Dakota skipper will not be a violation of section 9 of the Act if it occurs as a result of:

(i) Recreational trail maintenance activities;

(ii) Mowing of section line rights of way; and

(iii) Routine livestock ranching activities that are conducted in accordance with applicable State, Federal, tribal, and local laws and regulations. For the purposes of this rule, routine livestock ranching activities include:

(A) Fence construction and maintenance.

(B) Activities pertaining to livestock gathering and management, such as the installation and maintenance of corrals, loading chutes, and other livestock working facilities.

(C) Development and maintenance of livestock watering facilities.

(D) Spot-spraying of herbicides for noxious weed control (Broadcast application of herbicides is not allowed.).

(E) Haying, as set forth in this paragraph (b)(3)(i)(E):

(1) In native haylands, which are typically cut in August after the needlegrass (*Hesperostipa* spp. or *Nassella viridula*) awns drop, haying after July 15 is allowed.

(2) In replanted grasslands (grasslands replanted on formerly plowed or cultivated lands) or in tame haylands (grasslands comprising primarily nonnative grass species, such as smooth brome (*Bromus inermis inermis*)), mowing may occur at any time.

(F) Grazing of cattle, bison, or horses, except in Kittson County, Minnesota, and Eddy, McHenry, Richland, Rolette, Sargent, and Stutsman Counties, North Dakota, where the Dakota skipper inhabits areas that may be especially sensitive to the effects of grazing by these types of livestock.

* * * * *

Dated: September 23, 2013.

Rowan W. Gould,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2013–24175 Filed 10–23–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R3–ES–2013–0017; 4500030113]

RIN 1018–AZ58

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dakota Skipper and Poweshiek Skipperling

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 Dakota skipper and Poweshiek skipperling under the Endangered Species Act of 1973, as amended. The Endangered Species Act requires that critical habitat be designated to the maximum extent prudent and determinable for species determined to be endangered or threatened species. The effect of this regulation is to designate critical habitat for the Dakota skipper and Poweshiek skipperling under the Endangered Species Act.

DATES: *Written Comments:* We will accept comments received or postmarked on or before December 23, 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 **ADDRESSES** by December 9, 2013.

Public Informational Meetings: To better inform the public of the implications of the proposed listing and to answer any questions regarding this proposed rule, we plan to hold five public informational meetings. We have scheduled informational meetings regarding the proposed rule in the following locations:

(1) Minot, North Dakota, on November 5, 2013, at the Souris Valley Suites, 800 37th Avenue SW;

(2) Milbank, South Dakota, on November 6, 2013, at the Milbank Chamber of Commerce, 1001 East 4th Avenue;

(3) Milford, Iowa, on November 7, 2013, at the Iowa Lakeside Laboratory, 1838 Highway 86;

(4) Holly, Michigan, on November 13, 2013, at the Rose Pioneer Elementary School, 7110 Milford Road; and

(5) Berlin, Wisconsin, on November 14, 2013, at the Berlin Public Library, 121 West Park Avenue.

Except for the meeting in Berlin, Wisconsin, each informational meeting will be from 5:30 p.m. to 8:00 p.m.; the meeting in Berlin, Wisconsin will be from 4:30 p.m. to 7:00 p.m.

ADDRESSES: You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* In the Search box, enter FWS–R3–ES–2013–0017, which is the docket number for this rulemaking. You may submit a comment by clicking on ''Comment Now!'' If your comments will fit in the provided comment box, please use this feature of *http://www.regulations.gov,* as it is most compatible with our comment review procedures. If you attach your comments as a separate document, our preferred file format is Microsoft Word. If you attach multiple comments (such as form letters), our preferred format is a spreadsheet in Microsoft Excel.

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments

Processing, Attn: FWS–R3–ES–2013–0017; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We request that you send comments only by the methods described above. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

The coordinates or plot points or both from which the maps are generated are included in the administrative record for this critical habitat designation and are available at (*http://www.fws.gov/midwest/Endangered/*), *www.regulations.gov* at Docket No. FWS–R3–ES–2013–0017, and at the Twin Cities Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**). Any additional tools or supporting information that we may develop for this critical habitat designation will also be available at the Fish and Wildlife Service Web site and Field Office set out above, and may also be included at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Peter Fasbender, Field Supervisor, U.S. Fish and Wildlife Service, Twin Cities Ecological Services Office, 4101 American Boulevard East, Bloomington, Minnesota 55425, by telephone 612–725–3548 or by facsimile 612–725–3609. Persons who use a telecommunications device for the deaf (TDD) may 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), any species that is determined to be a threatened or endangered species requires critical habitat to be designated, to the maximum extent prudent and determinable. Designations and revisions of critical habitat can only be completed by issuing a rule. Elsewhere in today's **Federal Register**, we propose to list the Dakota skipper (*Hesperia dacotae*) and Poweshiek skipperling (*Oarisma poweshiek*) as endangered species under the Act.

This rule proposes to designate critical habitat for Dakota skipper and Poweshiek skipperling.

We are proposing critical habitat for Dakota skipper and Poweshiek skipperling under the Act.

Approximately 11,243 hectares (ha) (27,782 acres (ac)) are being proposed for designation as critical habitat for the Dakota skipper in Chippewa, Clay, Kittison, Lincoln, Murray, Norman, Pipestone, Polk, Pope, and Swift Counties in Minnesota; McHenry, McKenzie, Ransom, Richland, Rolette, and Wells Counties in North Dakota; and Brookings, Day, Deuel, Grant, Marshall, and Roberts Counties in South Dakota. Approximately 10,596 ha (26,184 ac) are being proposed for designation as critical habitat for the Poweshiek skipperling, in Cerro Gordo, Dickinson, Emmet, Howard, Kossuth, and Osceola Counties in Iowa; in Hilsdale, Jackson, Lenawee, Livingston, Oakland, and Washtenaw Counties in Michigan; Chippewa, Clay, Cottonwood, Douglas, La Qui Parle, Lincoln, Lyon, Mahnomen, Murray, Norman, Pipestone, Pope, Swift, and Wilkin Counties in Minnesota; Ransom, Richland, and Sargent Counties in North Dakota; Brookings, Day, Deuel, Grant, Marshall, Moody, and Roberts Counties in South Dakota; and Green Lake and Waukesha Counties in Wisconsin. In total, approximately 15,797 ha (39,035 ac) is being proposed as critical habitat for both species combined, as approximately 6,042 ha (14,931 ac) of proposed critical habitat is common to both species.

The basis for our action. Under the Endangered Species Act, any species that is determined to be a threatened or endangered species shall, to the maximum extent prudent and determinable, have habitat designated that is considered to be critical habitat. Section 4(b)(2) of the Endangered Species Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if she determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless she 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.

We are preparing an economic analysis of the proposed designations of critical habitat. In order to consider economic impacts, we are preparing an analysis of the economic impacts of the proposed critical habitat designations and related factors. We will announce the availability of the draft economic analysis as soon as it is completed, at which time we will seek additional public review and comment.

We will seek peer review. We are seeking comments from independent specialists to ensure that our critical habitat proposal is based on scientifically sound data and analyses. We have invited these peer reviewers to comment on our specific assumptions and conclusions in this critical habitat proposal. Because we will consider all comments and information we receive 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 government agencies, the scientific community, industry, or any other interested party concerning this proposed rule. We particularly seek comments concerning:

(1) The reasons we should or should not designate habitat as ''critical habitat'' under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threat outweighs the benefit of designation such that the designation of critical habitat may not be prudent.

(2) Specific information on:

(a) The amount and distribution of Dakota skipper and Poweshiek skipperling habitat;

(b) What areas, that were occupied at the time of listing (or are currently occupied) and that contain features essential to the conservation of the species, should be included in the designation and why;

(c) Special management considerations or protection that may be needed in critical habitat areas we are proposing, including how to implement livestock grazing, haying, or prescribed fire in a manner that is conducive to the conservation of Dakota skipper or Poweshiek skipperling, and managing for the potential effects of climate change; and

(d) 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 subject areas and their possible impacts on proposed critical habitat.

(4) Information on the projected and reasonably likely impacts of climate change on the Dakota skipper and

Poweshiek skipperling and proposed critical habitat.

(5) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation; in particular, any impacts on small entities or families, and the benefits of including or excluding areas that exhibit these impacts.

(6) Whether any specific areas we are proposing for critical habitat designation should be considered for exclusion under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any specific area outweigh the benefits of including that area under section 4(b)(2) of the Act. For instance, should the final designation exclude properties that are under conservation easement to the U.S. Fish and Wildlife Service or another conservation agency, or properties held by conservation organizations, and why? In addition, we are seeking information to better understand how the exclusion or inclusion of specific private lands in the final critical habitat designation would affect private landowner interest and acceptance of programs that are intended to conserve native grasslands in the range of Dakota skipper and Poweshiek skipperling. We seek any information relevant to potential exclusion of any proposed critical habitat unit, and particularly seek information relating to conservation programs or plans of any kind that may protect butterfly habitat on these units. Exclusion of any number of proposed critical habitat units, pursuant to section 4(b)(2) of the Act is within the range of possible decisions in the final rule.

(7) Whether any specific Tribally-owned areas we are proposing for critical habitat designation should be considered for exclusion from final designation under section 4(b)(2) of the Act, and information regarding the management of those areas.

(8) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

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 listing and critical habitat determinations 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 **ADDRESSES**. 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, Twin Cities Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**).

Previous Federal Actions

All previous Federal actions are described in the proposal to list the Dakota skipper as a threatened species and the Poweshiek skipperling as an endangered species under the Endangered Species Act published elsewhere in today's **Federal Register**.

Critical Habitat

Background

For more information on Dakota skipper and Poweshiek skipperling taxonomy, life history, habitat, and population descriptions and our proposal to list the species under the Act, please refer to the proposed rule to list the species that is published elsewhere in today's **Federal Register**.

It is our intent to discuss below only those topics directly relevant to the designation of critical habitat for the Dakota skipper and Poweshiek skipperling in this section of the proposed rule.

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) of the Act would apply, but even in the event of a destruction or adverse modification finding, the obligation of the Federal action agency and the landowner is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed

are included in a critical habitat designation if they contain physical or biological features (1) 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 or biological features within an area, we focus on the principal biological or physical constituent elements (primary constituent elements such as roost sites, nesting grounds, seasonal wetlands, water quality, tide, soil type) that are essential to the conservation of the species. Primary constituent elements are the elements of physical or biological features that provide for a species' life-history processes, and are essential to the conservation of the species.

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. For example, an area that was recently occupied, but not occupied at the time of listing, may be essential to the conservation of the species and may be included in the critical habitat designation. We designate critical habitat in areas outside the geographical area occupied by a species only when a designation limited to its range would be inadequate to ensure the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, other unpublished materials, or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. Climate change will be a particular challenge for biodiversity because the interaction of additional stressors associated with climate change and current stressors may push species beyond their ability to survive (Lovejoy 2005, pp. 325–326). The synergistic implications of climate change and habitat fragmentation are the most threatening facet of climate change for biodiversity (Hannah and Lovejoy 2005, p. 4). Current climate change predictions for terrestrial areas in the Northern Hemisphere indicate warmer air temperatures, more intense precipitation events, and increased summer continental drying (Field *et al.* 1999, pp. 1–3; Hayhoe *et al.* 2004, p. 12422; Cayan *et al.* 2005, p. 6; Intergovernmental Panel on Climate Change (IPCC) 2007, p. 1181). Climate change may lead to increased frequency and duration of severe storms and droughts (Golladay *et al.* 2004, p. 504; McLaughlin *et al.* 2002, p. 6074; Cook *et al.* 2004, p. 1015).

We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act, (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species, and (3) the prohibitions of section 9 of the Act if actions occurring in these areas may take 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.

Prudency Determination

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12), require that, to the maximum extent prudent and determinable, the Secretary 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 immediate threat of take attributed to collection or vandalism (see the Summary of Factors Affecting the Species section of the proposed listing rule published elsewhere in today's **Federal Register**) for either the Dakota skipper or Poweshiek skipperling, and identification and mapping of critical habitat is not expected to initiate any such threat. In the absence of finding that the designation of critical habitat would increase threats to a species, if there are any benefits to a critical habitat designation, then a prudent finding is warranted. Here, the potential benefits of designation include: (1) Triggering consultation under section 7 of the Act, in new areas for actions in which there may be a Federal nexus where it would not otherwise occur because, for example, it is or has become unoccupied or the occupancy is in question; (2) focusing conservation activities on the most essential features and areas; (3) providing educational benefits to State or county governments or private entities; and (4) preventing people from causing inadvertent harm to the species. Therefore, because we have determined that the designation of critical habitat will not likely increase the degree of threat to the Dakota

skipper or Poweshiek skipperling and may provide some measure of benefit, we find that designation of critical habitat is prudent for the Dakota skipper and Poweshiek skipperling.

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 Dakota skipper and Poweshiek skipperling 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 available information pertaining to the biological needs of the species and habitat characteristics where these species are located. This and other information represent the best scientific data available and led us to conclude that the designation of critical habitat is determinable for the Dakota skipper and Poweshiek skipperling.

Physical or Biological Features

In accordance with section 3(5)(A)(i) and regulations at 50 CFR 424.12(b), in determining which areas within the geographical area occupied by the species at the time of listing to designate as critical habitat, we consider the physical or biological features 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.

Dakota Skipper

We derived the specific physical or biological features required for the Dakota skipper from studies of the species' habitat, ecology, and life history as described below. Additional information can be found in the Background section of the proposed listing rule, published elsewhere in today's **Federal Register**. We have determined that the following physical or biological features are essential for the Dakota skipper:

Space for Individual and Population Growth and for Normal Behavior

Dakota skippers are obligate residents of remnant (untilled) high-quality prairie—habitats that are dominated by native grasses and that contain a high diversity of native forbs (flowering herbaceous plants). Dakota skipper habitat has been categorized into two main types: Type A habitat is described as high-quality, low (wet-mesic) prairie with little topographic relief that occurs on near-shore glacial lake deposits, dominated by little bluestem grass (*Schizachyrium scoparium*), with the likely presence of wood lily (*Lilium philadelphicum*), bluebell bellflower (*Campanula rotundifolia*), and mountain deathcamas (smooth camas; *Zigadenus elegans*) (McCabe 1981, p. 190; Royer and Marrone 1992a, pp. 8, 14–16, 21). Type B habitat is described as rolling native-prairie terrain over gravelly glacial moraine deposits and is dominated by bluestems and needlegrasses (*e.g., Hesperostipa spartea*) with the likely presence of bluebell bellflower, wood lily, purple coneflower (*Echinacea angustifolia*), upright prairie coneflower (*Ratibida columnifera*), and common gaillardia (*Gaillardia aristata*) (Royer and Marrone 1992a, pp. 21–22).

Dry prairies are described to have a sparse shrub layer (less than 5 percent cover) composed mainly of leadplant (*Amorpha canescens*), with prairie rose (*Rosa arkansana*) and wormwood sage (*Artemisia frigida*) often present (Minnesota Department of Natural Resources 2012a, p. 1). Taller shrubs, such as smooth sumac (*Rhus glabra*), may also be present. Occasional trees, such as bur oak (*Quercus macrocarpa*) or black oak (*Quercus velutina*), may also be present but remain less than approximately 5 percent cover (Minnesota Department of Natural Resources 2012a, p. 1). Similarly, wet-mesic prairies are described to have a sparse shrub layer (less than 5 to 25 percent cover) of leadplant, prairie rose, wolfberry (*Symphoricarpos occidentalis*), and other native shrubs such as gray dogwood (*Cornus racemosa*), American hazelnut (*Corylus americana*), and wild plum (*Prunus americana*) (Minnesota Department of Natural Resources 2012b, p. 1).

Therefore, based on the information above, we identify high-quality Type A or Type B native remnant (untilled) prairie, as described above, containing a mosaic of native grasses and flowering forbs and sparse shrub and tree cover to be a physical or biological feature essential to the conservation of the Dakota skipper.

Nonnative invasive plant species, such as Kentucky bluegrass (*Poa pratensis*) and smooth brome (*Bromus inermus*) may outcompete native plants that are necessary for the survival of Dakota skipper and lead to the deterioration or elimination of native vegetation. Dakota skipper depend on a diversity of native plants endemic to tallgrass and mixed-grass prairies; therefore, when nonnative or woody plant species become dominant, Dakota skipper populations decline due to insufficient sources of larval food and nectar for adults. Therefore, native prairies, as described above, with an absence or only sparse presence of nonnative invasive plant species is a physical or biological feature essential to the conservation of the Dakota skipper.

Royer and Marrone (1992a, p. 25) concluded that Dakota skippers are ''not inclined to dispersal,'' although they did not describe individual ranges or dispersal distances. Concentrated activity areas for Dakota skippers shift annually in response to local nectar sources and disturbance (McCabe 1979, p. 9; 1981, p. 186). Marked adults moved across less than 200 meters (m) (656 feet (ft)) of unsuitable habitat between two prairie patches and moved along ridges more frequently than across valleys (Dana 1991, pp. 37–38). Average movements of recaptured adults were less than 300 m (984 ft) over 3–7 days. Dana (1997, p. 6) later observed reduced movement rates across a small valley with roads and crop fields compared with movements in adjacent widespread prairie habitat.

Dakota skipper are not known to disperse widely and have low mobility; experts estimate Dakota skipper has a mean mobility of 3.5 (standard deviation = 0.71) on a scale of 0 (sedentary) to 10 (highly mobile) (Burke *et al.* 2011, Fitzsimmons 2012, pers. comm.). Five Dakota skipper experts interviewed in 2001 indicated that it was unlikely that Dakota skippers were capable of moving greater than 1 kilometer (km) (0.6 miles (mi)) between patches of prairie habitat separated by structurally similar habitats (*e.g.,* perennial grassland, but not necessarily native prairie) (Cochrane and Delphey 2002, p. 6). The species will not likely disperse across unsuitable habitat, such

as certain types of row crops (*e.g.,* corn, beets), or anywhere not dominated by grasses. Skadsen (1999, p. 2) reported possible movement of unmarked Dakota skippers from a known population at least 800 m (2,625 ft) away to a site with an unusually heavy growth of purple coneflower where he had not found Dakota skippers in three previous years when coneflower production was sparse. The two sites were connected by ''native vegetation of varying quality'' with a few asphalt and gravel roads interspersed (Skadsen *in litt.* 2001).

Dakota skipper may move in response to local nectar sources, disturbance, or in search of a mate. The tallgrass prairie that once made up a vast ecosystem prior to European settlement has now been reduced to fragmented remnants that make up less than 1 to 15 percent of the original land area across the species' range (Samson and Knopf 1994, p. 419). Similarly, mixed-grass prairie has been reduced to fragmented remnants that make up less than 1, 19, and 28 percent of the original land area in Manitoba, Saskatchewan, and North Dakota, respectively (Samson and Knopf 1994, p. 419). Before the range-wide fragmentation of prairie habitat, the species could move freely across suitable tallgrass and mixed-grass prairie and between high-quality prairies through suitable dispersal habitat. Now, these fragmented populations need immigration corridors for dispersal from nearby populations to prevent genetic drift and perhaps to reestablish a population after local extirpation. Therefore, based on the information above, we identify undeveloped dispersal habitat, structurally similar to suitable high-quality prairie habitat, as described above, to be a physical or biological feature essential to the conservation of the Dakota skipper. These dispersal habitats should be adjacent to or between high-quality prairie patches and within the known dispersal distance of Dakota skipper; within 1 km (0.6 mi) from suitable high-quality Type A or Type B prairie and should have limited shrub and tree cover, and no or limited amounts of certain row crops, which may act as barriers to dispersal.

In summary, we identify high-quality wet-mesic or dry (Type A and Type B) remnant (untilled) prairie containing a mosaic of native grasses and flowering forbs to be a physical or biological feature necessary to allow for normal behavior and population growth of Dakota skipper. Both wet-mesic and dry prairies have limited tree and low shrub coverage that may act as barriers to dispersal and limited or no invasive plant species that may lead to a change in the plant community. Dispersal habitat, structurally similar to suitable high quality prairie habitat and adjacent to or between high-quality prairie patches should be located within the known dispersal distance of Dakota skipper (within 1 km (0.6 miles) from suitable high-quality Type A or Type B prairie) to help maintain genetic diversity and to provide refuges from disturbance.

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

Dakota skipper larvae feed only on a few native grass species; little bluestem is a frequent food source (Dana 1991, p. 17; Royer & Marrone 1992a, p. 25), although they have also been found on *Panicwn* spp., *Poa* spp., and other native grasses (Royer and Marrone 1992a, p. 25). Seasonal senescence patterns (timing of growth) of grass species relative to the larval period of Dakota skippers are likely important in determining the suitability of grass species as larval host plants because warm-season grasses such as little bluestem grow and stay green and palatable from June through early September, the months when Dakota skipper larvae are feeding (NRCS 2004, p. 1). By contrast, cool-season grasses such as the nonnative Kentucky bluegrass grow during the cooler spring and fall (NRCS 2004, p. 1), and are, therefore, not available during the larval period of Dakota skipper. Consequently, based on the information above, we identify native grass species, such as little bluestem, to be a physical or biological feature essential to the conservation of the Dakota skipper. These native grasses should be available during the larval stage of Dakota skipper.

Adult Dakota skippers may use several species of native forbs as nectar sources, which can vary regionally. Examples of adult nectar sources include: Purple coneflower, bluebell bellflower, white prairie clover (*Dalea candida*), upright prairie coneflower, fleabanes (*Erigeron spp.*), blanketflowers (*Gaillardia spp.*), black-eyed Susan, yellow sundrops (*Calylophus serrulatus*), groundplum milkvetch (*Astragalus crassicarpus*), deathcamas (smooth camas), common primrose, and tooth-leaved primrose (*Calylophus serrulata*) (McCabe and Post 1977b, p. 36, McCabe 1979, p. 42, 1981, p. 187, Royer and Marrone 1992a, p. 21, Swengel and Swengel 1999, pp. 280–281). Plant species likely vary in their value as nectar sources for Dakota skipper due to the amount of nectar available to the species during the adult flight period (Dana 1991, p. 48). Swengel and Swengel (1999, pp. 280–281) observed nectaring at 25 plant species, but 85 percent of the observations were at the following three taxa, in declining order of frequency: Purple coneflower, blanketflower, and groundplum milkvetch. Dana (1991, p. 21) reported the use of 25 nectar species in Minnesota with purple coneflower most frequented. Flowering forbs also provide water necessary to avoid desiccation (drying out) during the flight period (Dana 2013, pers. comm.). Therefore, based on the information above, we identify the availability of native nectar plant species, including but not limited to, those listed above to be a physical or biological feature for this species. These nectar plant species should be flowering during the Dakota skipper's adult flight period.

Dakota skipper larvae are vulnerable to desiccation during hot, dry weather, and this vulnerability may increase in the western parts of the species' range (Royer *et al.* 2008, p. 15). Compaction of soils in the mesic and relatively flat Type A habitats may alter vertical water distribution and lead to decreased relative humidity levels near the soil surface (Gardiner and Miller 2007, pp. 36–40, 510–511; Frede 1985 in Royer 2008, p. 2), which would further increase the risk of desiccation (Royer 2008, p. 2). Soils associated with dry and wet-mesic prairies are described as having a seasonally high water table and moderate to high permeability. Soil textures in Dakota skipper habitats are classified as loam, sandy loam, or loamy sand (Royer and Marrone 1992b, p. 15, Skadsen 1997, Lenz 1999, pp. 4–5, 8, Swengel and Swengel 1999, p. 282); soils in moraine deposits are described as gravelly, but the deposits associated with glacial lakes are not described as gravelly. The native-prairie grasses and flowering forbs detailed in the above sections are typically found on these soil types (Lenz 1999, pp. 4–5, 8), and plant species diversity is generally higher in remnant prairies where the soils have never been plowed (Higgins *et al.* 2000, pp. 23–24). Cultivation changes the physical state of the soil, including changes to bulk density (compaction), which may hinder seed germination and root growth (Tomko and Hall 1986, pp. 173–175; Miller and Gardiner 2007, pp. 510–511). Furthermore, certain native prairie plants are found only in prairies that lack a tillage history (Higgins *et al.* 2000, p. 23). Finally, bulk density affects plant growth (Gardiner and Miller 2008, p. 36) and, therefore, can alter the plant community. For example, Dakota

skippers appear to be generally absent from Type A habitat in North Dakota when it is grazed due to a shift away from a plant community that is suitable for the species (McCabe 1979, p. 17; McCabe 1981, p. 179). The shift in plant community composition may occur rapidly (McCabe 1981, p. 179; Royer and Royer 1998, p. 23).

Therefore, we identify loam, sandy loam, loamy sand, or gravelly soils that have never been plowed or tilled to be a physical feature essential to the conservation of the Dakota skipper.

In summary, the biological features that provide food sources include native grass species for larval food, such as little bluestem and prairie dropseed, and native forb plant species for adult nectar sources, such as purple coneflower, bluebell bellflower, white prairie clover, upright prairie coneflower, fleabanes, blanketflowers, black-eyed Susan, and groundplum milkvetch. These prairies have undisturbed (untilled) edaphic (related to soil) features that are conducive to the development and survival of larval Dakota skipper and soil textures that are loam, sandy loam, loamy sand, or gravelly.

Cover or Shelter

Dakota skippers oviposit (lay eggs) on broadleaf plants such as *Astragalus* spp. (McCabe 1981, p. 180) and grasses such as little bluestem, big bluestem (*Andropogon gerardii*), sideoats gramma, prairie dropseed, porcupine grass (*Hesperostipa spartea*), and Wilcox's Panic Grass (*Dichanthelium wilcoxianum*) (Dana 1991, p. 17). After hatching, Dakota skipper larvae crawl to the bases of grasses where they form shelters at or below the ground surface with silk fastened together with plant tissue (Dana 1991, p. 16). Dakota skippers overwinter in their ground-level or subsurface shelters during either the fourth or fifth instar (Dana 1991, p. 15; McCabe 1979, p. 6; 1981; Royer & Marrone 1992a, pp. 25–26). In the spring, larvae resume feeding and undergo two additional molts before they pupate. During the last two instars, larvae shift from buried shelters to horizontal shelters at the soil surface (Dana 1991, p. 16). Therefore, sufficient availability of grasses used to form shelters at or below the ground surface is a physical or biological feature essential for cover and shelter for Dakota skipper larvae.

As discussed above, Dakota skipper larvae are vulnerable to desiccation (drying out) during hot, dry weather; this vulnerability may increase in the western parts of the species' range (Royer *et al.* 2008, p. 15). Compaction of soils in the mesic and relatively flat Type A habitats may alter vertical water distribution and lead to decreased relative humidity levels near the soil surface, Gardiner and Miller 2007, pp. 36–40, 510–511; Frede 1985 in Royer 2008, p. 2), which would further increase the risk of desiccation (Royer 2008, p. 2). Soils associated with wet-mesic prairies are described as having a seasonally high water table and moderate to high permeability (Lenz 1999, pp. 4–5). Cultivation changes the physical state of soil (Tomko and Hall 1986, pp. 173–175; Gardiner and Miller 2007, pp. 510–511), by, for example, changes to bulk density (compaction) that result in slower water movement through the soil (*e.g.,* Tomko and Hall 1986, pp. 173–175). Furthermore, because Dakota skipper spend a portion of their larval stage underground, the soil must remain undisturbed (untilled) during that time. Therefore, we identify untilled glacial soils including, but not limited to, loam, sandy loam, loamy sand, or gravelly soils to be a physical feature essential to the conservation of the Dakota skipper.

Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring

The annual, single generation of adult Dakota skippers emerges from mid-June to early July, depending on the weather, with flights starting earlier farther west in the range (McCabe 1979, p. 6, 1981, p. 180, Dana 1991, p. 1, Royer and Marrone 1992a, p. 26, Skadsen 1997, p. 3, Swengel and Swengel 1999, p. 282). During this time, adult male Dakota skippers typically perch on tall grasses and forbs, and occasionally appear to patrol in search of mating opportunities (Royer and Marrone 1992a, p. 25). Therefore, the physical or biological features essential to the conservation of the Dakota skipper include above-ground parts of grasses and forbs for perching that are available during the adult flight period.

The local flight period lasts two to four weeks and mating occurs throughout this period (McCabe 1979, p. 6, 1981, p. 180, Dana 1991, p. 15). Adults are thought to disperse a maximum of 1.0 mi (1.6 km) in search of a mate or nectar sources (Cochrane and Delphey 2002, p. 6). During this time, adult Dakota skippers depend on nectar plants for food and water. Therefore, it is important that nectar plants are available in close proximity to areas suitable for oviposition and larval feeding.

Dakota skippers lay eggs on broadleaf plants such as *Astragalus* spp. (McCabe 1981, p. 180) and grasses such as little bluestem, big bluestem (*Andropogon gerardii*), sideoats gramma, prairie dropseed, porcupine grass (*Hesperostipa spartea*), and Wilcox's Panic Grass (*Dichanthelium wilcoxianum*) (Dana 1991, p. 17), although larvae feed only on native grasses, such as little bluestem (Dana 1991, p. 17; Royer and Marrone 1992a, p. 25) and prairie dropseed (Royer and Marrone 1992a, p. 25). After hatching, Dakota skipper larvae crawl to the bases of grasses where they form shelters at or below the ground surface (Dana 1991, p. 16) and emerge at night from their shelters to forage (McCabe 1979, p. 6, 1981, p. 181, Royer and Marrone 1992a, p. 25). Dakota skippers overwinter in their ground-level or subsurface shelters during either the fourth or fifth instar (McCabe 1979, p. 6, 1981, p. 181, Dana 1991, p. 15, Royer and Marrone 1992a, pp. 25–26). In the spring, larvae resume feeding and undergo two additional molts before they pupate. During the last two instars, larvae shift from buried shelters to horizontal shelters at the soil surface (Dana 1991, p. 16). Therefore, the physical or biological features essential to the conservation of the Dakota skipper include above- and below-ground parts of grasses for oviposition and larval shelters and foraging; these grasses should be in close proximity to nectar plants where the adults are feeding during the short flight period.

Dakota skipper larvae spend most of the summer at or near the soil surface (McCabe 1981, p. 181, Dana 1991, p. 15), therefore, biological factors such as availability of nectar and larval food sources, edaphic features such as bulk density (an indicator of soil compaction) and soil moisture, as well as related non-biotic factors such as temperature and relative humidity at and near (to a 2.0 cm depth; 0.79 in) the soil surface may limit the survival of the sensitive larval and pupal stages of Dakota skippers (Royer *et al.* 2008, p. 2). Soil evaporation rates in the north-central United States are substantially affected by microtopography (variations of the soil surface on a small scale) (Cooper 1960 in Royer *et al.* 2008, p. 2). For example, removal of vegetation due to heavy livestock grazing, plowing, fire, and soil compaction alters evaporation and water movement through the soil, thereby altering the humidity of soil near the surface (*e.g.,* Tomko and Hall 1986, pp. 173–175; Zhao *et al.* 2010, pp. 93–96), although the timing and intensity of these operations may affect the results. Livestock grazing can increase soil bulk density (an indicator of soil compaction) (Greenwood *et al.* 1997, pp. 413, 416–418; Gardiner and

Miller 2007, pp. 510–511; Zhao *et al.* 2007, p. 248), particularly when the soil is wet (Gardiner and Miller 2008, p. 510), and these increases have been correlated with decreased soil water content and movement of water through the soil (Zhao *et al.* 2007, p. 248). The loss of porosity results in higher bulk densities, thereby decreasing water movement through the soil (Warren *et al.* 1986, pp. 493–494).

Similarly, vehicle traffic (including tilling and harvesting) increases compaction (Gardiner and Miller 2008, pp. 36, 510), and tilled land increases bulk densities (*e.g.,* Tomko and Hall 1986, pp. 173–175). During the hot and dry summer months, these changes in the soil restrict the movement of shallow groundwater to the soil surface, thus resulting in a dry soil layer during the time when Dakota skipper larvae are vulnerable to desiccation (Royer *et al.* 2008, p. 2). Furthermore, bulk density affects plant growth (Gardiner and Miller 2008, p. 36) and, therefore, can alter the plant community. For example, Dakota skippers appear to be generally absent from Type A habitat in North Dakota when it is grazed due to a shift away from a plant community that is suitable for the species (McCabe 1979, p. 17; McCabe 1981, p. 179). The shift in plant community composition and adverse effects to Dakota skipper populations may occur rapidly (McCabe 1981, p. 179; Royer and Royer 1998, p. 23).

The following are acceptable levels for microclimatological (climate in a small space, such as at or near the soil surface) variables between the soil surface and 2.0 cm (0.79 in) deep throughout the range of Dakota skippers during the summer season (from when eggs are laid through when larvae enter diapause near the end of September); mean temperature range of 17.8 to 20.5 °C (64.0 to 68.9 °F), mean dew point ranging from 13.9 to 16.8 °C (57.0 to 62.2 °F), and mean relative humidity between 72.5 and 85.1 percent (Royer 2008, pp. 7, 14–15). Type A habitats, as discussed above, are topographically of low relief (little change in elevation) (less than l m (3.2 ft)), with sandy soils that are relatively free of gravel at least to depths of 60 cm (23.6 in) and nearly saturated at depths between 40 and 60 cm (15.7 to 23.6 in). In these habitat types, soil bulk density exceeds 1.0 gram/cubic centimeter (g/cm^3) (0.8 ounce/cubic inch (oz/in^3) (Royer *et al.* 2008, p. 14). Type A habitat has a high water table (0.3 to 1.8 m (1 to 6 ft)) and is subject to intermittent flooding in the spring, but provides some habitat that is not flooded during the spring larval growth period (Royer *et al.* 2008, p. 15). Bulk density at Dakota skipper sites (including Type A and Type B habitats) ranged from approximately 0.9 g/cm^3 to 1.3 g/cm^3 (0.5 oz/in^3 to 0.7 oz/in^3), bulk density in Type A habitat ranged from 1.0 g/cm^3 to 1.3 g/cm^3 (0.6 oz/in^3 to 0.7 oz/in^3), whereas mean bulk densities in Type B habitat are below 1.0g/cm^3 (0.8 oz/in^3) (Royer *et al.* 2008, p. 10). The gravelly soils of type B habitats are considerably more compact at all depths than the bulk density of Type A habitat, perhaps due to the presence of gravel and its effect on the accuracy of the instrument (Royer 2008, p. 15). Soil textures in Dakota skipper Type A habitats are classified as loam, sandy loam, or loamy sand (Royer *et al.* 2008, pp. 3–5, 14–15). Type B habitats are associated with gravelly glacial landscapes of predominantly sandy loams and loamy sand soils with relatively higher relief, more variable soil moisture, and slightly higher soil temperatures than Type A habitats (Royer *et al.* 2008, p. 15).

Edaphic features that allow for micro-climate (between the soil surface and 2.0 cm (0.8 in) deep) conditions that are conducive to Dakota skipper larvae survival during the summer months include, specifically, mean summer temperatures from 17.8 to 20.5 °C (64.0 to 68.9 °F), mean dew point ranging from 13.9 to 16.8 °C (57.0 to 62.2 °F), mean relative humidity between 72.5 and 85.1 percent, and bulk densities between 0.86 g/cm^3 and 1.28 g/cm^3 (0.5 oz/in^3 to 0.74 oz/in^3). These microclimatological levels are characteristic of untilled glacial soils. Furthermore, as described above, intensive livestock grazing can increase soil bulk density (an indicator of soil compaction)—the effects of grazing are dependent on the intensity and timing of grazing and soil type. The increases in soil bulk density increases have been correlated with decreased soil water content and movement of water through the soil. Therefore, untilled glacial soils that are not subject to intensive grazing pressure are physical or biological features essential to the conservation of the Dakota skipper.

Habitats Protected From Disturbance or Representative of the Historical, Geographic, and Ecological Distributions of the Species

The Dakota skipper has a restricted geographic distribution. Species whose populations exhibit a high degree of isolation are extremely susceptible to extinction from both random and nonrandom catastrophic natural or human-caused events. Therefore, it is essential to maintain the native tallgrass prairies and native mixed-grass prairies upon which the Dakota skipper depends. This means protection from destruction or conversion, disturbance caused by exposure to land management actions (e.g., intense grazing, fire management, early haying, and herbicide or pesticide use), flooding, lack of management, and nonnative species that may degrade the availability of native grasses and flowering forbs. The Dakota skipper must, at a minimum, sustain its current distribution for the species to continue to persist. Introduced nonnative species are a serious threat to native tallgrass prairies and native mixed-grass prairies on which Dakota skipper depends ((Orwig 1997, pp. 4 and 8, Skadsen 2002, p. 52, Royer and Royer 2012b, p. 15–16, 22–23); see both *Factor C: Disease and Predation, and Factor E: Other Natural or Manmade Factors Affecting Its Continued Existence* sections of our proposed listing rule published elsewhere in today's **Federal Register**). Because the distribution of the Dakota skipper is isolated and its habitat so restricted, introduction of certain nonnative species into its habitat could have significant negative consequences. Dakota skipper typically occur at sites embedded in agricultural or developed landscapes, which makes them more susceptible to nonnative or woody plant invasion.

Potentially harmful nonnative species include leafy spurge (*Euphorbia esula*), Kentucky bluegrass, alfalfa (*Medicago sativa*), glossy buckthorn (*Frangula alnus*), smooth brome, purple loosestrife (*Lythrum salicaria*), Canada thistle (*Cirsium arvense*), reed canary grass (*Phalaris arundinacea*), gray dogwood (*Cornus racemosa*), and others (Orwig 1997, pp. 4 and 8, Skadsen 2002, p. 52, Royer and Royer 2012b, pp. 15–16, 22–23). Once these plants invade a site, they replace or reduce the coverage of native forbs and grasses used by adults and larvae of both butterflies. Leafy spurge displaces native plant species and its invasion is facilitated by actions that remove native plant cover and expose mineral soil (Belcher and Wilson 1989, p. 172). The threat from nonnative invasive species is compounded by the encroachment of native woody species into native-prairie habitat. Invasion of tallgrass and mixed-grass prairie by woody vegetation such as glossy buckthorn reduces light availability, total plant cover, and the coverage of grasses and sedges (Fiedler and Landis 2012, pp. 44, 50–51). This in turn reduces the availability of both nectar and larval host plants for Dakota skipper.

Dakota skippers are obligate residents of undisturbed high-quality prairie,

ranging from wet-mesic tallgrass prairie to dry-mesic mixed-grass prairie (Royer and Marrone 1992a, pp. 8, 21). High-quality prairie contains a high diversity of native species, including flowering herbaceous species (forbs). Degraded habitat consists of a high abundance of nonnative plants, woody vegetation, and a low abundance of native grasses and flowering forbs available during the larval growth period and a low abundance of native flowering forbs available during adult nectaring periods. Intensive grazing or fire management practices, early haying, flooding, as well as lack of management create such degraded habitats. Conversion to agriculture or other development also degrades or destroys native-prairie habitat. Therefore, based on the information above, we identify the necessary physical or biological features for the Dakota skipper as nondegraded native tallgrass prairie and native mixed-grass prairie habitat devoid of nonnative plant species, or habitat in which nonnative plant species and nonnative woody vegetation are at levels that allow persistence of Dakota skipper.

Poweshiek Skipperling

We derived the specific physical or biological features required for the Poweshiek skipperling from studies of the species' habitat, ecology, and life history as described below. Additional information can be found in the Background section of the proposed listing rule, published elsewhere in today's **Federal Register**. We have determined that the following physical or biological features are essential for the Poweshiek skipperling:

Space for Individual and Population Growth and for Normal Behavior

The full range of habitat preferences for Poweshiek skipperling includes high-quality prairie fens, grassy lake and stream margins, remnant moist meadows, and wet-mesic to dry tallgrass remnant (untilled) prairies. These areas are dominated by native-prairie grasses, such as little bluestem and prairie dropseed (*Sporobolus heterolepis*), but also contain a high diversity of native forbs, including black-eyed Susan (*Rudbeckia hirta*) and palespike lobelia (*Lobelia spicata*). The disjunct populations of Poweshiek skipperling in Michigan occur in prairie fens, specifically, in peat domes within larger prairie fen complexes in areas co-dominated by mat muhly (*Muhlenbergia richardsonis*) and prairie dropseed (Cuthrell 2011, pers. comm.).

Dry prairies are described to have a sparse shrub layer (less than 5 percent of cover) composed mainly of leadplant, with prairie rose and wormwood sage often present (Minnesota Department of Natural Resources 2012a, p. 1). Taller shrubs, such as smooth sumac, may also be present. Occasional trees, such as bur oak or black oak, may also be present but remain less than 5 percent cover (Minnesota Department of Natural Resources 2012a, p. 1). Similarly, wet-mesic prairies are described to have a sparse shrub layer (less than 5–25 percent cover) of leadplant, prairie rose, wolfberry, and other native shrubs such as gray dogwood, American hazelnut, and wild plum (Minnesota Department of Natural Resources 2012b, p. 1).

Nonnative invasive plant species, such as Kentucky bluegrass and smooth brome, may outcompete native plants that are necessary for the survival of Poweshiek skipperling and lead to the deterioration or elimination of native vegetation. Poweshiek skipperling depend on a diversity of native plants endemic to tallgrass prairies and prairie fens; therefore, when nonnative or woody plant species become dominant, Poweshiek skipperling populations decline due to insufficient sources of larval food and nectar for adults. Therefore, native prairies as defined above, with an absence or only sparse presence of nonnative invasive plant species is a physical or biological feature essential to the conservation of the Poweshiek skipperling.

The vegetative structure of prairie fens is a result of their unique hydrology and consists of plants that thrive in wetlands and calcium-rich soils mixed with tallgrass prairie and sedge meadow species (Michigan Natural Features Inventory 2012, p. 1). Three or four vegetation zones are often present in prairie fens, including diverse sedge meadows, wooded fen often dominated by tamarack (*Larix laricina*), and an area of calcareous groundwater seepage with sparsely vegetated marl precipitate (clay- or lime-rich soils that formed from solids that separated from water) at the surface (Michigan Natural Features Inventory 2012, p. 3). Shrubs and trees that may be present include shrubby cinquefoil (*Potentilla fruticosa*), bog birch (*Betula pumila*), and others (Michigan Natural Features Inventory 2012, p. 3).

Based on the information above, we identify high-quality remnant (untilled) wet-mesic to dry tallgrass prairies, moist meadows, or prairie fen habitat, as described above, containing a high diversity of native plant species and sparse tree and shrub cover to be a physical or biological feature essential to the conservation of the Poweshiek skipperling. These native prairies should have no or low coverage of nonnative invasive plant species.

Poweshiek skipperling are not known to disperse widely. The maximum dispersal distance for male Poweshiek skipperling travelling across contiguous suitable habitat is estimated to be approximately 1.6 km (1.0 mi) (Dana 2012a, pers. comm.). The species was evaluated among 291 butterfly species in Canada and is thought to have relatively low mobility, lower mobility than that of the Dakota skipper (Burke *et al.* 2011; Fitzsimmons 2012, pers. comm.). Therefore, a more conservative estimated dispersal distance would be that of the Dakota skipper, approximately 1 km (0.6 mi) (Cochrane and Delphey 2002, p. 6). Poweshiek skipperling frequently perch on vegetation, but males will occasionally patrol in search of mating opportunities (Royer and Marrone 1992b, p. 15). Poweshiek skipperling may move between patches of prairie habitat separated by structurally similar habitats (*e.g.,* perennial grasslands but not necessarily native prairie); small populations need immigration corridors for dispersal from nearby populations to prevent genetic drift and to reestablish a population after local extirpation. The species will not likely disperse across unsuitable habitat, such as certain types of row crops, or anywhere not dominated by grasses (Westwood 2012, pers. comm.; Dana 2012a, pers. comm.).

Poweshiek skipperling may move in response to local nectar sources, disturbance, or in search of a mate. The tallgrass prairie that once made up a vast ecosystem prior to European settlement has now been reduced to fragmented remnants that make up less than 1 to 15 percent of the original land area across the species' range (Samson and Knopf 1994, p. 419). Before the range-wide fragmentation of prairie habitat, the species could move freely across suitable tallgrass prairie and between high-quality prairies through suitable dispersal habitat. Now, these fragmented populations need immigration corridors for dispersal from nearby populations to prevent genetic drift and perhaps to reestablish a population after local extirpation. Therefore, based on the information above, we identify undeveloped dispersal habitat, structurally similar to suitable high-quality prairie habitat, as described above, to be a physical or biological feature essential to the conservation of the Poweshiek skipperling. These dispersal habitats should be adjacent to or between high-quality prairie patches and within the known dispersal distance of Poweshiek skipperling; within 1 km (0.6 mi) from

suitable high-quality tallgrass prairie or prairie fen and should have limited shrub and tree cover, and not consist of certain row crops (*e.g.,* corn, beets), which may act as barriers to dispersal.

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

Preferred nectar plants vary across the geographic range of Poweshiek skipperling. Smooth ox-eye (*Heliopsis helianthoides*) and purple coneflower were noted as the preferred nectar plants in North Dakota, Iowa, and Minnesota (Swengel and Swengel 1999, p. 280, Selby 2005, p. 5). In Wisconsin, other documented nectar species include stiff tickseed (*Coreopsis palmata*), black-eyed Susan, and palespike lobelia (Borkin 1995b, p. 6). On the relatively wet prairie habitats of Canada and prairie fens in Michigan, preferred nectar plants are black-eyed Susan, palespike lobelia, sticky tofieldia (*Triantha glutinosa*), and shrubby cinquefoil (*Dasiphora fruticosa ssp. floribunda*) (Bess 1988, p. 13; Catling and Lafontaine 1986, p. 65; Holzman 1972, p. 111; Nielsen 1970, p. 46; Summerville and Clampitt 1999, p. 231). Flowering forbs also provide water necessary to avoid desiccation during the flight period (Dana 2013, pers. comm.). Therefore, based on the information above, we identify the presence of native nectar plants, as listed above, that are flowering during the adult flight period of Poweshiek skipperling to be a physical or biological feature essential to the conservation of the Poweshiek skipperling.

Poweshiek skipperling larvae may not rely on a single species of grass for food, but instead may be able to use a narrow range of acceptable plant species at a site (Dana 2005, pers. comm.). Dana (2005, pers. comm.) noted that larvae and ovipositing females prefer grasses with ''very fine, threadlike structures.'' Recent observations indicate that prairie dropseed is the preferred larval food plant for some Poweshiek skipperling populations (Borkin 1995b, pp. 5–6); larval feeding has also been observed on little bluestem (Borkin 1995b, pp. 5–6) and sideoats grama (*Bouteloua curtipendula*) (Dana 2005, pers. comm.). Oviposition has been also observed on mat muhly (Cuthrell 2012, pers. comm.), a grass found in Michigan's prairie fens (Penskar and Higman 1999, p. 1). In general, to sustain all larval instars (developmental stages) and metamorphosis, Poweshiek skipperling require the availability of native, fine-stemmed grasses. Therefore, based on the information above, we identify native, fine-stemmed grasses, including but not limited to prairie dropseed, little bluestem, sideoats grama, and mat muhly to be a physical or biological feature essential to the conservation of the Poweshiek skipperling. These native grasses should be available during the larval stage of Poweshiek skipperling.

Soil textures in areas that overlap with Poweshiek skipperling sites are classified as loam, sandy loam, or loamy sand (Royer *et al.* 2008, pp. 3, 10); soils in moraine deposits are described as gravelly, but the deposits associated with glacial lakes are not described as gravelly. Michigan prairie fen habitat soils are described as saturated organic soils (sedge peat and wood peat) and marl, a calcium carbonate ($CaCO_3$) precipitate (Michigan Natural Features Inventory Web site accessed August 3, 2012). The native-prairie grasses and flowering forbs detailed above are typically found on these types of soils (Royer *et al.* 2008, p. 4, Michigan Natural Features Inventory 2012, pp. 1–3). As discussed above, plant species community composition is generally higher in remnant prairies where the soils have never been plowed (Higgins *et al.* 2000, pp. 23–24) and certain native prairie plants are found only in prairies that lack a tillage history (Higgins *et al.* 2000, p. 23). The physical state of cultivated soil can result in slower water movement, which can hamper root growth and seed germination (*e.g.,* Tomko and Hall 1986, pp. 173–175). Therefore, we identify loam, sandy loam, loamy sand, gravel, organic peat or marl soils that have never been plowed or tilled to be a physical feature essential to the conservation of the Poweshiek skipperling.

Cover or Shelter

Poweshiek skipperlings lay their eggs near native-grasses leaf-blade tips (McAlpine 1972, pp. 85–93); McAlpine did not identify the grasses, but Dana (2005, pers. comm.) noted that larvae and ovipositing females prefer grasses with ''very fine, threadlike structures'' such as prairie dropseed (Borkin 1995b, pp. 5–6); little bluestem (Borkin 1995b, pp. 5–6), sideoats grama (*Bouteloua curtipendula*) (Dana 2005, pers. comm.), and mat muhly (Cuthrell 2012, pers. comm.). After hatching, Poweshiek larvae crawl to the base of native grasses. Larvae emerge at night to forage, clip off blades of grass, and then crawl back to consume the grass (Dana 2012b, pers. comm.). Unlike Dakota skippers, Poweshiek skipperling do not burrow into the soil surface (McAlpine 1972, pp. 88–92, Borkin 1995b, p. 9). Therefore, sufficient availability of grasses used to form shelters at the ground surface is a physical or biological feature essential for cover and shelter for Poweshiek skipperling larvae.

Similar to Dakota skipper, as discussed above, Poweshiek skipperling larvae are vulnerable to desiccation during hot, dry weather and may require wet low areas to provide relief from high summer temperatures or fire (Borkin 1994, p. 8, 1995a, p. 10). Poweshiek skipperling adults also require low wet areas to provide refugia from fire (Borkin 1994, p. 8, 1995a, p. 10). Therefore, based on the information above, we identify the presence of low wet areas that provide shelter and relief from high summer temperatures and fire for both larvae and adults, to be a physical or biological feature for the Poweshiek skipperling.

Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring

The annual, single generation of adult Poweshiek skipperling emerges from mid-June to early July, although the actual flight period varies somewhat across the species' range and can also vary significantly from year-to-year depending on weather patterns (Royer and Marrone 1992b, p. 15, Skadsen 1997, Swengel and Swengel 1999, p. 282). The flight period in a locality lasts two to four weeks, and mating occurs throughout this period (McCabe and Post 1977a, p. 38, Swengel and Swengel 1999, p. 282). During this time, adult Poweshiek skipperling depend on nectar plants for food and water. Therefore, it is important that nectar plants are available in close proximity to areas suitable for oviposition and larval feeding. Adult male Poweshiek skipperling perch on tall grasses and forbs, and appear to patrol in search of mating opportunities (Royer and Marrone 1992b, p. 15). Therefore, the physical or biological features essential to the conservation of Poweshiek skipperling include above-ground parts of grasses and forbs for perching.

As described above, Poweshiek skipperling lay their eggs near the tips of leaf blades (McAlpine 1972, pp. 85–93). Poweshiek skipperling larvae crawl to the base of grasses and emerge at night to forage, clip off blades of grass, and then crawl back down to consume the grass (Dana 2012b, pers. comm.). Therefore, the physical or biological features essential to the conservation of Poweshiek skipperling include above-ground parts of grasses for oviposition and larval foraging and shelter; these grasses should be in close proximity to nectar plants, where the adults are feeding during the short flight period.

Poweshiek skipperling larvae are vulnerable to desiccation during hot, dry weather (Borkin 1994, p. 8, 1995a, p. 10). After hatching, Poweshiek larvae crawl to the base of grasses, but unlike Dakota skippers, Poweshiek skipperling do not form shelters underground, therefore, nonbiotic factors such as temperature and relative humidity at and near (to a 2.0 cm depth; 0.79 in) the soil surface may limit the survival of the sensitive larval and pupal stages of Poweshiek skipperling, as has been suggested for Dakota skippers (Royer *et al.* 2008, p. 2). Soil evaporation rates in the north-central United States are substantially affected by microtopography (evenness of the soil surface on a small scale) (Cooper 1960 in Royer *et al.* 2008, p. 2). For example, removal of vegetation due to livestock grazing, plowing, fire, and soil compaction alters evaporation and water movement through the soil, thereby altering the humidity of soil near the surface (*e.g.,* Tomko and Hall 1986, pp. 173–175; Zhao *et al.* 2010, pp. 93–96). Livestock grazing increases soil bulk density (an indicator of soil compaction) (Greenwood *et al.* 1997, p. __ Zhao *et al.* 2007, p. 248), and these increases have been correlated with decreased soil water content and movement of water through the soil (Zhao *et al.* 2007, p. 248). The loss of porosity results in higher bulk densities, thereby decreasing water movement through the soil (Warren *et al.* 1986, pp. 493–494). Furthermore, bulk density affects plant growth (Gardiner and Miller 2008, p. 36) and, therefore, can alter the plant community. For example, a rapid shift in plant community was documented in wet-mesic habitats in North Dakota that were grazed (McCabe 1979, p. 17, 1981, p. 179). The shift in plant community due to intensive grazing composition may occur rapidly (McCabe 1981, p. 179; Royer and Royer 1998, p. 23). Similarly, tilled land increases bulk densities (*e.g.,* Tomko and Hall 1986, pp. 173–175). During the hot and dry summer months, these changes in the soil restrict the movement of shallow groundwater to the soil surface (Royer *et al.* 2008, p. 2), thus resulting in a dry soil layer during the summer months (Royer *et al.* 2008, p. 2), when Poweshiek skipperling larvae are vulnerable to desiccation (Borkin 1994, p. 8; Borkin 1995a, p. 10).

Although Poweshiek skipperling habitats have not been studied extensively in terms of micro-climate, Royer (2008, pp. 4–5) studied six sites throughout the range of Dakota skipper that overlap with Poweshiek skipperling sites. The six sites represent Type B habitats, which are described as rolling native prairie terrain over gravelly glacial moraine deposits (Royer and Marrone 1992a, pp. 21–22). Royer (2008, pp. 7, 14–15) found the following acceptable levels for microclimatological (climate in a small space, such as at or near the soil surface) variables between the soil surface and 2.0 cm (0.79 in) deep throughout the range of Dakota skippers during the summer season (from when eggs are laid through when larvae enter diapause near the end of September): mean temperature range of 17.8 to 20.5 °C (64.0 to 68.9 °F), mean dew point ranging from 13.9 to 16.8 °C (57.0 to 62.2 °F), and mean relative humidity between 72.5 and 85.1 percent. Bulk density at the six sites ranged from 0.86g/cm^3 to 0.96 g/cm^3 (0.5 oz/in^3; to 0.55 oz/in^3); mean bulk density was below 1.0 g/cm^3 (0.8 oz/in^3). Type B habitat are associated with gravelly glacial landscapes of predominantly sandy loams and loamy sand soils with relatively higher relief, more variable soil moisture, and slightly higher soil temperatures than Type A habitats (Royer *et al.* 2008, p. 15). These variables have not been studied in Iowa, Michigan, and Wisconsin sites.

Micro-climate conditions near the soil surface conducive to Poweshiek skipperling larvae survival are characteristic of untilled glacial soils without intense grazing pressure. Therefore, untilled glacial soils that are not subject to intense grazing pressure are physical or biological features essential to the conservation of the Poweshiek skipperling.

Habitats Protected From Disturbance or Representative of the Historical, Geographic, and Ecological Distributions of the Species

The Poweshiek skipperling has a restricted geographic distribution. Species whose populations exhibit a high degree of isolation are extremely susceptible to extinction from both random and nonrandom catastrophic natural or human-caused events. Therefore, it is essential to maintain the native tallgrass prairies and prairie fens upon which the Poweshiek skipperling depends. This means protection from disturbance caused by exposure to land management actions (cattle grazing, fire management, destruction or conversion, early haying, and herbicide or pesticide use), flooding, water withdrawal or depletion, water contamination, lack of management, and nonnative species that may degrade the availability of native grasses and flowering forbs. The Poweshiek skipperling must, at a minimum, sustain its current distribution for the species to continue to persist. Introduced nonnative species are a serious threat to native tallgrass prairies and prairie fens on which Poweshiek skipperling depends ((Orwig 1997, pp. 4, 8, MNFI unpubl. data 2011, Skadsen 2002, p. 52, Royer and Royer 2012b, pp. 15–16, 22–23); see both *Factor C: Disease and Predation, and Factor E: Other Natural or Manmade Factors Affecting Its Continued Existence* sections of our proposed listing rule published elsewhere in today's **Federal Register**).

Because the distribution of the Poweshiek skipperling is isolated and its habitat so restricted, introduction of certain nonnative species into its habitat could be devastating. Poweshiek skipperling typically occur at sites embedded in agricultural or developed landscapes, which makes them more susceptible to nonnative or woody plant invasion. Potentially harmful nonnative species include leafy spurge (*Euphorbia esula*), Kentucky bluegrass, alfalfa (*Medicago sativa*), glossy buckthorn *(Frangula alnus*), smooth brome, purple loosestrife (*Lythrum salicaria*), Canada thistle (*Cirsium arvense*), reed canary grass (*Phalaris arundinacea*), gray dogwood (*Cornus racemosa*), and others (Orwig 1997, p. 4, 8, MNFI unpubl. data 2011, Skadsen 2002, p. 52, Royer and Royer 2012b, pp. 15–16, 22–23). Once these plants invade a site, they replace or reduce the coverage of native forbs and grasses used by adults and larvae of both butterflies. Leafy spurge displaces native plant species and its invasion is facilitated by actions that remove native plant cover and expose mineral soil (Belcher and Wilson 1989, p. 172). The threat from nonnative invasive species is compounded by the encroachment of native woody species into native prairie habitat. Invasion of tallgrass prairie by woody vegetation such as glossy buckthorn reduces light availability, total plant cover, and the coverage of grasses and sedges (Fiedler and Landis 2012, pp. 44, 50–51). This in turn reduces the availability of both nectar and larval host plants for Poweshiek skipperling.

In Michigan, Poweshiek skipperling live on prairie fens, which occur on the lower slopes of glacial moraines or ice contact ridges (Albert 1995 in Michigan Natural Features Inventory 2012, p. 1) where coarse glacial deposits provide high hydraulic connectivity that forces groundwater to the surface (Moran 1981 in Michigan Natural Features Inventory 2012, p. 1). Small lakes, headwater streams, or rivers are often associated with prairie fens. The sapric peat (partially decomposed vegetation with less than one-third recognizable plant

fibers) substrate typical of prairie fens is saturated with calcareous (rich in calcium in magnesium bicarbonate) groundwater as a result of its filtration through glacial deposits. These bicarbonates often precipitate as marl at the soil surface. The typical pH ranges from 6.8 to 8.2 (Michigan Natural Features Inventory 2012, p. 1). As described above, prairie fens may include some low shrubs and trees, but the amount of tree and shrub cover should not cause a barrier to dispersal (i.e., >15% trees or shrubs). Prior to European settlement, fires on upland habitats likely spread to adjacent prairie fens, which inhibited shrub invasion and maintained the open prairie fen plant community (Michigan Natural Features Inventory 2012, pp. 1–3). Now, the vegetation is largely a result of the unique hydrology; the plant community consists of obligate wetland and calcicolous species (species that thrive in lime-rich soils) mixed with tallgrass prairie and sedge meadow species (Michigan Natural Features Inventory 2012, pp. 1–3). The hydraulic processes connecting groundwater to the surface are essential to maintain the vegetative structure of prairie fens and are, therefore, a physical or biological feature essential to the conservation of the Poweshiek skipperling.

Poweshiek skipperling are obligate residents of untilled high-quality prairie, ranging from wet-mesic tallgrass prairie to dry-mesic mixed-grass prairie to prairie fens (Royer and Marrone 1992a, pp. 8, 21). High-quality remnant tallgrass prairies and prairie fens contain a high diversity of native species, including flowering herbaceous species (forbs) (Dana 2001, pers. comm.). Degraded habitat consists of a high abundance of nonnative plants, woody vegetation, and a low abundance of native grasses and flowering forbs available during the larval growth period and a low abundance of native flowering forbs available during adult nectaring periods. Intense grazing or fire management practices, early haying, flooding, as well as lack of management create such degraded habitats. Conversion to agriculture or other development also degrades or destroys native prairie habitat. Therefore, based on the information above, we identify the necessary physical or biological features for the Poweshiek skipperling as nondegraded habitat devoid of nonnative plant species, or habitat in which nonnative plant species and nonnative woody vegetation are at levels that allow persistence of Poweshiek skipperling.

Summary

We identify high-quality remnant untilled tallgrass prairies, moist meadows, or prairie fen habitat containing a high diversity of native plant species including a mosaic of native grasses and flowering forbs to be a physical or biological feature necessary for population growth and normal behavior of Poweshiek skipperling. These prairies have edaphic features that support the development and survival of larval Poweshiek skipperling and soil textures that are loam, sandy loam, loamy sand, gravel, or peat. Biological features that provide food sources for larvae are native fine-stemmed grass species, such as prairie dropseed, little bluestem, sideoats grama or mat muhly, and native forb plant species for adult nectar and water sources, such as purple coneflower, black-eyed Susan, stiff tickseed, palespike lobelia, sticky tofieldia, and shrubby cinquefoil. Physical or biological features for breeding, reproduction and offspring include grasses and forbs at or above the ground surface used for perching by adults and grasses at or above the ground surface used for oviposition as well as for larval shelter. Physical or biological features that provide cover or shelter dispersed within or adjacent to native prairies include areas for relief from high summer temperatures and fire, such as depressional wetlands, low wet areas, within or adjacent to prairies and edaphic features that are conducive to the development and survival of larval Poweshiek skipperling.

These high-quality native tallgrass prairies and prairie fens have limited tree and low shrub coverage that may act as barriers to dispersal. These habitats also have limited or no invasive plant species that may lead to a change in the plant community. Physical or biological features that provide cover or shelter and relief from high summer temperatures include depressional wetlands, low wet areas, as well as undisturbed glacial soils. Contiguous prairie habitat that once characterized the historical distribution of the species has been severely fragmented; therefore, dispersal habitat, structurally similar to suitable high-quality prairie habitat and adjacent to or between high-quality prairie patches within the known dispersal distance of Poweshiek skipperling (within 1 km from suitable high-quality prairie or prairie fens) is another physical and biological feature identified for the Poweshiek skipperling to help maintain genetics and to provide refuges from disturbance. The unique hydrology that supports prairie fen vegetation is an essential physical and biological feature for Poweshiek skipperling in Michigan prairie fens.

Primary Constituent Elements

Dakota Skipper

Under the Act and its implementing regulations, we are required to identify the physical or biological features essential to the conservation of Dakota skipper in areas occupied at the time of listing, focusing on the features' primary constituent elements. We consider primary constituent elements to be the elements of physical or biological features that provide for a species' life-history processes and are essential to the conservation of the species.

Based on our current knowledge of the physical or biological features and habitat characteristics required to sustain the species' life-history processes, we determine that the primary constituent elements specific to the Dakota skipper are:

(1) Primary Constituent Element 1—Wet-mesic tallgrass or mixed-grass remnant untilled prairie that occurs on near-shore glacial lake soil deposits or high-quality dry-mesic remnant untilled prairie on rolling terrain consisting of gravelly glacial moraine soil deposits, containing:

a. A predominance of native grasses and native flowering forbs,

b. Glacial soils that provide the soil surface or near surface (between soil surface and 2 cm depth) micro-climate conditions conducive to Dakota skipper larval survival and native prairie vegetation such as, mean soil surface summer temperatures from 17.8 to 20.5 °C (64.0 to 68.9 °F), mean near soil surface dew point ranging from 13.9 to 16.8 °C (57.0 to 62.2 °F), mean near soil surface relative humidity between 72.5 and 85.1 percent, and soil bulk densities between 0.86g/cm^3 and 1.28 g/cm^3 (0.5 oz/in^3 to 0.74 oz/in^3);

c. If present, trees or large shrub cover of less than 5 percent of area in dry prairies and less than 25 percent in wet-mesic prairies; and

d. If present, nonnative invasive plant species occurring in less than 5 percent of area.

(2) Primary Constituent Element 2—Native grasses and native flowering forbs for larval and adult food and shelter, specifically;

a. At least one of the following native grasses to provide larval food and shelter sources during Dakota skipper larval stages: Prairie dropseed (*Sporobolus heterolepis*) or little bluestem (*Schizachyrium scoparium*); and

b. One or more of the following forbs in bloom to provide nectar and water

sources during the Dakota skipper flight period: Purple coneflower (*Echinacea angustifolia*), bluebell bellflower (*Campanula rotundifolia*), white prairie clover (*Dalea candida*), upright prairie coneflower (*Ratibida columnifera*), fleabane (*Erigeron spp.*), blanketflower (*Gaillardia spp.*), black-eyed Susan (*Rudbeckia hirta*), yellow sundrops (*Calylophus serrulatus*), groundplum milkvetch (*Astragalus crassicarpus*), common gaillardia (*Gaillardia aristata*), or tooth-leaved primrose (*Calylophus serrulata*).

(3) Primary Constituent Element 3—Dispersal grassland habitat that is within 1 km (0.6 mi) of native high-quality remnant prairie (as defined in Primary Constituent Element 1) that connects high-quality wet-mesic to dry tallgrass prairies or moist meadow habitats. Dispersal grassland habitat consists of undeveloped open areas dominated by perennial grassland with limited or no barriers to dispersal including tree or shrub cover less than 25 percent of the area and no row crops such as corn, beans, potatoes, or sunflowers.

With this proposed designation of critical habitat, we intend to identify the physical or biological features essential to the conservation of the species, through the identification of the features' primary constituent elements sufficient to support the life-history processes of the species.

All units and subunits proposed to be designated as critical habitat that are currently occupied by the Dakota skipper contain the primary constituent elements sufficient to support the life-history needs of the species. Additional unoccupied units that we determine are essential for the conservation of the species also contain the primary constituent elements sufficient to support the life-history needs of the species.

Poweshiek Skipperling

Under the Act and its implementing regulations, we are required to identify the physical or biological features essential to the conservation of Poweshiek skipperling in areas occupied at the time of listing, focusing on the features' primary constituent elements. We consider primary constituent elements to be the elements of physical or biological features that provide for a species' life-history processes and are essential to the conservation of the species.

Based on our current knowledge of the physical or biological features and habitat characteristics required to sustain the species' life-history processes, we determine that the primary constituent elements specific to the Poweshiek skipperling are:

(1) Primary Constituent Element 1—Wet-mesic to dry tallgrass remnant untilled prairies or remnant moist meadows containing:

a. A predominance of native grasses and native flowering forbs;

b. Undisturbed (untilled) glacial soil types including, but not limited to, loam, sandy loam, loamy sand, gravel, organic soils (peat), or marl that provide the edaphic features conducive to Poweshiek skipperling larval survival and native prairie vegetation;

c. Depressional wetlands or low wet areas, within or adjacent to prairies that provide shelter from high summer temperatures and fire;

d. If present, trees or large shrub cover less than 5 percent of area in dry prairies and less than 25 percent in wet-mesic prairies and prairie fens; and

e. If present, nonnative invasive plant species occurring in less than 5 percent of area.

(2) Primary Constituent Element 2—Prairie fen habitats containing:

a. A predominance of native grasses and native flowering forbs;

b. Undisturbed (untilled) glacial soil types including, but not limited to, organic soils (peat), or marl that provide the edaphic features conducive to Poweshiek skipperling larval survival and native prairie vegetation;

c. Depressional wetlands or low wet areas, within or adjacent to prairies that provide shelter from high summer temperatures and fire;

d. Hydraulic features necessary to maintain prairie fen groundwater flow and prairie fen plant communities;

e. If present, trees or large shrub cover less than 25 percent of the unit; and

f. If present, nonnative invasive plant species occurring in less than 5 percent of area.

(3) Primary Constituent Element 3—Native grasses and native flowering forbs for larval and adult food and shelter, specifically;

a. At least one of the following native grasses available to provide larval food and shelter sources during Poweshiek skipperling larval stages: prairie dropseed (*Sporobolus heterolepis*), little bluestem (*Schizachyrium scoparium*), sideoats grama (*Bouteloua curtipendula*), or mat muhly (*Muhlenbergia richardsonis*); and

b. At least one of the following forbs in bloom to provide nectar and water sources during the Poweshiek skipperling flight period: purple coneflower (*Echinacea angustifolia*), black-eyed Susan (*Rudbeckia hirta*), smooth ox-eye (*Heliopsis helianthoides*), stiff tickseed (*Coreopsis palmata*), palespike lobelia (*Lobelia spicata*), sticky tofieldia (*Triantha glutinosa*), or shrubby cinquefoil (*Dasiphora fruticosa ssp. floribunda*).

(4) Primary Constituent Element 4—Dispersal grassland habitat that is within 1 km (0.6 mi) of native high-quality remnant prairie (as defined in Primary Constituent Element 1) that connects high quality wet-mesic to dry tallgrass prairies, moist meadows, or prairie fen habitats. Dispersal grassland habitat consists of the following physical characteristics appropriate for supporting Poweshiek skipperling dispersal: undeveloped open areas dominated by perennial grassland with limited or no barriers to dispersal including tree or shrub cover less than 25 percent of the area and no row crops such as corn, beans, potatoes, or sunflowers.

With this proposed designation of critical habitat, we intend to identify the physical or biological features essential to the conservation of the species, through the identification of the features' primary constituent elements sufficient to support the life-history processes of the species. Many of the units proposed to be designated as critical habitat are currently occupied by the Poweshiek skipperling and contain the primary constituent elements sufficient to support the life-history needs of the species. Additional unoccupied units also contain the primary constituent elements sufficient to support the life-history needs of the species.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain features that are essential to the conservation of the species and which may require special management considerations or protection. All areas proposed for designation as critical habitat as described below may require some level of management to address the current and future threats to the physical or biological features essential to the conservation of Dakota skipper and Poweshiek skipperling. In all of the described units, special management may be required to ensure that the habitat is able to provide for the biological needs of both species.

A detailed discussion of the current and future threats to Dakota skipper and Poweshiek skipperling can found in the proposed listing rule to list each species as an endangered species, which is published elsewhere in today's **Federal Register**. In general, the features

essential to the conservation of Dakota skipper and Poweshiek skipperling may require special management considerations or protection to reduce the following individual threats and their interactions:

(1) The direct and indirect impacts of land use conversions, primarily from urban and energy development, gravel mining, and conversion to agriculture;

(2) invasive species encroachment and secondary succession of woody plants;

(3) grazing that reduces or continues to suppress the availability or predominance of native plants that provide larval food and adult nectar;

(4) wetland destruction and degradation such that the affected area is flooded or drained of water permanently or over a long term such that it increases the risk of invasive species invasion, changes the prairie plant community, or eliminates wet areas used as relief from high temperatures and fire;

(5) herbicide application; and

(6) the stochastic effects of drought or floods.

The greatest, overarching threat to Dakota skipper and Poweshiek skipperling are habitat curtailment, destruction, and fragmentation. The aforementioned activities will require special management consideration not only for the direct effects of the activities on the species and their habitat, but also for their indirect effects and how they are cumulatively and individually increasing habitat curtailment, destruction, and fragmentation.

Based on our analysis of threats to Dakota skipper and Poweshiek skipperling, special management activities that could ameliorate these threats include, but are not limited to, habitat maintenance or restoration activities that occur at an intensity, duration, spatial arrangement or timing that is not detrimental to the species. These activities include, but are not limited to:

(1) Prescribed fire,

(2) late-season haying (after August 1),

(3) brush or tree removal,

(4) prescribed low-intensity rotational grazing,

(5) invasive species control, and

(6) habitat preservation.

Management activities should be of the appropriate timing, intensity, and extent to be protective of Dakota skipper and Poweshiek skipperling during all life stages (*e.g.,* pupae, larvae, and adults) and to maximize habitat quality and quantity. Some management activities, depending on how they are implemented, can have intensive impacts to the species, its habitat, or both. Depending on site-specific conditions, management that includes prescribed fire and some low-intensity grazing must affect no more than one-quarter to one-third of the occupied habitat at a site in any single year to ensure that the resulting mortality or effects to reproduction do not have undue impacts on population viability. Management activities should protect the primary constituent elements for the species by conserving the extent of the habitat patches, the quality of habitat within the patches, and connectivity among occupied patches (*e.g.,* see Schmitt, 2003). Appropriate management helps increase the number of individuals reproducing each year by minimizing the activities that may harm Dakota skippers or Poweshiek skipperling during adult, larval, or pupal stages.

Such special management activities may be required to protect the physical or biological features and support the conservation of Dakota skipper and Poweshiek skipperling by preventing or reducing the loss, degradation, and fragmentation of native prairie landscapes. Additionally, management of critical habitat lands can increase the amount of suitable habitat and enhance connectivity among Dakota skipper and Poweshiek skipperling populations through the restoration of areas that were previously composed of native tallgrass and mixed-grass prairie communities. The limited extent of native tallgrass and mixed-grass prairie habitats, particularly the eastern portion of the Poweshiek skipperling range, emphasizes the need for additional habitat into which the Poweshiek skipperling could expand to survive and recover as well as to allow for adjustment to changes in habitat availability that may result from climate change.

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 at the time of listing—are necessary to ensure the conservation of the species. We are proposing to designate critical habitat in areas within the geographical area currently occupied by Dakota skipper and Poweshiek skipperling as described in detail below. We also are proposing to designate specific areas outside the geographical area occupied by the Dakota skipper and Poweshiek skipperling at the time of listing that were historically occupied, but where we are uncertain of the current occupancy, and areas that are presently unoccupied, because such areas are essential for the conservation of the species.

Species Occupancy

We generally considered a species to be ''present'' at sites where it was detected during the most recent survey, if the survey was conducted in 2002 or more recently and no evidence suggests that the species is now extirpated from the site, (*e.g.,* no destruction or obvious and significant degradation of the species' habitat), with the exception of one Poweshiek skipperling site and four Dakota skipper sites, which are discussed in detail in the listing rule published elsewhere in this **Federal Register**. At these five sites, there is no evidence to suggest the species is not still present because the habitat and management is still considered to be conducive to the species, the occupancy status was supported by the species expert review of the site, and at least one of these sites had a 2012 habitat assessment that concluded that the habitat was suitable for the species.

We assigned a status of ''unknown'' if the species was found in 1993 or more recently, but not in the most recent one to two sequential survey year(s) since 1993 and we found no evidence to suggest the species is now extirpated from the site (*e.g.,* no destruction or obvious and significant degradation of the species' habitat). We considered a species to be ''possibly extirpated'' at sites where it was detected at least once prior to 1993, but not in the most recent one to two sequential survey years(s). A species is also considered ''possibly extirpated'' at sites where it was found prior to 1993 and no surveys have been conducted in 1993 or more recently. At least three sequential years of negative surveys were necessary for us to consider the species ''extirpated'' from a site, because of the difficulty of detecting these species, as explained further in this section. A species is also considered ''extirpated'' at sites where habitat for the species is no longer present.

When determining whether the species occupancy is unknown, possibly extirpated, or extirpated at a particular site, we used the survey year 1993 as a cut-off date, because most known sites (more than 75 percent of known Poweshiek skipperling sites and more than 89 percent of known Dakota

skipper sites) have been surveyed at least once since 1993 and survey data more than 20 years old may not reflect the current status of a species or its habitat at a site (for example, due to habitat loss from secondary succession of woody vegetation or a change in plant communities due to invasive species). Although it cannot be presumed that the species is absent at sites not surveyed since 1993, the likelihood of occupancy of these sites should be considered differently than sites with more recent survey data (*e.g.,* due to woody vegetation succession over time). When analyzing survey results, we disregarded negative surveys conducted outside of the species' flight period or under unsuitable conditions (*e.g.,* high wind speeds).

After we applied these standards to initially ascertain the status of the species, we asked species experts and Service personnel to help verify, modify, or correct species' occupancy at each site (particularly for sites with questionable habitat quality or those that have not been surveyed recently). In most cases, we used the status confirmed during expert review, unless we received additional information (*e.g.,* additional survey or habitat data provided after the expert reviews) that suggests a different status at a particular site.

Timing of surveys is based on initial field checks of nectar plant blooms and sightings of butterfly species with synchronous emergence (sightings of butterfly species that emerge at the same time as Dakota skipper and Poweshiek skipperling), and, more recently, emergence estimated by a degree-day emergence model using high and low daily temperature data from weather stations near the survey sites (Selby, undated, unpublished dissertation). Surveys are conducted during flight periods when the species' abundance is expected to be at levels at which the species can be detected. However, as with many rare species, detection probabilities are imperfect and some uncertainty remains between non-detection and true absence (Gross *et al.* 2007, pp. 192, 197–198; Pellet 2008, pp. 155–156). Three sequential years of negative surveys is sufficient to capture variable detection probabilities, since each survey year typically encompasses more than one visit (*e.g.,* the average number of visits per Dakota skipper site per year ranges from 1 to 11) and the probability of false absence after 5–6 visits drops below 5 percent for studied butterfly species with varying average detection probabilities (Pellet 2008, p. 159). Therefore, the site is considered ''extirpated'' if there are three sequential years of negative surveys.

It cannot be presumed that the species is not persisting at a site only because there have not been recent surveys. At several sites, the species has persisted for longer than 20 years; for example, Dakota skipper was first recorded at Scarlet Fawn Prairie in South Dakota in 1985 and has had positive detections every survey since that date–the most recent detection was in 2012. The year 1993 was chosen based on habitat-related inferences, specifically, the estimated time for prairie habitat to degrade to non-habitat due to woody encroachment and invasive species. For example, native prairies with previous light-grazing management that were subsequently left idle transitioned from mixed grass to a mix of woody vegetation and mixed grass in 13 years and it was predicted that these idle prairies would be completely lost due to woody succession in a 30-year timeframe (Penfound 1964, pp. 260–261). The time for succession of idle prairie depends on numerous factors, such as the size of the site, edge effects (the changes that occur on the boundary of two habitat types), and the plant composition of adjacent areas.

This approach is the most objective way to evaluate the data range-wide. Most sites have been surveyed over multiple years, although the frequency and type of surveys varied among sites and years. In several cases, species experts provided input on occupancy based on their familiarity with the habitat quality and stressors to populations at particular sites.

We determined current occupancy using occurrence data from the Service's Dakota skipper geodatabase (Service 2013, unpubl, geodatabase) and Poweshiek skipperling database (Service 2013, unpubl. data), which were built based on survey reports from throughout the range of the species and expert input. Areas with occurrence records or sites classified as ''present'' (see Background of the proposed listing rule and above for definitions) are considered occupied, while areas where the species is presumed extirpated or possibly extirpated are considered currently unoccupied, but occupied historically.

Several proposed critical habitat units contain several nearby survey sites (or point occurrences) that occur within the maximum estimated dispersal distance of Dakota skipper and Poweshiek skipperling. Because the species could move between these sites (or occurrences), if several sites are contained within one CH unit, we used the ''best'' status for the species to determine occupancy in areas where the habitat was contiguous. For example, if there are two sites (or occurrences) within a proposed critical habitat unit and one site has a status of present and the other status is unknown, we used the status of present and considered the unit to be occupied. We did this because we found it reasonable to assume that the species could travel between sites (or point occurrence locations) if they were within the maximum dispersal distance of each other and if we determined that the habitat between point locations was, at the minimum, suitable for dispersal. Furthermore, the delineation of what constituted a ''site'' by surveyors was often not ecologically based, but was instead based on ownership or political boundaries and may only roughly approximate the extent of a suitable habitat patch.

The status of the species is unknown at a number of sites—in other words, we are not certain whether the species may be extant at densities that are so low that it has not been recently detected, or if it is truly absent at these sites. Therefore, we are uncertain of the occupancy in units where the best species status is unknown. Areas with an uncertain occupancy were examined to determine if such areas were essential for the conservation of the species. In other words, for the purposes of these critical habitat designations, we are considering these areas to be unoccupied at the time of listing and we examined these areas with uncertain occupancy using the same criteria as we used for unoccupied areas. We also examined lands where the status of the species is considered to be possibly extirpated or extirpated to determine if such areas are essential for the conservation of the species.

Areas Occupied at Time of Listing

We reviewed available information that pertains to the ecology, natural history, and habitat requirements of each species and evaluated all known species locations using data from the following sources: Spatial data for known species locations from the Minnesota Natural Heritage Program (MN DNR, 2012, entire data set), Michigan Natural Heritage Program (MI DNR 2011, entire data set), Michigan Natural Features Inventory (MNFI), regional Geographic Information System (GIS) coverages, recent biological surveys and reports; site visits and site-specific habitat evaluations; research published in peer-reviewed articles and presented in academic theses or reports; and discussions with species experts.

Criteria for selecting critical habitat units are based on species survey data

and the extent and distribution of essential habitat features. Our criteria are based on the available scientific information on habitat and distribution of the species (see ''Background'' section of the proposed listing rule). The criteria for selecting the occupied sites are: (1) Type, amount, and quality of habitat associated with occupied areas; (2) presence of the physical or biological features essential for the species; and (3) estimated population viability of the species in a particular area, if known.

We considered occupied areas containing plant communities classified as (or based on the best available information and recent aerial photography) dry prairie, dry-mesic prairie, mesic prairie, or wet-mesic remnant (untilled) prairie as potential suitable habitat for Dakota skipper and Poweshiek skipperling. Prairie fens, as defined by the MNFI, were also considered as potential suitable habitat for Poweshiek skipperling in Michigan. Using state natural heritage rankings, habitat information from recent reports, and expert knowledge, we selected areas with habitat quality ratings of fair to excellent because these areas are most likely to contain the physical or biological features essential for the conservation of the species. In some cases the habitat was not given a quality rating, but instead the site was given an estimated population viability rating, in recent reports or heritage databases, which directly reflect the quality of the habitat (*e.g.,* excellent population viability rating indicates the presence of high-quality native prairie habitat). Therefore, we selected sites with viability ranks of fair to excellent from the most recent reports available because these areas are most likely to contain the physical or biological features essential for the conservation of the species. Another physical or biological feature essential for the conservation of the species is grassland-dominated areas that are necessary for dispersal between higher quality prairies. Therefore, we also considered including areas that contain potential dispersal habitat to connect patches of higher quality native prairies that are (1) lesser quality (or unrated) native dry-mesic prairie, mesic prairie, or wet-mesic remnant prairies or other habitat types such as wet meadow, oak savannas, and other types of grassland-dominated areas (*e.g.,* not row crops or dense forests) suitable for dispersal and (2) within 1 km (0.6 mi) of higher (fair to excellent) quality native prairie. In other words, more than one site may be contained in a single unit if the habitats are connected by areas that contain the physical or biological features essential for the conservation of the species (nearby sites may have been named as different sites, for example, in survey reports, due to changes in landownership, dispersal barriers that may have existed at the time of the survey, or other situations).

Why Occupied Areas Are Not Sufficient for the Conservation of Dakota Skippers and Why Unoccupied Areas Are Essential for the Conservation of the Species

The Dakota skipper has experienced recent declines in large parts of its historical range. The species is now considered to be present at 46 sites in the United States, including 14 sites in Minnesota, 18 sites in North Dakota, and 14 sites in South Dakota. More than one site can be contained in a single proposed critical habitat unit; consequently, we are proposing a total of 31 occupied units (*i.e.,* 6 occupied units in Minnesota, 10 occupied units in North Dakota, and 10 occupied units in South Dakota). The remaining sites where the species is considered to be present are located in Canada (45 of total 91), mostly within three isolated complexes, and were observed in either 2002 or 2007 with no subsequent surveys.

The areas of unoccupied habitat that we are proposing as critical habitat were recently occupied (had positive records in 1993 or more recently) and are within the historical range of the species. The areas of habitat where we are uncertain of the occupancy that we are proposing as critical habitat were recently occupied (generally, a site with an unknown occupancy had positive records in 1993 or more recently but may have had one or two years of negative surveys or were determined by a species expert in the state to have an unknown occupancy), and are within the historical range of the species. We determine that these unoccupied areas are essential for the Dakota skipper's conservation because the range of the species has been severely curtailed, occupied habitats are limited and isolated, population sizes are small, and additional lands will be necessary to recover the species.

Furthermore, the unoccupied units and units where we are uncertain of the occupancy are needed to satisfy the conservation principles of redundancy, resiliency, and representation for the Dakota skipper, as there may be too few occupied areas remaining to ensure conservation of the species—the species having been extirpated from substantial portions of its range. The inclusion of unoccupied habitat and habitat where we are uncertain of the occupancy as proposed critical habitat is essential for the species' conservation in three ways: (1) It would substantially increase the diversity of historically occupied habitats and geographic areas to increase the chances of the species persisting despite demographic and environmental stressors that are not uniformly distributed; (2) it would ensure that at least some populations may be sufficiently large to withstand stochastic events; and, (3) it would help to ensure that geographic areas of recent importance to the species contain sufficient numbers of populations to maintain the species.

Specifically, we are proposing unoccupied critical habitat units and units with uncertain occupancy to conserve habitat that may hold potential genetic representation of the species that is necessary for the species to conserve its adaptive capabilities across portions of its highly fragmented historical ranges. A 2002 study of Dakota skipper genetics showed that each Dakota skipper population studied had evidence of inbreeding and was subject to genetic drift that may erode its genetic variability over time (Britten and Glasford 2002, pp. 371–372). Therefore, it is essential to conserve the range-wide genetic diversity we have for the species (and the habitats that may contain that diversity) to help safeguard the genetic representation necessary for the species to maintain its adaptive capabilities. The fragmentation of Dakota skipper's genetic diversity and limited detectability during low population densities further argue for the conservation value of populations currently defined as unknown. We are certain of the species' presence at relatively few sites and there remains some likelihood of Dakota skipper presence at sites where they have not been detected during recent surveys. In light of the species' fragmentation and the need to preserve any remaining genetic diversity, we believe it is also essential to conserve Dakota skipper at units where the occupancy of the species is unknown.

Since a species' genetics is shaped by its environment, successful conservation should aim to preserve a species across the array of environments in which it occurs (Shaffer and Stein 2000, p. 308), especially if much remains unknown about the nature and extent of its genetic diversity. Conservation of habitat and genetic material is vital in the core of the species' range, but it is also critical to preserve the species in less typical habitats on the periphery of its range, for example, wet-mesic prairies in North

Dakota, to preserve the adaptive capabilities of the species over the long term.

Genetic variation allows populations to tolerate a range of environmental stressors such as new infectious diseases, parasites, pollution, food sources, predators, and changes in climate. Fragmentation of a species' habitat across its range can ''exacerbate genetic drift and random fluctuations in allele frequencies, causing the genetic variation originally present within a large population to become redistributed among the remaining subpopulations'' (Redford *et al.* 2011, p. 41). Furthermore, a ''fully representative sample of founders is required, if the population is to encompass the genetic diversity in the wild and minimize subsequent inbreeding'' (Frankham *et al.* 2009, p. 434). Because there is evidence of range-wide genetic isolation and inbreeding, the Dakota skipper's historical genetic variation may be fragmented unevenly among the remaining subpopulations. As a basis of future reintroductions, a sample of founders representative of appropriate types and levels of genetic diversity (e.g., to minimize inbreeding) is essential to conserve the genetic material at units where we are uncertain of the occupancy.

We are also proposing critical habitat units with uncertain occupancy and unoccupied units to help capture the habitats necessary for population persistence despite stochastic events—in other words, we would increase the likelihood that units would contain large enough populations to be resilient to those stressors. We do not know the minimum population size needed to attain an acceptable likelihood of population persistence of Dakota skipper, but we make inferences using data from populations for which we have some evidence of persistence—in general, the chances of maintaining a species is thought to increase with the size of the sites. Insects may need a population size of more than 10,000 individuals to maintain population viability for 40 generations (Trail *et al.* 2007 in Frankham *et al.* 2009, pp. 518–519). By increasing the resiliency of each unit (*e.g.,* by ensuring an appropriate size), we are hoping to increase the chance of species persistence in individual units. In systematic surveys on Minnesota prairies, Swengel and Swengel (1997; 1999) found no Dakota skippers on the smallest remnants (< 20 ha (49 ac)), and significantly lower abundance on intermediate size (30–130 ha (74–321 ac)) than on larger tracts (>140 ha (346 ac)). We did not specify a minimum size for proposed critical habitat units; however, almost all of the proposed Dakota skipper critical habitat units are larger than 30 ha (74 ac) and are, therefore, more resilient to stochastic events. In general, researchers have made consistent observations of relatively small proposed critical habitat units that demonstrate persistence of the species or are one of a few units representative of a specific eco-region or eco-region subsection (see the redundancy discussion below in this section), or a combination of these factors.

Furthermore, the importance of conserving habitats with uncertain occupancy and unoccupied areas is vital in proposed units that contain sites that were, until recently, considered some of the best populations of the species range-wide. For example, some of the areas where we are uncertain of the species occupancy have had positive detections as recently as 2009. Other unoccupied units also had relatively recent detections; for example, one unoccupied unit in South Dakota had positive detections of the species in 2008, but the species is now extirpated at the site. In addition, some of these areas were considered to have, until recently, some of the best populations of Dakota skipper, but the populations have apparently suddenly disappeared or have been reduced to undetectable numbers, not due to habitat degradation or destruction, but instead due to unknown stressors (see further discussion in Factor E of the proposed listing rule published elsewhere in this **Federal Register**). These unoccupied units and units with uncertain occupancy are essential for the conservation of the Dakota skipper, particularly for future reintroduction efforts to aid species recovery, because they contain the habitat that is conducive to the species.

Finally, by proposing unoccupied units and units where we are uncertain of the occupancy, we include areas that help to provide adequate redundancy within the Dakota skipperling's recent geographic distributions and full variety of habitat types. By including unoccupied units and units with uncertain occupancy, we will help to ensure that geographic areas of recent importance to the species contain sufficient numbers of populations to maintain the species. In order to conserve the Dakota skipper across the array of environments in which it occurs, we capture habitat redundancy by including a number of sites within each Bailey's eco-region (*i.e.,* Bailey 1983, entire) section and subsection of critical habitat units that is roughly proportional to the number of sites with recent records within those areas. The Dakota skipper historically ranged across at least 10 eco-region sections and 18 eco-region subsections, with the majority of historically documented sites from the Red River Valley, North Central Glaciated Plains, and North East Glaciated Plains eco-region sections (Service 2013, unpubl. geodatabase; Service 2013, unpubl.). Occupied units occur on 9 eco-region subsections within 5 eco-regions, the Red River Valley, North Central Glaciated Plains, North West Great Plains sections, and two sections with the same name (North East Glaciated Plains). By including unoccupied units and units with uncertain occupancy, we are capturing areas in 3 additional eco-region subsections within 2 sections (*i.e.,* Lake Agassiz-Aspen Parklands and North East Glaciated Plains eco-region sections). Furthermore, by including unoccupied units and units with uncertain occupancy, we are including more areas within the eco-regions where a larger number of sites are located (*e.g.,* Red River Valley, North Central Glaciated Plains, and North East Glaciated Plains eco-region sections); therefore, the number of units within each section and subsection is roughly proportional to the number of sites with recent records within those areas. These unoccupied units and units with uncertain occupancy are essential for the conservation of the Dakota skipper, particularly for future reintroduction efforts to aid species recovery, because they contain the habitat that is conducive to the species and help capture the environmental variability across the range of the species.

In summary, representation, resiliency, and redundancy are the three conservation principles important to threatened and endangered species recovery (Shaffer and Stein 2000, p. 307) (USFWS 2004, p 89). Representation involves conserving the breadth of the genetic makeup of the species to conserve its adaptive capabilities; resiliency involves ensuring that each population is sufficiently large to withstand stochastic events; and redundancy involves ensuring a sufficient number of populations to provide a margin of safety for the species to withstand catastrophic events (USFWS 2004, p. 89). Both the occupied and unoccupied units are needed to satisfy the conservation principles of redundancy, resiliency, and representation for the Dakota skipper because there may be too few occupied areas remaining to ensure the species' conservation. The concepts

of representation, resiliency, and redundancy are not mutually exclusive; populations that contribute to the resiliency of a species may also contribute to its redundancy or representation. Furthermore, it may not be necessary for a single population to contribute to all three conservation principles to be important for maintaining the species across its range in the long term—because the Dakota skipper is being evaluated across its range, a particular population may not meet the strictest test of one of the three conservation principles yet contribute to the others.

Why Occupied Areas Are Not Sufficient for the Conservation of the Poweshiek Skipperling and Why Unoccupied Areas Are Essential for the Conservation of the Species

The Poweshiek skipperling has experienced recent declines in large parts of its historical range. The species is now considered to be present at 10 sites in Michigan, 3 sites in Wisconsin, and 1 site in Manitoba. More than 1 site can be contained in a single proposed critical habitat unit; consequently, we are proposing a total of 10 occupied units (*i.e.,* 8 occupied units in Michigan and 2 occupied units in Wisconsin). Until relatively recently, Poweshiek skipperling was also present in native prairies in Iowa, Minnesota, North Dakota and South Dakota—none of these areas are included in occupied areas.

The areas of unoccupied habitat that we are proposing as critical habitat were recently occupied (had positive records in 1993 or more recently) and are within the historical range of the species. The areas of habitat where we are uncertain of the occupancy that we are proposing as critical habitat were recently occupied (generally, a site with an unknown occupancy had positive records in 1993 or more recently but may have had one or two years of negative surveys or were determined by a species expert in the state to have an unknown occupancy), and are within the historical range of the species. We determine that these unoccupied areas are essential for the Poweshiek skipperling's conservation because the range of the species has been severely curtailed, occupied habitats are limited and isolated, population sizes are small, and additional lands will be necessary to recover the species.

Furthermore, the unoccupied units and units where we are uncertain of the occupancy are needed to satisfy the conservation principles of redundancy, resiliency, and representation for the Poweshiek skipperling, as there may be too few occupied areas remaining to ensure conservation of the species—the species having been extirpated from substantial portions of its range. The inclusion of unoccupied habitat and habitat where we are uncertain of the occupancy as proposed critical habitat is essential for the species' conservation in three ways: (1) It would substantially increase the diversity of historically occupied habitats and geographic areas to increase the chances of the species persisting despite demographic and environmental stressors that are not uniformly distributed; (2) it would ensure that at least some populations may be sufficiently large to withstand stochastic events; and (3) it would help to ensure that geographic areas of recent importance to the species contain sufficient numbers of populations to maintain the species.

Specifically, we are proposing unoccupied critical habitat units and units with uncertain occupancy to conserve habitat that may hold potential genetic representation of the species that is necessary for the species to conserve its adaptive capabilities across portions of its highly fragmented historical ranges. Poweshiek skipperling populations are small and fragmented, and thus are subject to genetic drift and inbreeding (Frankham *et al.* 2009, p. 309). Therefore, it is essential to conserve the range-wide genetic diversity we have for the species (and the habitats that may contain that diversity) to help safeguard the genetic representation necessary for the species to maintain its adaptive capabilities. The fragmentation of Poweshiek skipperling's genetic diversity and limited detectability during low population densities further argue for the conservation value of populations currently defined as unknown. We are certain of the species' presence at relatively few sites and there remains some likelihood of Poweshiek skipperling presence at sites where they have not been detected during recent surveys. In light of the species' fragmentation and the need to preserve any remaining genetic diversity, we believe it is also essential to conserve Poweshiek skipperling at units where the occupancy of the species is unknown.

Since a species' genetics is shaped by its environment, successful conservation should aim to preserve a species across the array of environments in which it occurs (Shaffer and Stein 2000, p. 308), especially if much remains unknown about the nature and extent of its genetic diversity. Conservation of habitat and genetic material is vital in the core of the species' range, but it is also critical to preserve the species in less typical habitats on the periphery of its range, for example, prairie fens in Michigan, to preserve the adaptive capabilities of the species over the long term.

Genetic variation allows populations to tolerate a range of environmental stressors such as new infectious diseases, parasites, pollution, food sources, predators, and changes in climate. Fragmentation of a species' habitat across its range can ''exacerbate genetic drift and random fluctuations in allele frequencies, causing the genetic variation originally present within a large population to become redistributed among the remaining subpopulations'' (Redford *et al.* 2011, p. 41). Furthermore, a ''fully representative sample of founders is required, if the population is to encompass the genetic diversity in the wild and minimize subsequent inbreeding'' (Frankham *et al.* 2009, p. 434). Because there is evidence of range-wide genetic isolation and inbreeding, the species' historical genetic variation may be fragmented unevenly among the remaining subpopulations. As a basis of future reintroductions, a sample of founders representative of appropriate types and levels of genetic diversity (e.g., to minimize inbreeding) is essential to conserve the genetic material at units where we are uncertain of the occupancy.

We are also proposing critical habitat units with uncertain occupancy and unoccupied units to help capture the habitats necessary for population persistence despite stochastic events—in other words, we would increase the likelihood that units would contain large enough populations to be resilient to those stressors. We do not know the minimum population size needed to attain an acceptable likelihood of population persistence for either species, but we make inferences using data from populations for which we have some evidence of persistence—in general, the chances of maintaining a species is thought to increase with the size of the sites. Insects may need a population size of more than 10,000 individuals to maintain population viability for 40 generations (Trail *et al.* 2007 in Frankham *et al.* 2009, pp. 518–519). By increasing the resiliency of each unit (*e.g.,* by ensuring an appropriate size), we are hoping to increase the chance of species persistence in individual units. Based on ten years of surveys in Iowa, Minnesota, and North Dakota, Poweshiek skipperling was found to peak in numbers in ''undegraded (never tilled)'' upland prairie sites that were

greater than 30 ha (74 ac) with some topographic diversity (referenced within Swengel and Swengel 2012, p. 3). Systematic surveys on Minnesota prairies show that Dakota skipper abundances increased with increasing size of sites (Swengel and Swengel 1999, pp. 278, 284). We did not specify a minimum size for proposed critical habitat units; however, almost all of the proposed Poweshiek skipperling critical habitat units in Minnesota, Iowa, South Dakota, North Dakota, and Wisconsin are much larger than 30 ha (74 ac) and are, therefore, more resilient to stochastic events. In general, relatively small proposed critical habitat units have had consistent observations that demonstrate persistence of the species or are one of a few units representative of a specific eco-region or eco-region subsection (see the redundancy discussion below in this section), or a combination of these factors.

Furthermore, the importance of conserving habitats with uncertain occupancy and unoccupied units is vital in proposed units that contain sites that were, until recently, considered some of the best populations of the species range-wide. For example, some of the areas where we are uncertain of the species occupancy have had positive detections as recently as 2007. Other unoccupied units also had relatively recent detections, for example, as one unoccupied unit in Iowa and two unoccupied units in South Dakota contain sites that had positive detections of the species in 2008, but where the species is now extirpated. In addition, some of these areas were considered to have, until recently, some of the best populations of Poweshiek skipperlings, but the populations have apparently suddenly disappeared or have been reduced to undetectable numbers, not due to habitat degradation or destruction, but instead due to unknown stressors (see further discussion in Factor E of the proposed listing rule published in this **Federal Register**). These unoccupied units and units with uncertain occupancy are essential for the conservation of the Poweshiek skipperling, particularly for future reintroduction efforts to aid species recovery, because they contain the habitat that is conducive to the species.

Finally, by proposing unoccupied units and units where we are uncertain of the occupancy, we include areas that help to provide adequate redundancy within the Poweshiek skipperling's recent geographic distributions and full variety of habitat types. By including unoccupied units and units with uncertain occupancy, we will help to ensure that geographic areas of recent importance to the species contain sufficient numbers of populations to maintain the species. In order to conserve the Poweshiek skipperling across the array of environments in which it occurs, we capture habitat redundancy by including a number of sites within each Bailey's eco-region (Bailey 1983) section and subsection critical habitat units that is roughly proportional to the number of sites with recent records within those areas. The Poweshiek skipperling historically ranged across at least 12 eco-regions sections and 21 eco-region subsections, with the majority of historically documented sites from the Red River Valley and North Central Glaciated Plains eco-region sections (Service 2013, unpubl. geodatabase; Service 2013, unpubl.). Occupied units occur on 3 eco-region subsections within 2 eco-regions, the Jackson Interlobate Moraine and the Southwest Great Lakes Morainal sections. By including unoccupied units and units with uncertain occupancy, we are capturing 6 additional eco-region subsections within 3 sections (*i.e.,* Red River Valley, North Central Glaciated Plains, and the Minnesota and Northwest Iowa Morainal-Oak Savannah eco-region sections) roughly proportional to the number of sites with recent records within those areas. These additional eco-region subsections include core areas of the species range. These unoccupied units and units with uncertain occupancy are essential for the conservation of the Poweshiek skipperling, particularly for future reintroduction efforts to aid species recovery, because they contain the habitat that is conducive to the species and help capture the environmental variability across the range of the species.

In summary, representation, resiliency, and redundancy are the three conservation principles important to threatened and endangered species recovery (Shaffer and Stein 2000, p. 307) (USFWS 2004, p 89). Representation involves conserving the breadth of the genetic makeup of the species to conserve its adaptive capabilities; resiliency involves ensuring that each population is sufficiently large to withstand stochastic events; and redundancy involves ensuring a sufficient number of populations to provide a margin of safety for the species to withstand catastrophic events (USFWS 2004, p. 89). Both the occupied and unoccupied units are needed to satisfy the conservation principles of redundancy, resiliency, and representation for the Poweshiek skipperling because there may be too few occupied areas remaining to ensure the species' conservation. The concepts of representation, resiliency, and redundancy are not mutually exclusive; populations that contribute to the resiliency of a species may also contribute to its redundancy or representation. Furthermore, it may not be necessary for a single population to contribute to all three conservation principles to be important for maintaining the species across its range in the long term—because the Poweshiek skipperling is being evaluated across its range, a particular population may not meet the strictest test of one of the three conservation principles yet contribute to the others.

Areas Unoccupied at Time of Listing

We also examined lands that were historically occupied by both species, but where we are uncertain of the current occupancy, or that are currently unoccupied. These units were all occupied within the past 20 years (had records in 1993 or more recently) and are essential for the conservation of the species. Some units may have multiple landowner types.

The criteria for selecting unoccupied sites and areas where we are uncertain of the occupancy as critical habitat are: (1) Type, amount, and quality of habitat associated with those occurrences (*e.g.,* high-quality native remnant prairies); (2) presence of the physical or biological features essential for the species; (3) no known appreciable degradation in habitat quality since the species was last detected; (4) prairies where known threats to the species are few and could feasibly be alleviated (*e.g.,* by modifying grazing practices or controlling invasive species) through conservation measures; (5) prairies where there is reasonable potential for survival of the species if reoccupation were to occur, either by natural means through dispersal from currently occupied sites or by future reintroduction efforts; and (6) prairies currently occupied by other remnant prairie-dependent butterfly species, (*e.g.,* Dakota skipper, Poweshiek skipperling, Ottoe skipper, Leonard's skipper, or regal fritillary) that share essential habitat features with the species. These areas outside the geographical area currently occupied by the Dakota skipper and Poweshiek skipperling that were historically occupied are essential for the conservation of the species.

For unoccupied areas, and areas where we are uncertain of the occupancy of the species, we considered areas containing plant communities

classified as (or based on the best available information and recent aerial photography) dry prairie, dry-mesic prairie, mesic prairie, or wet-mesic remnant (untilled) prairie as potential suitable habitat for Dakota skipper and Poweshiek skipperling. Prairie fens, as defined by the MNFI, were also considered as potential suitable habitat for Poweshiek skipperling in Michigan. Using state natural heritage rankings, habitat information from recent reports, and expert knowledge, we selected areas with habitat quality ratings of fair to excellent because these areas are most likely to contain the physical or biological features essential for the conservation of the species. In some cases the habitat was not given a quality rating, but instead the site was given an estimated population viability rating, in recent reports or heritage databases, which directly reflect the quality of the habitat (*e.g.,* excellent population viability rating indicates the presence of hig- quality native-prairie habitat). Therefore, we selected sites with viability ranks of fair to excellent from the most recent reports available because these areas are recognized to contain the physical or biological features essential for the conservation of the species. As discussed above in the *Physical or Biological Features* section of this proposal, one physical or biological feature essential for the conservation of the species is grassland-dominated areas that are necessary for dispersal between higher quality prairies. Therefore, we also considered including areas that contain potential dispersal habitat to connect patches of higher quality native prairies that are (1) lesser quality (or unrated) native dry-mesic prairie, mesic prairie, or wet-mesic remnant prairies or other habitat types such as wet meadow, oak savannas, and other types of grassland-dominated areas (*e.g.,* not row crops or dense forests) suitable for dispersal and (2) within 1 km (0.6 mi) of higher (fair to excellent) quality native prairie.

Mapping of Proposed Critical Habitat Units

The following steps to map potential critical habitat areas were taken separately for each species. First we mapped all known locations (points and polygons) of each species in ArcGIS and divided them into occupied and other (either unoccupied (areas with extirpated or possibly extirpated occupancy) or areas where we were uncertain of the occupancy (areas with unknown occupancy) using the definitions above and the population status provided in the ''Background'' section of the proposed listing rule.

Mapping of Occupied Critical Habitat Units

Mapping occupied units was conducted separately for the two species; however, the general procedure was the same for both species. The following describes our mapping procedure for occupied areas. Occupied areas contain the physical and biological features essential for the conservation of the Dakota skipper or Poweshiek skipperling.

Using state natural heritage rankings, habitat information from recent reports and expert knowledge, as described in more detail above, we chose occupied sites with quality prairie habitat ratings of fair to excellent or population viability ratings of fair to excellent, which directly reflects the habitat quality. If habitat at a site was not previously defined (*e.g.,* we had a point or transect location for the butterfly survey, but the boundaries of the suitable habitat were not mapped in such a way to define the entire area of suitable habitat such as a mapped polygon in a survey report), a circle with a radius of 1 km (0.6 mi) [776 ac (314 ha)] (estimated dispersal distance) was circumscribed around each occurrence point location; the area within the circle was then examined for possible suitable habitat. Polygons were drawn around areas that contain the features essential to the conservation of the species. We conducted aerial photograph interpretation using the National Agriculture Imagery Program (NAIP) aerial imagery, which was acquired during the 2010–2011 agricultural growing seasons, to draw and refine polygons around areas that contain the physical or biological features essential for the conservation of the species. If available, we also used state natural heritage plant community, natural feature polygons, and other habitat mapping information to help refine habitat polygons.

Areas containing plant communities classified as dry prairie, dry-mesic prairie, mesic prairie, or wet-mesic prairie as defined by the MNFI, Minnesota Department of Natural Resources (MN DNR) (Michigan Natural Features Inventory 2012, Minnesota Department of Natural Resources 2012b, a), recent reports, and expert knowledge are mapped as potentially suitable habitat for Dakota skipper and Poweshiek skipperling, and these areas with fair to excellent quality habitat in particular contain the features essential to the conservation of the species and were included in polygons. Prairie fens, as defined by the MNFI (Michigan Natural Features Inventory 2012), also contain the features essential for the conservation of Poweshiek skipperling in Michigan; these areas with fair to excellent quality habitat in particular contain the features essential to the conservation of the species. Patches of wet meadow, oak savannas, and other grassland-dominated prairies contain features essential to the conservation of the species because they provide dispersal habitat between patches of higher quality habitat and, therefore, were also included in the polygons. Patches of grassland-dominated habitats that are lower quality or have not been given a habitat quality rating also contain features essential to the conservation of the species—these areas provide for dispersal between higher quality prairies. To the maximum extent possible, converted areas (e.g., row crops and housing developments) were excluded from the suitable habitat mapped polygons, as described below in this section.

Dakota skipper and Poweshiek skipperling may move between patches of prairie habitat separated by structurally similar habitats (*e.g.,* perennial grasslands but not necessarily native prairie); small populations need immigration corridors for dispersal from nearby populations to prevent genetic drift and to reestablish a population after local extirpation. Thus, a Poweshiek skipperling or Dakota skipper population may require a sufficient amount of undeveloped dispersal habitat to ensure immigration of adults to the population from nearby native prairies. For this reason, if polygons were in close proximity to each other, buffer zones between polygons were examined for suitable dispersal habitat and were combined to create areas containing multiple prairies connected to each other by dispersal habitat corridors.

After initial suitable habitat polygons were refined, we applied a 0.5-km (0.3-mile) radius buffer (half the estimated dispersal distance) to each polygon. If the polygons of two or more buffers overlapped, we examined the areas within the buffers for potential areas of overlapping, contiguous dispersal habitat (*e.g.,* prairies dominated by grasses, not row-crop), which was defined above as one of the essential physical or biological features essential to the conservation of the species, through aerial photograph (NAIP) interpretation and overlaying state natural heritage plant community and natural feature polygons, where available. We then combined overlapping areas of suitable dispersal habitat to form the proposed critical habitat polygons. Generally, polygons

separated by less than 0.6 mi (1 km) were defined as subunits of a larger unit encompassing those subunits, if there was a barrier to dispersal between the polygons. Polygons and thus critical habitat subunits of units may have multiple landowners. Units or subunits were named and numbered separately for each state.

When determining proposed critical habitat boundaries, we made every effort to avoid including developed areas such as buildings, paved areas, and other structures that lack PCEs for the Dakota skipper or Poweshiek skipperling. The scale of the maps 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 the critical habitat is finalized as proposed, a Federal action involving these developed 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 physical or biological features in the adjacent critical habitat.

Mapping of Unoccupied Critical Habitat Units

Mapping unoccupied units (and units with uncertain occupancy) was conducted separately for the two species; however, the general procedure was the same for both species. The following describes our mapping procedure for unoccupied units (and units with uncertain occupancy). As described above, we analyzed areas with uncertain occupancy as if they were unoccupied, in other words, using the standard of ''necessary for the conservation of the species'' as defined in the Act. Both unoccupied areas and areas where we are uncertain of the occupancy are necessary for the conservation of the Dakota skipper or Poweshiek skipperling.

Using state natural heritage rankings, habitat information from recent reports and expert knowledge, as described in more detail above, we chose unoccupied sites (and sites with uncertain occupancy) with fair to excellent quality prairie habitat ratings of fair to excellent or population viability ratings of fair to excellent, which directly reflects the habitat quality, and that met our criteria as discussed above. If habitat at a site was not previously defined (*e.g.,* we had a point or transect location for the butterfly survey, but the boundaries of the suitable habitat were not mapped in such a way to define the entire area of suitable habitat such as a mapped polygon in a survey report), a circle with a radius of 1 km (0.6 mi) [776 ac (314 ha)] (estimated dispersal distance) was circumscribed around each occurrence point location; the area within the circle was then examined for possible suitable habitat. Polygons were drawn around areas that were considered to be essential to the conservation of the species. We conducted aerial photograph interpretation using the National Agriculture Imagery Program (NAIP) aerial imagery, which was acquired during the 2010–2011 agricultural growing seasons, to draw and refine polygons around areas considered to be essential to the conservation of the species. If available, we also used state natural heritage plant community, natural feature polygons, and other habitat mapping information to help refine habitat polygons. Areas containing plant communities classified as dry prairie, dry-mesic prairie, mesic prairie, or wet-mesic prairie as defined by the MNFI, MN DNR (Michigan Natural Features Inventory 2012, Minnesota Department of Natural Resources 2012b, a), recent reports, and expert knowledge are mapped as potentially suitable habitat for Dakota skipper and Poweshiek skipperling, and these areas with fair to excellent quality habitat in particular were considered to be essential to the conservation of the species. Prairie fens, as defined by the MNFI (Michigan Natural Features Inventory 2012), are essential for the conservation of the Poweshiek skipperling in Michigan, particularly these areas with fair to excellent quality habitat.

Patches of wet meadow, oak savannas, and other grassland-dominated prairies are also considered to be essential to the conservation of the species, primarily because these areas provide the species with dispersal habitat between patches of higher quality prairie; therefore, these areas were also included in the mapped polygons. Patches of grassland-dominated habitats that are lower quality or have not been given a habitat quality rating are also considered to be essential to the conservation of the species, primarily because these areas provide the species with patches of dispersal habitat between patches of higher quality habitat. To the maximum extent possible, converted areas (*e.g.,* row crops and housing developments) were excluded from the mapped polygons, as described below in this section.

Dakota skipper and Poweshiek skipperling may move between patches of prairie habitat separated by structurally similar habitats (*e.g.,* perennial grasslands but not necessarily native prairie); small populations need immigration corridors for dispersal from nearby populations to prevent genetic drift and to reestablish a population after local extirpation. Thus, a Poweshiek skipperling or Dakota skipper population may require a sufficient amount of undeveloped dispersal habitat to ensure immigration of adults to the population from nearby native prairies. For this reason, if polygons were in close proximity to each other, buffer zones between polygons were examined for suitable dispersal habitat and were combined to create areas containing multiple prairies connected to each other by dispersal habitat corridors. Dispersal areas, which connect native-prairie habitats, are essential to the conservation of the species.

After initial suitable habitat polygons were refined, we applied a 0.5-km (0.3-mile) radius buffer (half the estimated dispersal distance) to each polygon. If two or more buffer polygons overlapped, we examined the areas within the buffers for potential areas of overlapping, contiguous dispersal habitat (*e.g.,* prairies dominated by grasses, not row-crop) through aerial photograph (NAIP) interpretation and overlaying state natural heritage plant community and natural feature polygons, where available. We then combined overlapping areas of suitable dispersal habitat to form the proposed critical habitat polygons.

Generally, polygons separated by less than 0.6 mi (1 km) were defined as subunits of a larger unit encompassing those subunits, if there was a barrier to dispersal between the polygons. Polygons and thus critical habitat subunits of units may have multiple landowners. Units or subunits were named and numbered separately for each state.

When determining proposed critical habitat boundaries, we made every effort to avoid including developed areas such as buildings, paved areas, and other structures that lack PCEs for the Dakota skipper or Poweshiek skipperling. The scale of the maps 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 the critical habitat is finalized as proposed, a Federal action involving these developed 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 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, and lands outside of the geographical area occupied at the time of listing that we have determined are essential for the conservation of Dakota skipper and Poweshiek skipperling.

Units were proposed for designation based on sufficient elements of physical or biological features being present to support Dakota skipper and Poweshiek skipperling life-history processes. Some units contained all of the identified elements of physical or biological features and supported multiple life-history processes. Some units contained only some elements of the physical or biological features necessary to support the Dakota skipper and Poweshiek skipperling particular use of that habitat.

The critical habitat designation is defined by the map or maps, as modified by any accompanying regulatory text, presented at the end of this document in the rule portion. We include more detailed information on the boundaries of the critical habitat designation in the preamble of this document. We will make the coordinates or plot points or both on which each map is based and detailed textual descriptions of each unit or subunit available to the public on *http://www.regulations.gov* at Docket No. FWS–R3–ES–2013–0017, on our Internet site *http://www.fws.gov/midwest/Endangered,* and at the Twin Cities Field Office (see **FOR FURTHER INFORMATION CONTACT** above).

Proposed Critical Habitat Designation

Dakota Skipper

For the Dakota skipper, 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 the physical or biological features necessary to support life-history processes essential for the conservation of the species. We are also proposing lands outside of the geographical area occupied at the time of listing that we have determined are essential for the conservation of Dakota skipper. Due to their small numbers of individuals or low population sizes, suitable habitat and space for expansion or reintroduction are essential to achieve population levels necessary for recovery.

We are proposing 51 areas as critical habitat for the Dakota skipper: (1) DS Minnesota Units 1 through 15, (2) DS North Dakota Units 1 through 14, and (3) DS South Dakota Units 1 through 22. The occupancy status of all units is listed in Table 1. Table 1 shows the primary type of ownership and approximate area of each proposed critical habitat unit. Each unit contains all of the primary constituent elements of the physical or biological features essential to the conservation of the Dakota skipper, unless otherwise noted.

TABLE 1—PROPOSED CRITICAL HABITAT UNITS FOR DAKOTA SKIPPER—AREA ESTIMATES REFLECT ALL LAND WITHIN CRITICAL HABITAT UNIT BOUNDARIES—NOTE: AREA SIZES MAY NOT SUM DUE TO ROUNDING—DETAILED UNIT DESCRIPTIONS ARE POSTED AT *http://www.regulations.gov* AND CAN BE FOUND AT DOCKET NO. FWS–R3–ES–2013–0017—SOME UNITS MAY HAVE MULTIPLE LANDOWNER TYPES; THE PRIMARY LANDOWNER COLUMN GIVES THE TYPE OF OWNER WITH THE MOST LAND AREA IN EACH UNIT—OCCUPANCY OF EACH PROPOSED UNIT IS NOTED AS EITHER OCCUPIED (YES) OR UNOCCUPIED (NO)—UNITS WITH UNCERTAIN OCCUPANCY ARE NOTED AS UNOCCUPIED (NO) AS THEY ARE TREATED AS SUCH FOR THE PURPOSES OF THIS CRITICAL HABITAT PROPOSAL—THE PRIMARY CONSTITUENT ELEMENTS (PCES) PRESENT IN EACH UNIT ARE ALSO GIVEN

State	County	Critical habitat unit name	Area in acres (ha)	Primary landowner (type)	Occupied	PCE
MN	Pope	DS Minnesota Unit 1	2,887 (1,168)	State	Yes	1, 2, 3
MN	Murray	DS Minnesota Unit 2	905 (366)	Private	Yes	1, 2, 3
MN	Murray	DS Minnesota Unit 3	126 (51)	Private	No	1, 2
MN	Clay	DS Minnesota Unit 4	1,875 (759)	Consv. Org.	Yes	1, 2
MN	Clay	DS Minnesota Unit 5	1,470 (595)	Private	Yes	1, 2, 3
MN	Norman	DS Minnesota Unit 6	275 (111)	Consv. Org.	No	1, 2
MN	Lincoln	DS Minnesota Unit 7A	1,312 (531)	State	No	1, 2
MN	Lincoln	DS Minnesota Unit 7B	92 (37)	Consv. Org.	No	1, 2
MN	Lincoln	DS Minnesota Unit 7C	149 (60)	Consv. Org.	No	1, 2
MN	Pipestone	DS Minnesota Unit 8	352 (143)	State	No	1, 2
MN	Pipestone	DS Minnesota Unit 9	416 (168)	State	Yes	1, 2
MN	Swift/Chippewa	DS Minnesota Unit 10	967 (392)	State	No	1, 2, 3
MN	Pipestone	DS Minnesota Unit 11	197 (80)	State	No	1, 2
MN	Lincoln	DS Minnesota Unit 12	549 (222)	Private	Yes	1, 2
MN	Kittison	DS Minnesota Unit 13A	38 (16)	State	No	1, 2
MN	Kittison	DS Minnesota Unit 13B	224 (91)	State	No	1, 2
MN	Polk	DS Minnesota Unit 14	842 (341)	State	No	1, 2
MN	Polk	DS Minnesota Unit 15	268 (108)	Consv. Org.	No	1, 2
ND	Richland	DS North Dakota Unit 1	119 (48)	Federal	No	1, 2
ND	Ransom	DS North Dakota Unit 2	949 (348)	Federal	No	1, 2, 3
ND	McHenry	DS North Dakota Unit 3	1,526 (618)	Private	Yes	1, 2, 3
ND	McHenry	DS North Dakota Unit 4	197 (80)	Private	Yes	1, 2
ND	McHenry	DS North Dakota Unit 5	2,446 (990)	Private	Yes	1, 2, 3
ND	McHenry	DS North Dakota Unit 6	80 (33)	State	Yes	1, 2
ND	McHenry	DS North Dakota Unit 7	280 (113)	Private	Yes	1, 2

TABLE 1—PROPOSED CRITICAL HABITAT UNITS FOR DAKOTA SKIPPER—AREA ESTIMATES REFLECT ALL LAND WITHIN CRITICAL HABITAT UNIT BOUNDARIES—NOTE: AREA SIZES MAY NOT SUM DUE TO ROUNDING—DETAILED UNIT DESCRIPTIONS ARE POSTED AT *http://www.regulations.gov* AND CAN BE FOUND AT DOCKET NO. FWS–R3–ES–2013–0017—SOME UNITS MAY HAVE MULTIPLE LANDOWNER TYPES; THE PRIMARY LANDOWNER COLUMN GIVES THE TYPE OF OWNER WITH THE MOST LAND AREA IN EACH UNIT—OCCUPANCY OF EACH PROPOSED UNIT IS NOTED AS EITHER OCCUPIED (YES) OR UNOCCUPIED (NO)—UNITS WITH UNCERTAIN OCCUPANCY ARE NOTED AS UNOCCUPIED (NO) AS THEY ARE TREATED AS SUCH FOR THE PURPOSES OF THIS CRITICAL HABITAT PROPOSAL—THE PRIMARY CONSTITUENT ELEMENTS (PCEs) PRESENT IN EACH UNIT ARE ALSO GIVEN—Continued

State	County	Critical habitat unit name	Area in acres (ha)	Primary landowner (type)	Occupied	PCE
ND	McHenry	DS North Dakota Unit 8	448 (181)	State	Yes	1, 2, 3
ND	Rolette	DS North Dakota Unit 9	514 (208)	Private	No	1, 2, 3
ND	McKenzie	DS North Dakota Unit 10	639 (259)	Tribal	No	1, 2, 3
ND	McKenzie	DS North Dakota Unit 11	418 (169)	Federal	Yes	1, 2
ND	McKenzie	DS North Dakota Unit 12	309 (125)	Federal	Yes	1, 2
ND	Ransom	DS North Dakota Unit 13	727 (294)	Federal	Yes	1, 2
ND	Wells	DS North Dakota Unit 14	242 (98)	Private	Yes	1, 2
SD	Marshall	DS South Dakota Unit 1	451 (183)	Federal	No	1, 2
SD	Brookings	DS South Dakota Unit 2	169 (68)	State	Yes	1, 2
SD	Deuel	DS South Dakota Unit 3	516 (209)	State	No	1, 2
SD	Grant	DS South Dakota Unit 4	292 (118)	Federal	Yes	1, 2
SD	Deuel	DS South Dakota Unit 5	119 (48)	Federal	No	1, 2
SD	Roberts	DS South Dakota Unit 6	31 (13)	State	Yes	1, 2
SD	Roberts	DS South Dakota Unit 7	470 (190)	Tribal	Yes	1, 2, 3
SD	Roberts	DS South Dakota Unit 8	501 (203)	Federal	Yes	1, 2, 3
SD	Roberts	DS South Dakota Unit 9	160 (65)	Tribal	Yes	1, 2, 3
SD	Roberts	DS South Dakota Unit 10	117 (47)	Tribal	Yes	1, 2
SD	Roberts	DS South Dakota Unit 11	89 (36)	Tribal	Yes	1, 2
SD	Day	DS South Dakota Unit 12	531 (215)	Tribal	Yes	1, 2, 3
SD	Day	DS South Dakota Unit 13	56 (23)	Private	No	1, 2
SD	Day	DS South Dakota Unit 14	189 (76)	Tribal	Yes	1, 2
SD	Day	DS South Dakota Unit 15	188 (76)	State	No	1, 2, 3
SD	Roberts	DS South Dakota Unit 16	348 (141)	Federal	No	1, 2, 3
SD	Roberts	DS South Dakota Unit 17	552 (223)	Federal	Yes	1, 2
SD	Marshall/ Roberts	DS South Dakota Unit 18	216 (87)	Federal	No	1, 2
SD	Roberts	DS South Dakota Unit 19	363 (147)	Private	Yes	1, 2
SD	Brookings	DS South Dakota Unit 20	255 (103)	Private	Yes	1, 2
SD	Brookings	DS South Dakota Unit 21	198 (80)	Private	Yes	1, 2
SD	Brookings	DS South Dakota Unit 22	133 (54)	Private	Yes	1, 2

Poweshiek Skipperling

For the Poweshiek skipperling, we are proposing for designation as critical habitat lands that we have determined are occupied at the time of listing and contain sufficient elements of the physical or biological features necessary to support life-history processes essential for the conservation of the species. We are also proposing lands outside of the geographical area occupied at the time of listing (unoccupied lands) that we have determined are essential for the conservation of the Poweshiek skipperling because it provides the features necessary for the reestablishment of wild populations within their historical range. Due to their small numbers of individuals or low population sizes, suitable habitat and space for expansion or reintroduction are essential to achieving population levels necessary for recovery of the species.

We are proposing 61 areas as critical habitat for the Poweshiek skipperling: (1) PS Iowa Units 1 through 11, (2) PS Michigan Units 1 through 9, (3) PS Minnesota Units 1 through 18, (4) PS North Dakota Units 1 through 3, (5) PS South Dakota Units 1 through 18, and (6) PS Wisconsin Units 1 and 2. All critical habitat units are occupied by Poweshiek skipperling unless otherwise stated. Table 2 shows the primary type of ownership and approximate area of each proposed critical habitat unit.

TABLE 2—PROPOSED CRITICAL HABITAT UNITS FOR POWESHIEK SKIPPERLING, WITH OCCUPANCY AND SIZE INFORMATION—AREA ESTIMATES REFLECT ALL LAND WITHIN CRITICAL HABITAT UNIT BOUNDARIES—NOTE: AREA SIZES MAY NOT SUM DUE TO ROUNDING—DETAILED UNIT DESCRIPTIONS ARE POSTED AT *http://www.regulations.gov* IN DOCKET NO. FWS–R3–ES–2013–0017—SOME UNITS MAY HAVE MULTIPLE LANDOWNER TYPES—THE PRIMARY LANDOWNER COLUMN GIVES THE TYPE OF OWNER WITH THE MOST LAND AREA IN EACH UNIT—OCCUPANCY OF EACH PROPOSED UNIT IS NOTED AS EITHER OCCUPIED (YES), UNOCCUPIED (NO)—UNITS WITH UNCERTAIN OCCUPANCY ARE NOTED AS UNOCCUPIED (NO) AS THEY ARE TREATED AS SUCH FOR THE PURPOSES OF THIS CRITICAL HABITAT PROPOSAL—THE PRIMARY CONSTITUENT ELEMENTS (PCEs) PRESENT IN EACH UNIT ARE ALSO GIVEN

State	County	Critical habitat unit name	Area in acres (ha)	Primary landowner (type)	Occupied	PCE
IA	Howard	PS Iowa Unit 1	237 (96)	State	No	1, 3
IA	Cerro Gordo	PS Iowa Unit 2	34 (14)	Consv. Org.	No	1, 3
IA	Dickinson	PS Iowa Unit 3	136 (55)	Consv. Org.	No	1, 3
IA	Dickinson	PS Iowa Unit 4	755 (306)	State	No	1, 3, 4
IA	Osceola	PS Iowa Unit 5	75 (30)	Private	No	1, 3, 4
IA	Dickinson	PS Iowa Unit 6	79 (32)	State	No	1, 3
IA	Dickinson	PS Iowa Unit 7	146 (59)	State	No	1, 3
IA	Osceola	PS Iowa Unit 8	205 (83)	Private	No	1, 3
IA	Dickinson	PS Iowa Unit 9	312 (126)	Private	No	1, 3
IA	Kossuth	PS Iowa Unit 10	139 (56)	Private	No	1, 3
IA	Emmet	PS Iowa Unit 11	272 (110)	State	No	1, 3
MI	Oakland	PS Michigan Unit 1	25 (10)	State	Yes	2, 3
MI	Oakland	PS Michigan Unit 2	66 (27)	State	Yes	2, 3
MI	Oakland	PS Michigan Unit 3	456 (184)	Private	Yes	2, 3, 4
MI	Oakland	PS Michigan Unit 4	369 (149)	Private	Yes	2, 3
MI	Livingston	PS Michigan Unit 5	23 (10)	Private	No	2, 3
MI	Washtenaw	PS Michigan Unit 6	268 (109)	County	Yes	2, 3
MI	Lenawee	PS Michigan Unit 7	123 (50)	Consv. Org.	Yes	2, 3
MI	Jackson/Hilsdale	PS Michigan Unit 8	363 (147)	Private	Yes	2, 3, 4
MI	Jackson	PS Michigan Unit 9	34 (14)	Private	Yes	2, 3
MN	Pope	PS Minnesota Unit 1	2,887 (1168)	State	No	1, 3, 4
MN	Murray	PS Minnesota Unit 2	905 (366)	Private	No	1, 3, 4
MN	Murray	PS Minnesota Unit 3	126 (51)	Private	No	1, 3
MN	Clay	PS Minnesota Unit 4	1,875 (759)	Consv. Org.	No	1, 3
MN	Clay	PS Minnesota Unit 5	1,470 (595)	Private	No	1, 3, 4
MN	Norman	PS Minnesota Unit 6	275 (111)	State	No	1, 3
MN	Lincoln	PS Minnesota Unit 7	1,312 (531)	State	No	1, 3, 4
MN	Pipestone	PS Minnesota Unit 8	352 (143)	State	No	1, 3
MN	Pipestone	PS Minnesota Unit 9	416 (168)	State	No	1, 3
MN	Swift/Chippewa	DS Minnesota Unit 10	967 (392)	State	No	1, 3, 4
MN	Wilkin	PS Minnesota Unit 11	437 (177)	Consv. Org.	No	1, 3, 4
MN	Lyon	PS Minnesota Unit 12	274 (111)	State	No	1, 3
MN	La Qui Parle	PS Minnesota Unit 13	525 (212)	Consv. Org.	No	1, 3
MN	Douglas	PS Minnesota Unit 14	90 (36)	Consv. Org.	No	1, 3
MN	Mahnomen	PS Minnesota Unit 15	1,369 (554)	State	No	1, 3
MN	Cottonwood	PS Minnesota Unit 16	239 (97)	State	No	1, 3
MN	Pope	PS Minnesota Unit 17	431 (174)	Consv. Org.	No	1, 3
MN	Clay	PS Minnesota Unit 18	466 (189)	Consv. Org.	No	1, 3
ND	Richland	PS North Dakota Unit 1	119 (48)	Federal	No	1, 3
ND	Richland	PS North Dakota Unit 2	47 (19)	Federal	No	1, 3
ND	Sargent	PS North Dakota Unit 3	117 (47)	Federal	No	1, 3
SD	Marshall	PS South Dakota Unit 1	451(183)	Federal	No	1, 3
SD	Brookings	PS South Dakota Unit 2	169 (68)	State	No	1, 3
SD	Deuel	PS South Dakota Unit 3A	516 (209)	State	No	1, 3
SD	Deuel	PS South Dakota Unit 3B	582 (236)	State	No	1, 3
SD	Grant	PS South Dakota Unit 4	292 (118)	Federal	No	1, 3
SD	Deuel	PS South Dakota Unit 5	119 (48)	Federal	No	1, 3
SD	Roberts	PS South Dakota Unit 6	31 (13)	State	No	1, 3
SD	Roberts	PS South Dakota Unit 7	470 (190)	Tribal	No	1, 3, 4
SD	Roberts	PS South Dakota Unit 8	501 (203)	Federal	No	1, 3, 4
SD	Roberts	PS South Dakota Unit 9	160 (65)	Tribal	No	1, 3, 4
SD	Roberts	PS South Dakota Unit 10	117 (47)	Tribal	No	1, 3
SD	Roberts	PS South Dakota Unit 11	89 (36)	Tribal	No	1, 3
SD	Day	PS South Dakota Unit 12	676 (274)	Tribal	No	1, 3, 4
SD	Day	PS South Dakota Unit 13	56 (23)	Private	No	1, 3
SD	Day	PS South Dakota Unit 14	189 (76)	Tribal	No	1, 3
SD	Day	PS South Dakota Unit 15	188 (76)	State	No	1, 3, 4
SD	Day	PS South Dakota Unit 16	348 (141)	Federal	No	1, 3, 4
SD	Moody	PS South Dakota Unit 17	198 (80)	Consv. Org.	No	1, 3
SD	Marshall	PS South Dakota Unit 18	401 (162)	Federal	No	1, 3
WI	Waukesha	PS Wisconsin Unit 1	1,535 (621)	State	Yes	1, 3, 4

TABLE 2—PROPOSED CRITICAL HABITAT UNITS FOR POWESHIEK SKIPPERLING, WITH OCCUPANCY AND SIZE INFORMATION—AREA ESTIMATES REFLECT ALL LAND WITHIN CRITICAL HABITAT UNIT BOUNDARIES—NOTE: AREA SIZES MAY NOT SUM DUE TO ROUNDING—DETAILED UNIT DESCRIPTIONS ARE POSTED AT *http://www.regulations.gov* IN DOCKET NO. FWS–R3–ES–2013–0017—SOME UNITS MAY HAVE MULTIPLE LANDOWNER TYPES—THE PRIMARY LANDOWNER COLUMN GIVES THE TYPE OF OWNER WITH THE MOST LAND AREA IN EACH UNIT—OCCUPANCY OF EACH PROPOSED UNIT IS NOTED AS EITHER OCCUPIED (YES), UNOCCUPIED (NO)—UNITS WITH UNCERTAIN OCCUPANCY ARE NOTED AS UNOCCUPIED (NO) AS THEY ARE TREATED AS SUCH FOR THE PURPOSES OF THIS CRITICAL HABITAT PROPOSAL—THE PRIMARY CONSTITUENT ELEMENTS (PCEs) PRESENT IN EACH UNIT ARE ALSO GIVEN—Continued

State	County	Critical habitat unit name	Area in acres (ha)	Primary landowner (type)	Occupied	PCE
WI	Green Lake	PS Wisconsin Unit 2	280 (113)	State	Yes	1, 3

Note: Area sizes may not sum due to rounding.

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 that is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

Decisions by the 5th and 9th Circuit Courts of Appeals have invalidated our regulatory definition of ''destruction or adverse modification'' (50 CFR 402.02) (see *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service,* 378 F. 3d 1059 (9th Cir. 2004) and *Sierra Club* v. *U.S. Fish and Wildlife Service et al.,* 245 F.3d 434, 442 (5th Cir. 2001)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the statutory provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the U.S. Department of Agriculture, Natural Resources Conservation Service, Farm Service Agency, Rural Development, Rural Utilities Service, Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat, and actions on State, tribal, local, or private lands that are not federally funded or authorized, do not require section 7 consultation.

As a result of section 7 consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, or are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define ''reasonable and prudent alternatives'' (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies sometimes may need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Application of the ''Adverse Modification'' Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species. Activities that may destroy or adversely modify critical habitat are those that alter the physical or biological features to an extent that appreciably reduces the conservation value of critical habitat for the Dakota skipper and Poweshiek skipperling. As discussed above, the role of critical habitat is to support life-history needs of

the species and provide for the conservation of these species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

Activities that may affect critical habitat, when carried out, funded, or authorized by a Federal agency, should result in consultation for the Dakota skipper and Poweshiek skipperling. These activities include, but are not limited to:

(1) Actions that would significantly alter the native plant community such that native grasses or flowering forbs are not readily available during the adult flight period or larval stages in the life cycle of the species. Such activities could include, but are not limited to, conversion to agriculture or other nonagricultural development, heavy grazing, haying prior to July 15, spraying of herbicides or pesticides, and fire. These activities could eliminate or reduce the habitat necessary for the growth and reproduction of these species by reducing larval and adult food sources that could result in direct or indirect adverse effects to individuals and their life cycles.

(2) Actions that would significantly disturb the unplowed (untilled) soils and thereby reduce the native plant community and increase the nonnative plant and woody vegetation within the prairie habitat. Such activities could include, but are not limited to, plowing (tilling), heavy grazing, mining, development, and other disturbances to the soil such that the native plant community is reduced and the encroachment of nonnative plants and woody vegetation can outcompete native plants. These activities can result in the loss of the native plant community necessary for adult and larval food sources to levels below the tolerances of the species.

(3) Actions that would significantly alter the hydrology of the prairie or prairie fen habitat. Such activities could include but are not limited to water withdrawal or diversion, agricultural tilling, urban development, mining, and dredging. These activities may lead to changes in water levels that would degrade or eliminate the native-prairie plants and their habitats to levels that are beyond the tolerances of the species.

Exemptions

Application of Section 4(a)(3) of the Act

Section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) provides that: ''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 [INRMP] prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.'' There are no Department of Defense lands with a completed INRMP within the proposed critical habitat designation.

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, the impact on national security, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if she determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless she determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

Under section 4(b)(2) of the Act, we may exclude an area from designated critical habitat based on economic impacts, impacts on national security, or any other relevant impacts. In considering whether to exclude a particular area from the designation, we identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and evaluate whether the benefits of exclusion outweigh the benefits of inclusion. If the analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, the Secretary may exercise her discretion to exclude the area only if such exclusion would not result in the extinction of the species. Therefore, and as discussed in more detail below, we are seeking any and all relevant information relating to the possible exclusion of any particular proposed critical habitat unit. The potential exclusion of any number of the proposed critical habitat units is one logical outgrowth of this proposed rule.

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 probable economic impacts of the proposed critical habitat designation and related factors.

Sectors that may be affected by the proposed designation include, but are not limited to, private developers of residential, recreational, and commercial property; city, county, and State governments that construct and maintain roads and other infrastructure; private and public entities that use land for grazing and other agricultural purposes; Native American Tribal governments; energy developers, private conservation organizations; entities that mine gravel or other products; and wind power developers.

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 Twin Cities Ecological Services Field Office directly (see **FOR FURTHER INFORMATION CONTACT** section). During the development of a final designation, we will consider the probable economic impacts, public comments, and other new information, and areas may be excluded from the final critical habitat designation under section 4(b)(2) of the Act and our implementing regulations at 50 CFR 424.19.

Exclusions Based on National Security Impacts

Under section 4(b)(2) of the Act, we consider whether there are lands owned or managed by the Department of Defense where a national security impact might exist. In preparing this proposal, we have determined that the lands within the proposed designation of critical habitat for the Dakota Skipper and Poweshiek skipperling 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 her 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.

To determine whether any non-Federal lands should be excluded from the final designation, we compare the benefits of designating them as critical habitat to the benefits to the conservation of the species and the physical or biological features that would likely occur as a result of implementing and maintaining existing and functioning management plans and conservation partnerships, respectively. Partnerships between the Service and private landowners, state conservation agencies, and others that are likely to facilitate the continued implementation of management actions that benefit the species and its habitat may provide as much or more benefit than might be realized as a result of consultation carried out under section 7(a)(2) of the Endangered Species Act. We must evaluate each potential exclusion on a case-by-case basis to determine whether the benefits of exclusion may outweigh the benefits of inclusion with regard to the conservation and recovery of the listed species in question.

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 the 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.

Based on the information provided by entities seeking exclusion, as well as any additional public comments received, we will evaluate whether certain lands in the proposed critical habitat are appropriate for exclusion from the final designation under 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 her discretion to exclude the lands from the final designation.

For example, some stakeholders and conservation agencies are concerned that designating critical habitat on private lands may harm existing or future conservation partnerships necessary to conserve a range of prairie species, including these butterflies, especially in light of the factors that may be relaxing some of the ''natural constraints'' (*e.g.,* soil quality and slope) on conversion of prairie to cropland (Sylvester *et al.* 2013, p. 14). Continued private landowner acceptance of conservation programs has been identified as one of the most important factors that will determine whether or not efforts to protect prairie from conversion will succeed—more than 90 percent of land in the range of the Dakota skipper may be privately owned, and protection of remaining grassland by conservation easements is now the primary tool used to slow their conversion to cropland (Doherty *et al.* 2013, p. 13). In an era of high commodity prices and expanding agricultural technological innovations, critical habitat may influence some owners to sell or plow their grasslands or it may erode landowner interest and acceptance of conservation programs, which would undermine butterfly and prairie conservation. At this time, we are requesting specific information on this topic so that we may weigh the relative benefits of critical habitat designation versus exclusion to the conservation of the species and the physical or biological features essential to the conservation of the species.

We seek information regarding any and all types of conservation programs and plans relevant to the protection of proposed critical habitat units for the Dakota skipper and Poweshiek skipperling. Such programs and plans may include conservation easements, management agreements, tax incentive programs, or any other plan or program, particularly those programs that include specific grazing regimes and other management actions that benefit these species. We also note that the Service is not the only agency with active conservation programs throughout the range of these two butterflies; landowners interested in conserving native prairie should also consider contacting their State and Tribal conservation offices, as well as offices of the U.S. Department of Agriculture, Natural Resources Conservation Service, and other agencies in your area. Some examples of existing conservation programs and plans are provided below, though these are not intended to present an exhaustive list of programs that may be relevant to potential exclusion of proposed critical habitat from the final designation.

Grassland Easements: The Service's grassland easement program began in 1989. With the continued conversion of grassland to cropland and consistent declines in the populations of grassland-dependent birds, the need to protect grassland habitats became evident. A grassland easement transfers limited perpetual rights to the Service for a one-time, lump-sum payment; perpetual easements are bought from willing landowners. The program was developed and is carried out by managers, biologists, and realty specialists with an interest in protecting resources at the landscape scale. Grassland easements generally prohibit the cultivation of grassland habitat, while still permitting the landowner traditional livestock uses. Grassland easements restrict the landowner from altering the grass by digging, plowing, disking, or otherwise destroying the vegetative cover. Haying, mowing, and seed harvest are restricted until July 16 of each year. Grassland easements are inspected yearly for possible violations of the easement contract.

The grassland easement program further advanced the philosophy of protecting working landscapes that provide conservation benefits in the agricultural environment. The Service intended the grassland easement and management policy to reflect a partnership between the Service and the surface owner of the property. Each potential easement is evaluated for its value to wildlife. Large native grass tracts with good wetland complexes are given the highest priority when Migratory Bird Treaty Act funds are used to purchase the easement. Land and Water Conservation Funds are also used to preserve northern tallgrass prairie. This program may benefit the Dakota skipper and Poweshiek skipperling to the extent that native prairie meeting the habitat needs of these species is protected; parcels covered by a grassland easement will be examined on a case-by-case basis to determine the conservation benefits of

this program for these two butterfly species. Landowners interested in participating in this program should contact the Service's Partners for Fish and Wildlife program in their particular state.

Voluntary Grazing Agreements: Native prairie grasslands are the foundation of the ranching and livestock industry, but are increasingly being destroyed through conversion to row crops, such as corn and soybeans. Voluntary conservation programs that focus on helping ranchers manage their native-prairie grasslands to stay economically viable and preserve grassland condition are vitally important to maintaining grassland-dominated landscapes in North Dakota and South Dakota. Such conservation programs provide financial cost-share assistance and prescribe managed grazing on native prairie grasslands for periods of time varying from 3 to 10 years and provide incentives for ranchers to conserve wildlife habitat; this can be a benefit for the ranching community and the Dakota skipper and Poweshiek skipperling populations. Therefore, we will consider voluntary grazing agreements as one relevant type of conservation plan or program that may support excluding native-prairie grasslands from our final critical habitat designation. These voluntary grazing programs may benefit the Dakota skipper and Poweshiek skipperling to the extent that native prairie that meets the habitat needs of these species is protected; parcels covered by voluntary grazing agreements will be examined on a case-by-case basis to determine conservation benefits of the particular grazing agreement to these two butterfly species. Landowners interested in participating in this program should contact the Service's Partners for Fish and Wildlife program or the USDA's Natural Resources Conservation Service office in their particular state.

Minnesota's Native Prairie Tax Exemption: The Prairie Tax Exemption program exempts eligible lands from property taxes and is administered by the MN DNR in cooperation with local County Tax Assessors. To be considered for enrollment, landowners complete a one-page Prairie Tax Exemption application and submit it to the local County Assessor's Office with an aerial photo of the property. After a landowner has submitted an application, the County Assessor will contact the MN DNR, who will visit the property to evaluate and certify qualifying acres.

To be eligible for Native Prairie Tax Exemption, a parcel of land must meet several criteria, including that it:

- Has never been plowed, cultivated, or reseeded;
- Has not been severely altered by heavy grazing or herbicides;
- Is dominated throughout by native-prairie vegetation with no, or limited, tree cover;
- Has at least 5 native-prairie species of grasses or sedges and 12 native-prairie forb species present;
- Is not in use as pasture (annually hayed tracts may still qualify); and
- Has at least 5 acres (smaller tracts with important rare species habitat or other significant prairie features may still qualify).

This program may benefit the Dakota skipper and Poweshiek skipperling by providing a financial incentive to protect native prairie that meets habitat needs of these species. Each parcel would be examined on its own merits to determine the conservation benefits of this program.

Minnesota Native Prairie Bank Program: This Program allows landowners, through a conservation easement with the MN DNR, to protect native prairie on their property that has never been plowed. Landowners receive payment for their native-prairie land while keeping it in private ownership. Certain agricultural practices are included in some easements, such as livestock grazing, mowing for hay, or harvesting of native seed. Because funding for the program is limited, the MN DNR prioritizes tracts for funding based on the quality of the prairie, the variety of plants and animals present, and its proximity to other prairie units. Payments for permanent Prairie Bank easements are based on a percentage of the average value of cropland in the township as recorded in tax assessment records. To be considered for this program, landowners should contact MN DNR's Statewide Acquisition Coordinator, one of the MN DNR's three Regional Prairie Specialists. This program may benefit the Dakota skipper and Poweshiek skipperling to the extent that native prairie that meets the habitat needs of these species is protected; parcels protected by the prairie bank program will be examined on a case-by-case basis to determine the conservation benefits of this program for these two butterfly species.

At the time of publication of this proposed rule, we have not yet identified any specific conservation agreements that would fulfill the above criteria, but will work to identify any such agreements and conservation partnerships before publication of the final rule. Again, however, we are explicitly noting that every type of conservation plan and program applicable or available to each proposed unit will be considered within the context of whether specific units should be excluded from the final critical habitat designation. We encourage any non-Federal landowners who are interested in being excluded from a final designation to contact us (see **ADDRESSES** section of this proposed rule) to obtain our assistance with crafting and evaluating conservation agreements. We are also seeking additional information with regard to how designating specific areas as critical habitat would affect landowner interest and acceptance of programs that protect Dakota skipper or Poweshiek skipperling habitat via conservation easements. Continued interest and acceptance of easement programs has been identified as one of three factors that are important to the conservation of prairie on private lands, in addition to continued funding of these programs and other public policy initiatives that conserve prairie habitats (Doherty *et al.* 2013, p. 13).

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 have invited these peer reviewers to comment during this public comment period on our specific assumptions and conclusions in this proposed designation of critical habitat.

We will consider all comments and information received during this comment period on this proposed rule during our preparation of a final determination. Accordingly, the final decision may differ from this proposal.

Public Hearings and Informational Meetings

Section 4(b)(5) of the Act provides for one or more public hearings on this proposal, if requested. Requests must be received within 45 days after the date of publication of this proposed rule in the **Federal Register**. Such requests must be sent to the address shown in **FOR FURTHER INFORMATION CONTACT**. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing.

We have scheduled informational meetings regarding the proposed rule in the following locations: Minot, North Dakota, on November 5, 2013, at the Souris Valley Suites, 800 37th Avenue SW.; Milbank, South Dakota, on November 6, 2013, at the Milbank Chamber of Commerce, 1001 East 4th Avenue; Milford, Iowa, on November 7, 2013, at the Iowa Lakeside Laboratory, 1838 Highway 86; Holly, Michigan, on November 13, 2013, at the Rose Pioneer Elementary School, 7110 Milford Road; and, in Berlin, Wisconsin, on November 14, 2013, at the Berlin Public Library, 121 West Park Avenue. Except for the meeting in Berlin, Wisconsin, each informational meeting will be from 5:30 p.m. to 8:00 p.m.; the meeting in Berlin, Wisconsin will be from 4:30 p.m. to 7:00 p.m.

Any interested individuals or potentially affected parties seeking additional information on the public informational meetings should contact the Twin Cities Ecological Services Office (See **FOR FURTHER INFORMATION CONTACT**). The U.S. Fish and Wildlife Service is committed to providing access to this event for all participants. Please direct all requests for interpreters, closed captioning, or other accommodation to the Twin Cities Ecological Services Office (See **FOR FURTHER INFORMATION CONTACT**).

Required Determinations

Regulatory Planning and Review (Executive Order 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is not significant.

Executive Order (E.O.) 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include such businesses as manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and forestry and logging operations with fewer than 500 employees and annual business less than $7 million. To determine whether small entities may be affected, we will consider the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

Importantly, the incremental impacts of a rule must be *both* significant and substantial to prevent certification of the rule under the RFA and to require the preparation of an initial regulatory flexibility analysis. If a substantial number of small entities are affected by the proposed critical habitat designation, but the per-entity economic impact is not significant, the Service may certify. Likewise, if the per-entity economic impact is likely to be significant, but the number of affected entities is not substantial, the Service may also certify.

Under the RFA, as amended, and following recent court decisions, Federal agencies are only required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself, and not the potential impacts to indirectly affected entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried by the Agency is not likely to adversely modify critical habitat. Therefore, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Under these circumstances, it is our position that only Federal action agencies will be directly regulated by this designation. Therefore, because Federal agencies are not small entities, the Service may certify that the proposed critical habitat rule will not have a significant economic impact on a substantial number of small entities.

We acknowledge, however, that in some cases, third-party proponents of the action subject to permitting or funding may participate in a section 7 consultation, and thus may be indirectly affected. We believe it is good policy to assess these impacts if we have sufficient data before us to complete the necessary analysis, whether or not this analysis is strictly required by the RFA. While this regulation does not directly regulate these entities, in our draft economic analysis we will conduct a brief evaluation of the potential number of third parties participating in consultations on an annual basis in order to ensure a more complete examination of the incremental effects of this proposed rule in the context of the RFA.

In conclusion, we believe that, based on our interpretation of directly regulated entities under the RFA and relevant case law, this designation of critical habitat will directly regulate only 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 because the majority of the lands we are proposing do not have energy production or distribution. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required. However, we will further evaluate this issue as we conduct our economic analysis, and review and revise this assessment as warranted.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(1) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule will significantly or uniquely affect small governments because the proposed areas that cover small government jurisdictions are small, and there is little potential that the proposal would impose significant additional costs above those associated with the proposed listing of the species. Most lands are Federal, State, or privately owned, and most of the units do not occur within the jurisdiction of small governments. Therefore, a Small Government Agency Plan is not required. However, we will further evaluate this issue as we conduct our economic analysis, and review and revise this assessment if appropriate.

Takings (Executive Order 12630)

In accordance with Executive Order 12630 (''Government Actions and Interference with Constitutionally Protected Private Property Rights''), we have analyzed the potential takings implications of designating critical habitat for the Dakota skipper and Poweshiek skipperling in a takings implications assessment. Based on the best available information, the takings implications assessment concludes that this designation of critical habitat for the Dakota skipper and Poweshiek skipperling does not pose significant takings implications. However, we will further evaluate this issue as we develop our final designation, and review and revise this assessment as warranted.

Federalism (Executive Order 13132)

In accordance with Executive Order 13132 (Federalism), this proposed rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior policy, we requested information from, and coordinated development of, this proposed critical habitat designation with appropriate State resource agencies in Iowa, Michigan, Minnesota, North Dakota, South Dakota, and Wisconsin. From a federalism perspective, the designation of critical habitat directly affects only the responsibilities of Federal agencies. The Act imposes no other duties with respect to critical habitat, either for States and local governments, or for anyone else. As a result, the rule does not have substantial direct effects either on the States, or on the relationship between the national government and the States, or on the distribution of powers and responsibilities among the various levels of government. The designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the physical or biological 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 these local governments in long-range planning (because these local governments no longer have to wait for case-by-case section 7 consultations to occur).

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform (Executive Order 12988)

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. 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 (42 U.S.C. 4321 et seq.)

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), need not be prepared in connection with listing a species as endangered or threatened under the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

It is 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)).]

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes.

There are tribal lands in North Dakota and South Dakota included in this proposed designation of critical habitat. Using the criteria found in the Criteria Used to Identify Critical Habitat section, we have determined that Tribal lands meet the definition of critical habitat for the Dakota skipper and Poweshiek skipperling. We will seek government-to-government consultation with these tribes throughout the proposal and development of the final designation of critical habitat. We will consider these areas for exclusion from final critical habitat designation to the extent consistent with the requirements of 4(b)(2) of the Act. We informed tribes of how we are evaluating areas under section 4(b)(2) of the Act and of our interest in consulting with them on a government-to-government basis.

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 Twin Cities Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this package are staff of the Twin Cities 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—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

■ 2. In § 17.95, amend paragraph (i) by adding an entry for ''Dakota Skipper *(Hesperia dacotae)''* after the entry for ''Ash Meadows Naucorid *(Ambrysus amargosus)''* and an entry for ''Poweshiek Skipperling *(Oarisma Poweshiek)''* after the entry for ''Laguna Mountains Skipper *(Pyrgus ruralis lagunae)'',* to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(i) *Insects.*

* * * * *

Dakota Skipper (Hesperia Dacotae)

(1) Critical habitat units are designated in Chippewa, Clay, Kittison, Lincoln, Murray, Norman, Pipestone, Polk, Pope, and Swift Counties in Minnesota; McHenry, McKenzie, Ransom, Richland, Rolette, and Wells Counties in North Dakota; and Brookings, Day, Deuel, Grant, Marshall, and Roberts Counties in South Dakota.

(2) Within these areas, the primary constituent elements of the physical or

biological features essential to the conservation of the Dakota skipper are:

(i) Primary Constituent Element 1—Wet-mesic tallgrass or mixed-grass remnant untilled prairie that occurs on near-shore glacial lake soil deposits or high-quality dry-mesic remnant untilled prairie on rolling terrain consisting of gravelly glacial moraine soil deposits, containing:

(A) A predominance of native grasses and native flowering forbs,

(B) Glacial soils that provide the soil surface or near surface (between soil surface and 2 cm depth) micro-climate conditions conducive to Dakota skipper larval survival and native-prairie vegetation such as mean soil surface summer temperatures from 17.8 to 20.5 °C (64.0 to 68.9 °F), mean near soil surface dew point ranging from 13.9 to 16.8 °C (57.0 to 62.2 °F), mean near soil surface relative humidity between 72.5 and 85.1 percent, and soil bulk densities between 0.86 g/cm^3 and 1.28 g/cm^3 (0.5 oz/in^3 to 0.74 oz/in^3);

(C) If present, trees or large shrub cover of less than 5 percent of area in dry prairies and less than 25 percent in wet-mesic prairies; and

(D) If present, nonnative invasive plant species occurring in less than 5 percent of area.

(ii) Primary Constituent Element 2—Native grasses and native flowering forbs for larval and adult food and shelter, specifically;

(A) At least one of the following native grasses to provide food and shelter sources during Dakota skipper larval stages: prairie dropseed *(Sporobolus heterolepis)* or little bluestem *(Schizachyrium scoparium);* and

(B) One or more of the following forbs in bloom to provide nectar and water sources during the Dakota skipper flight period: purple coneflower *(Echinacea angustifolia),* bluebell bellflower *(Campanula rotundifolia),* white prairie clover *(Dalea candida),* upright prairie coneflower *(Ratibida columnifera),* fleabane *(Erigeron* spp.), blanketflower *(Gaillardia* spp.), black-eyed Susan *(Rudbeckia hirta),* yellow sundrops *(Calylophus serrulatus),* groundplum milkvetch *(Astragalus crassicarpus),* common gaillardia *(Gaillardia aristata),* or tooth-leaved primrose *(Calylophus serrulata).*

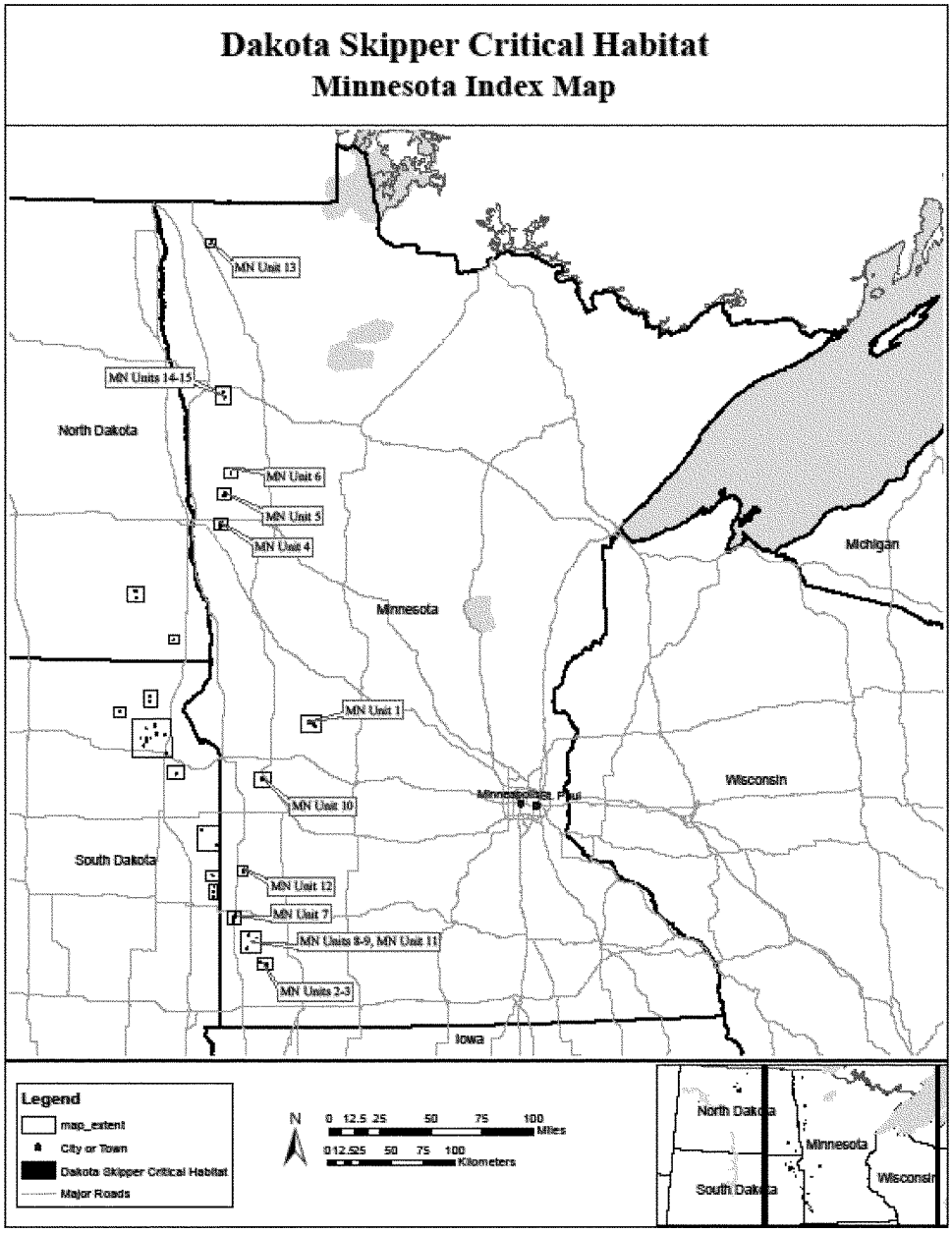
(iii) Primary Constituent Element 3—Dispersal grassland habitat that is within 1 km (0.6 mi) of native high-quality remnant prairie (as defined in Primary Constituent Element 1) that connects high-quality wet-mesic to dry tallgrass prairies or moist meadow habitats. Dispersal grassland habitat consists of undeveloped open areas dominated by perennial grassland with limited or no barriers to dispersal including tree or shrub cover less than 25 percent of the area and no row crops such as corn, beans, potatoes, or sunflowers.

(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 [INSERT EFFECTIVE DATE OF FINAL RULE].

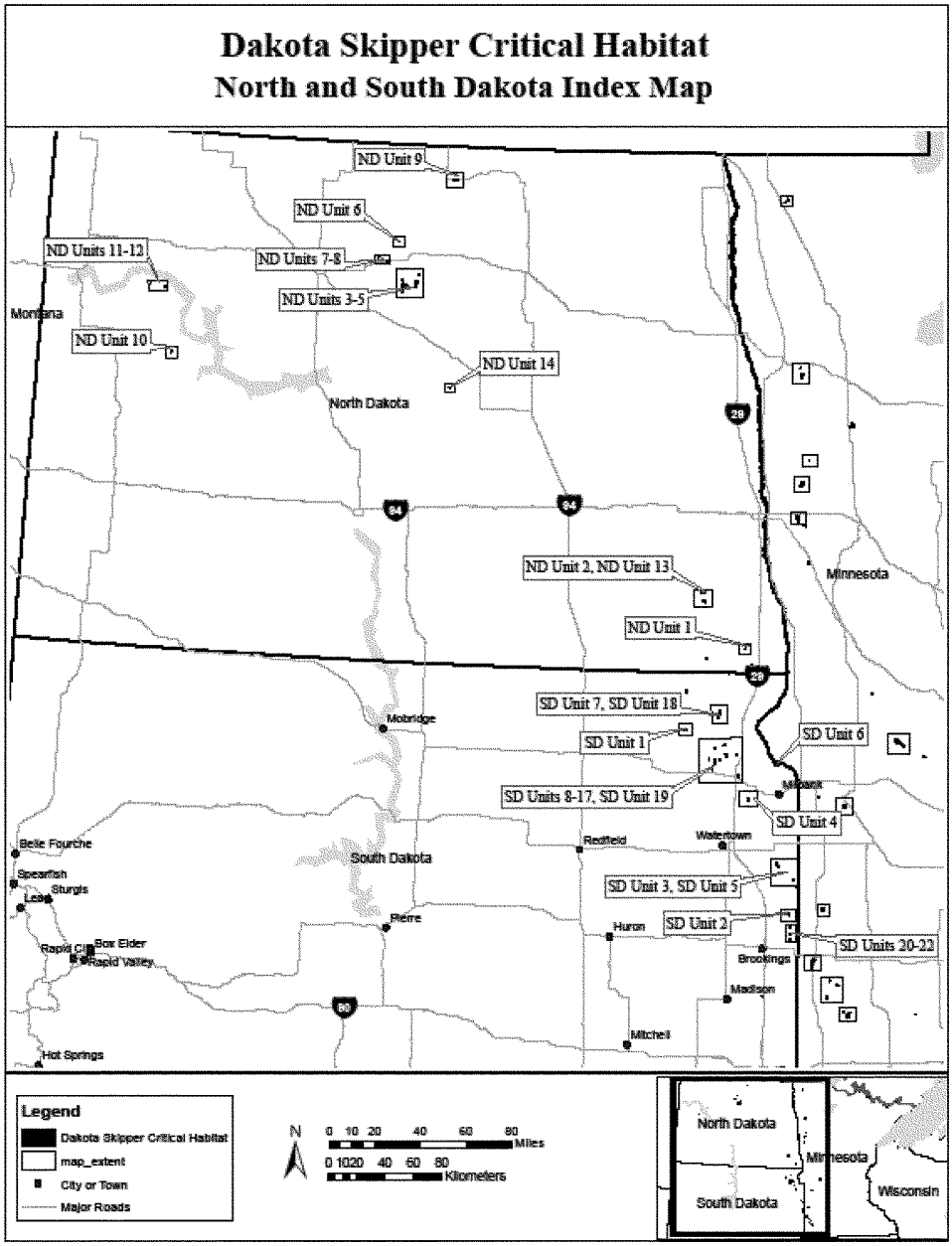
(4) *Critical habitat map units.* Data layers defining map units were created and digitized using ESRI's ArcMap (version 10.0) and comparing USGS NAIP/FSA high-resolution orthophotography from 2010 or later and previously mapped skipper habitat polygons submitted by contracted researchers or prairie habitat polygons made available from Minnesota Department of Natural Resources' County Biological Survey. Critical habitat units then were mapped in Geographic Coordinate System WGS84. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at the Service's internet site (*http://www.fws.gov/midwest/Endangered*), at *http://www.regulations.gov* at Docket No. FWS–R3–ES–2013–0017, and at the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) Minnesota index map follows:

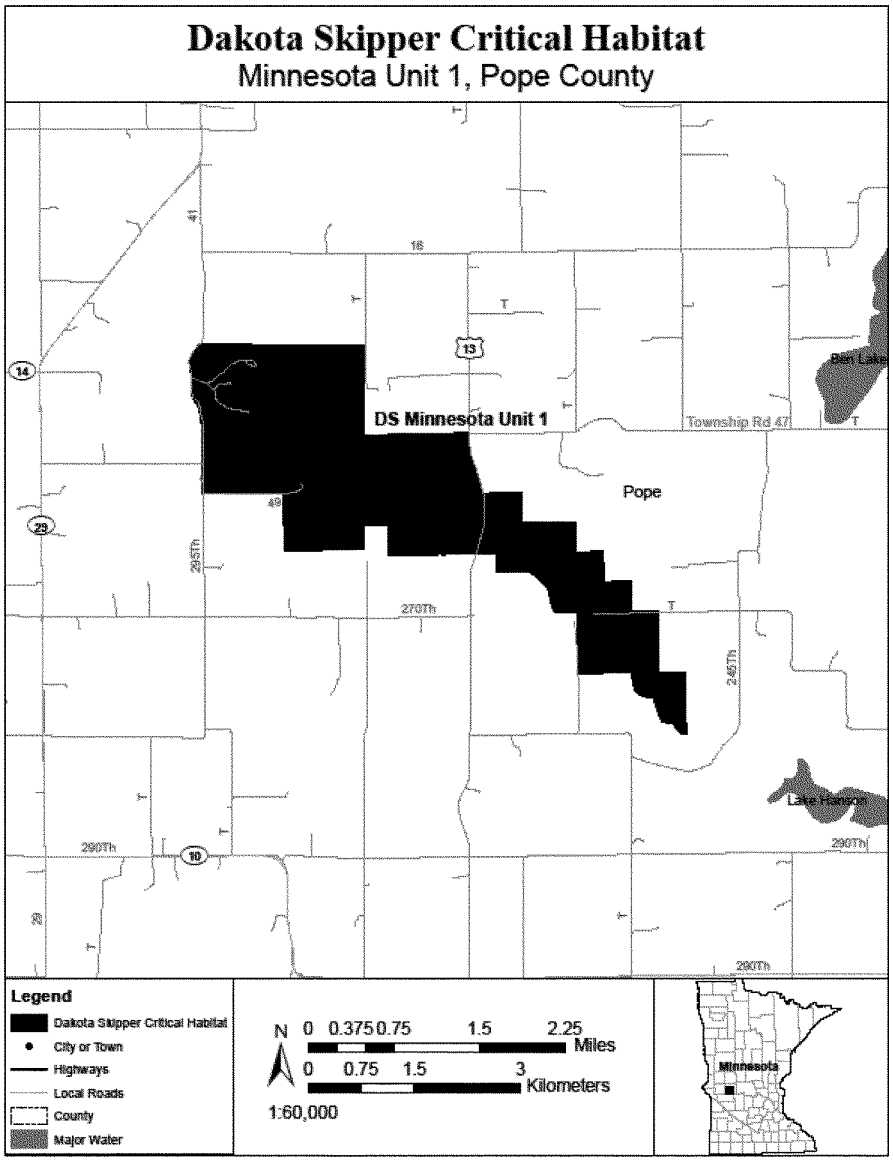
BILLING CODE 4310–55–P



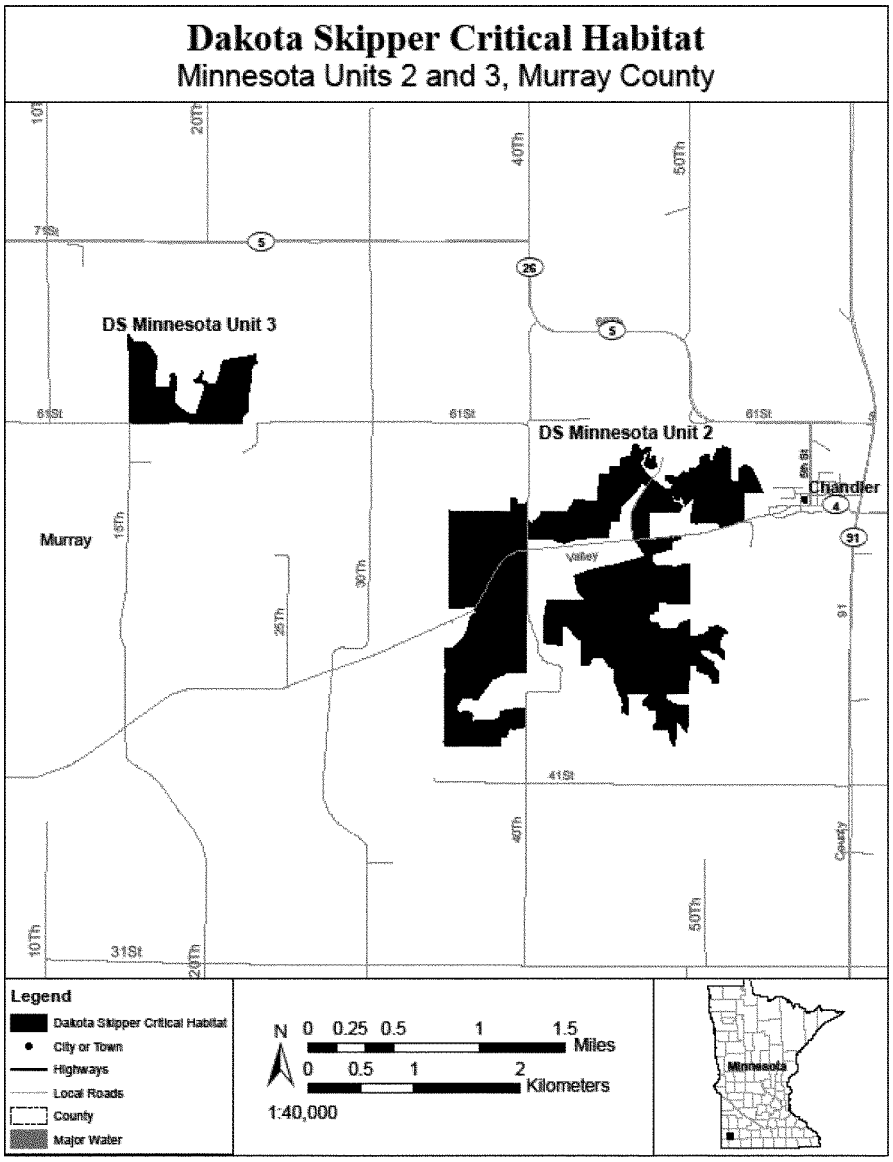
(6) North Dakota and South Dakota index map follows:



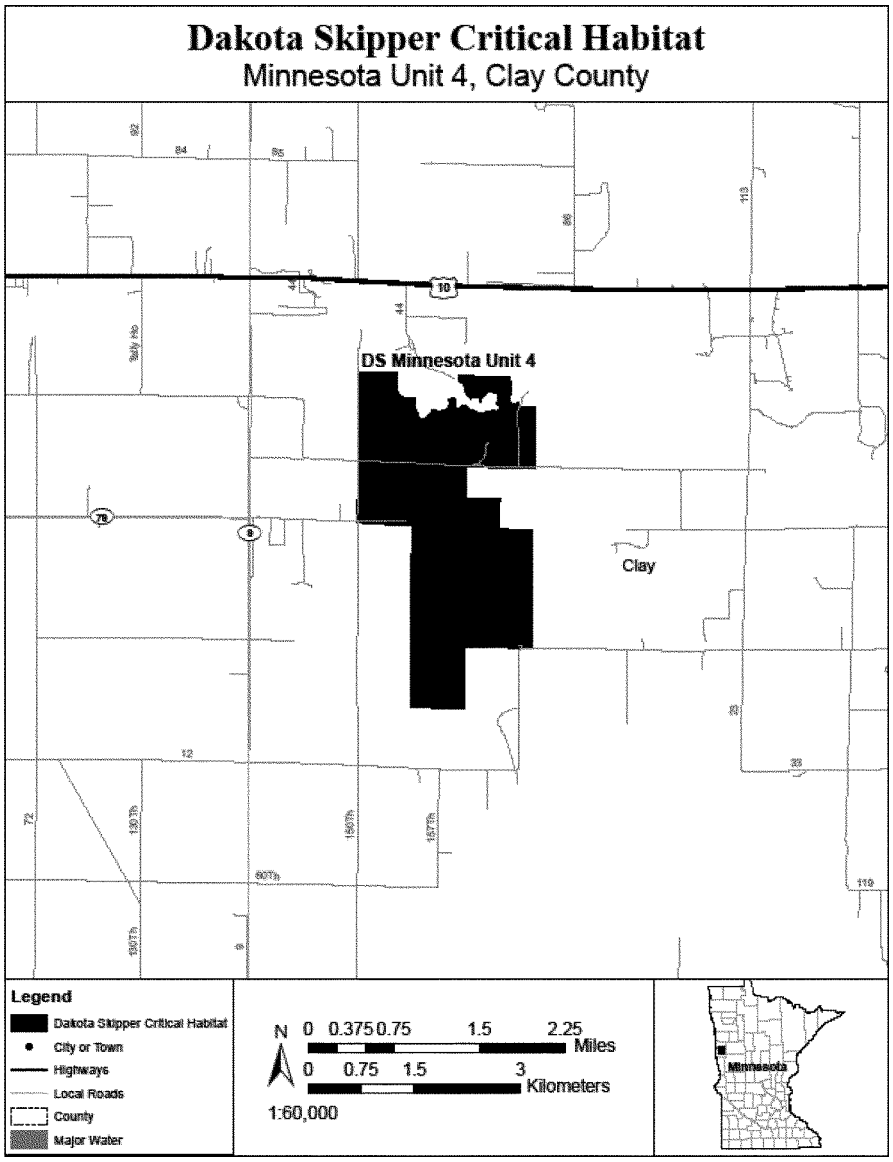
(7) DS Minnesota Unit 1, Pope County, Minnesota. Map of DS Minnesota Unit 1 follows:



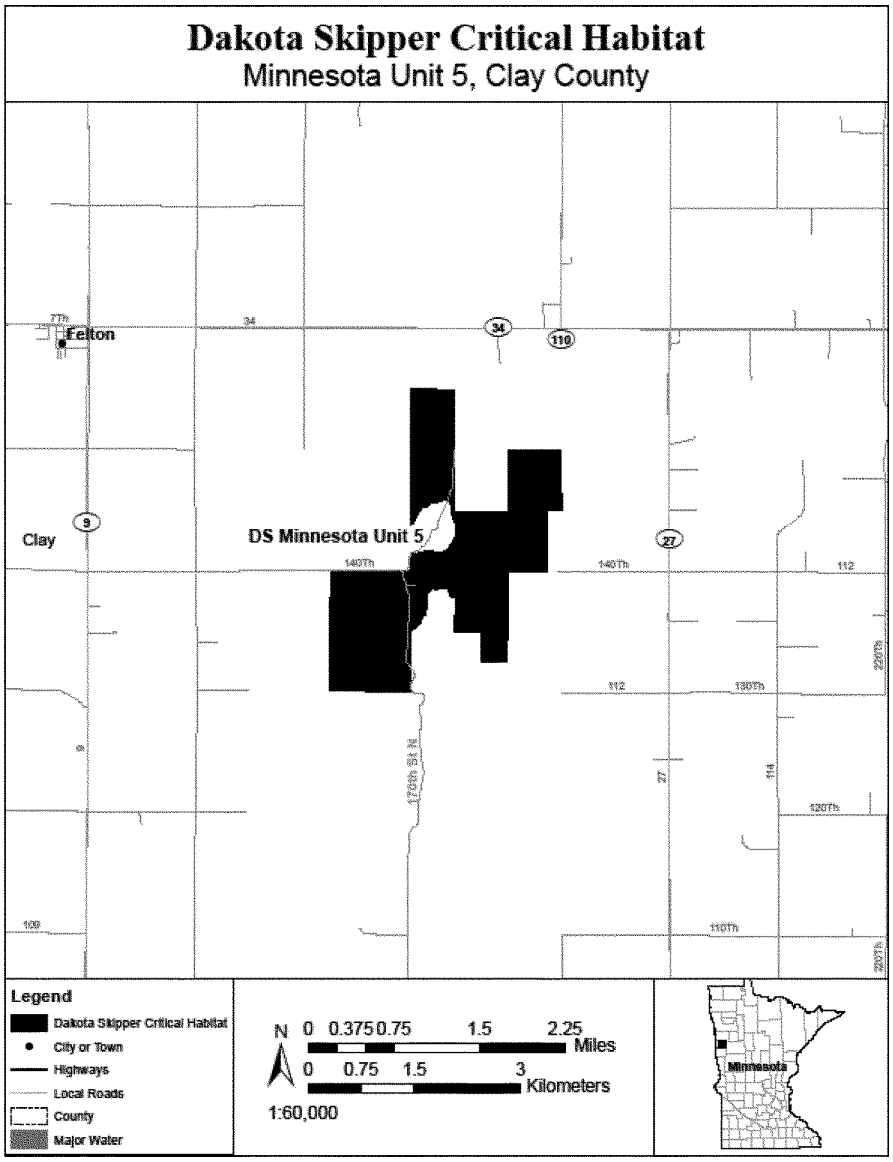
(8) DS Minnesota Units 2 and 3, Murray County, Minnesota. Map of DS Minnesota Units 2 and 3 follows:



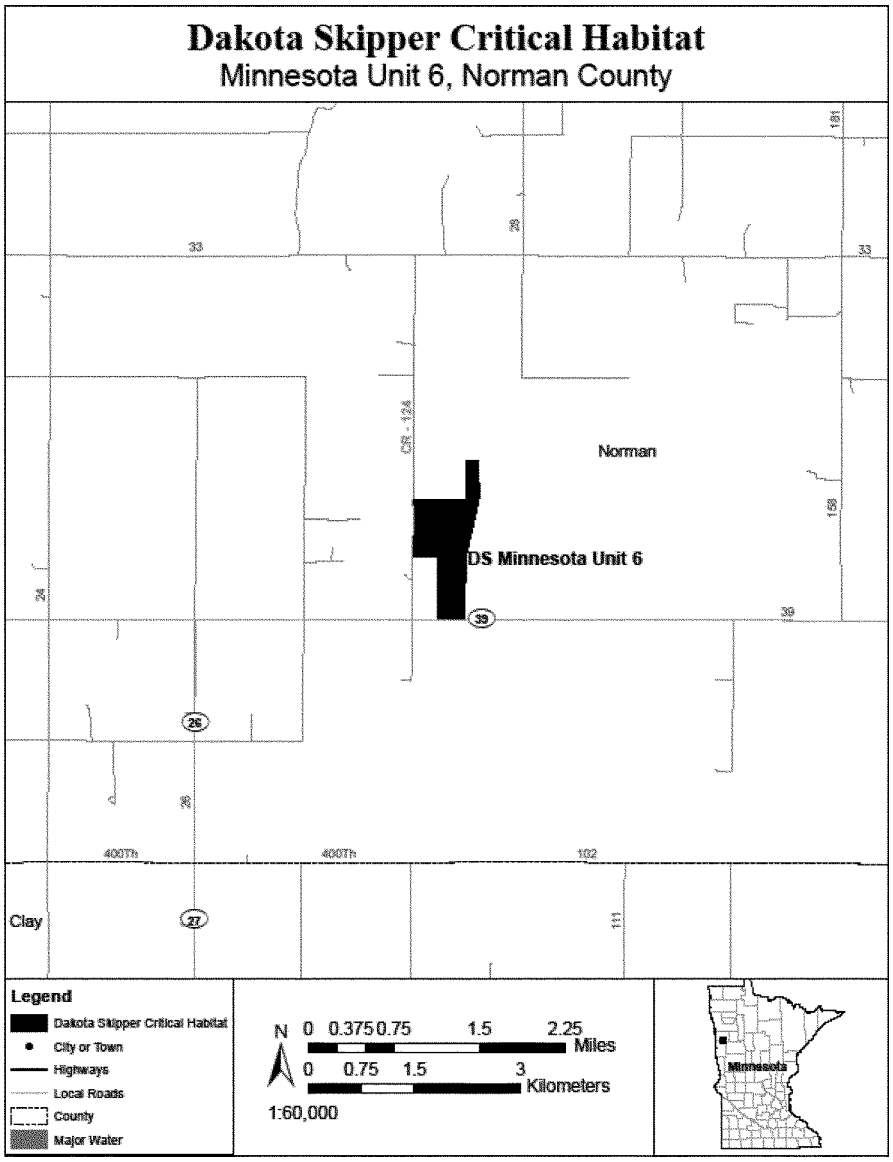
(9) DS Minnesota Unit 4, Clay County, Minnesota. Map of DS Minnesota Unit 4 follows:



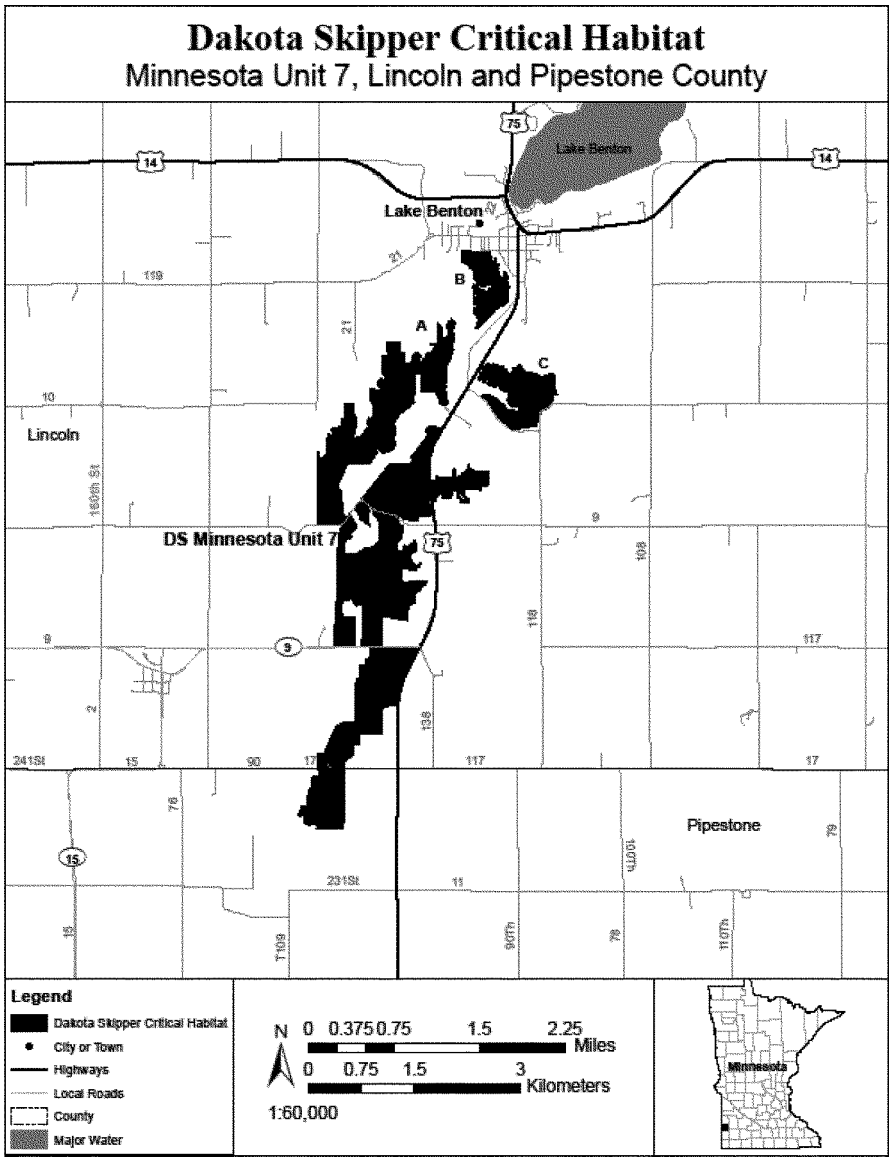
(10) DS Minnesota Unit 5, Clay County, Minnesota. Map of DS Minnesota Unit 5 follows:



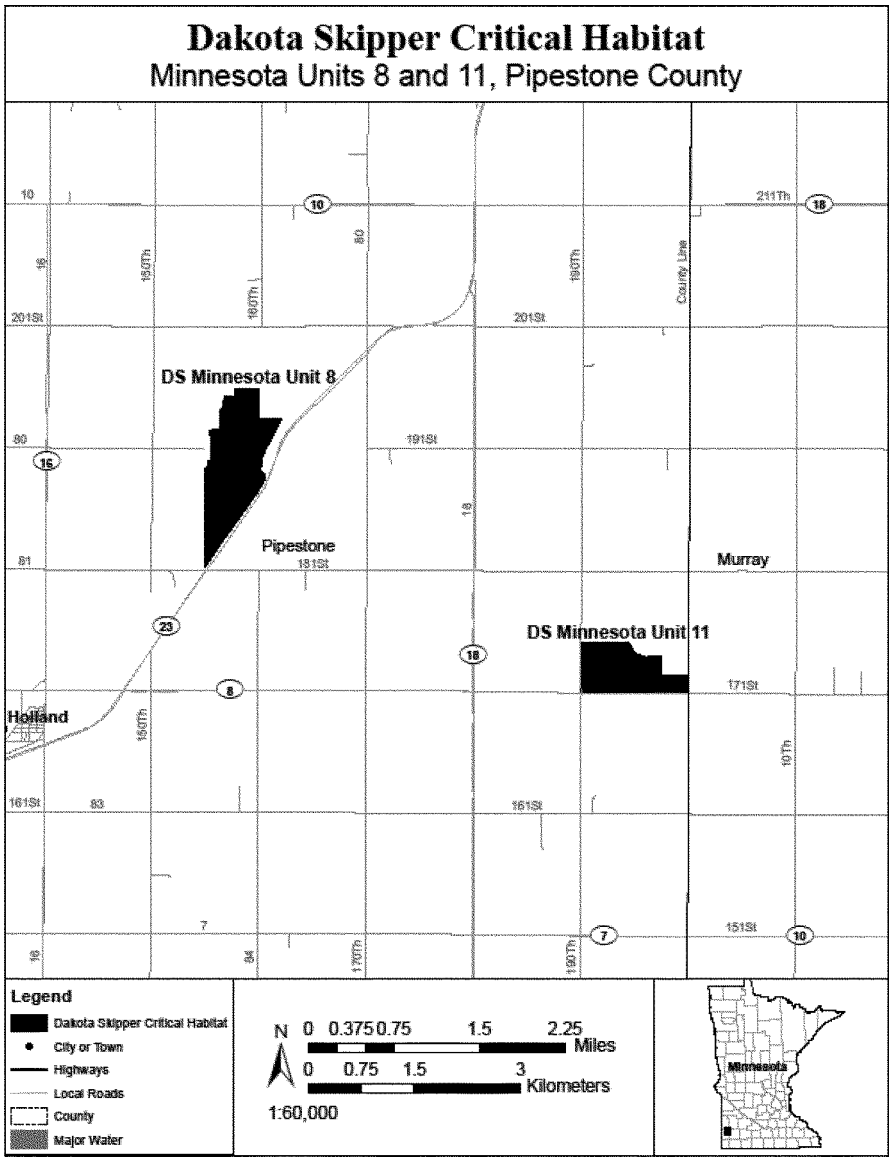
(11) DS Minnesota Unit 6, Norman County, Minnesota. Map of DS Minnesota Unit 6 follows:



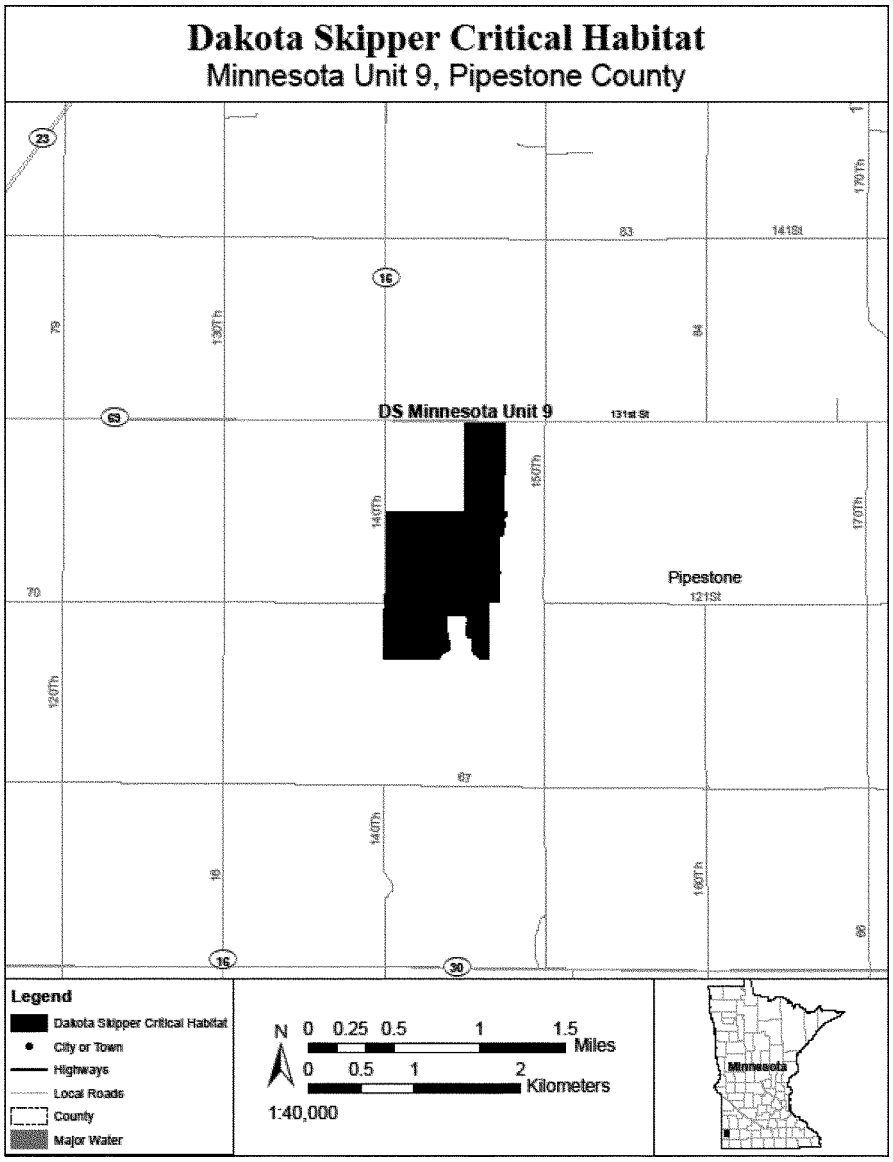
(12) DS Minnesota Unit 7, Lincoln County, Minnesota. Map of DS Minnesota Unit 7 follows:



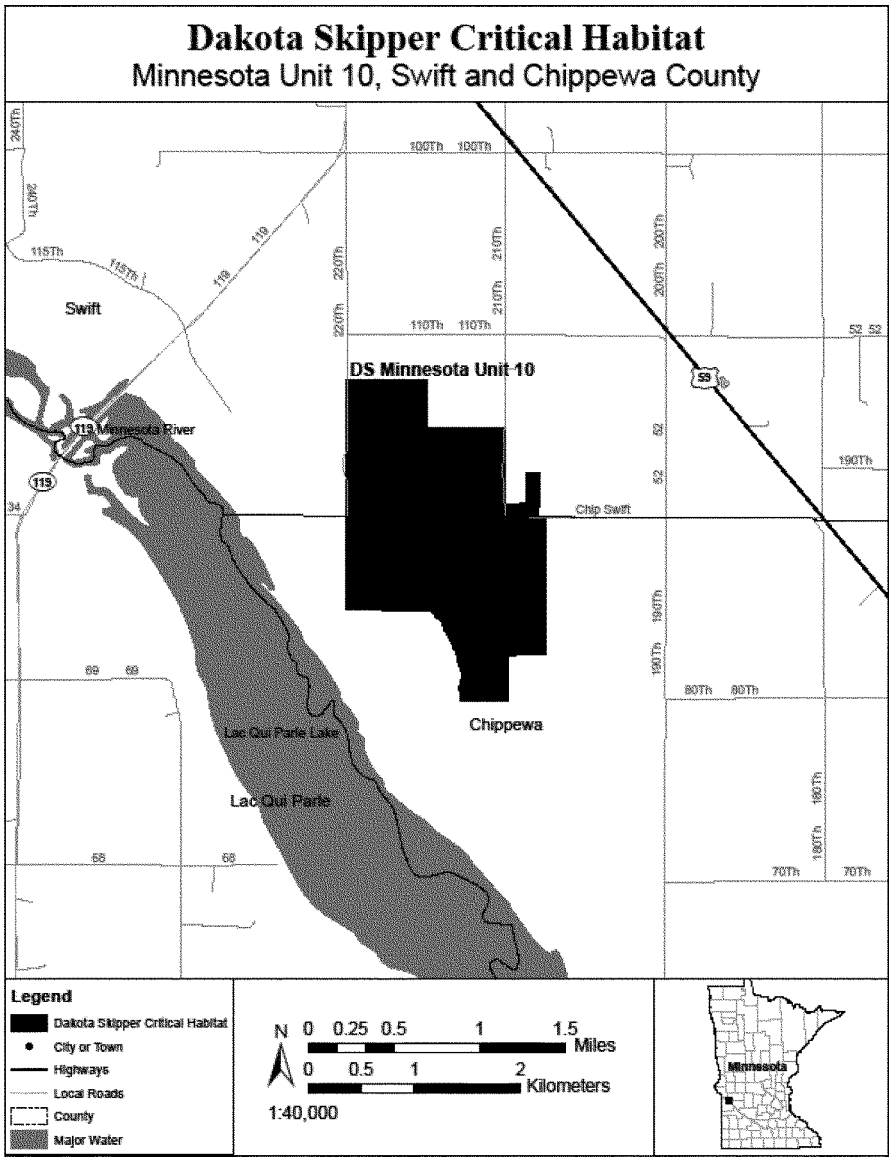
(13) DS Minnesota Units 8 and 11, Pipestone County, Minnesota. Map of DS Minnesota Units 8 and 11 follows:



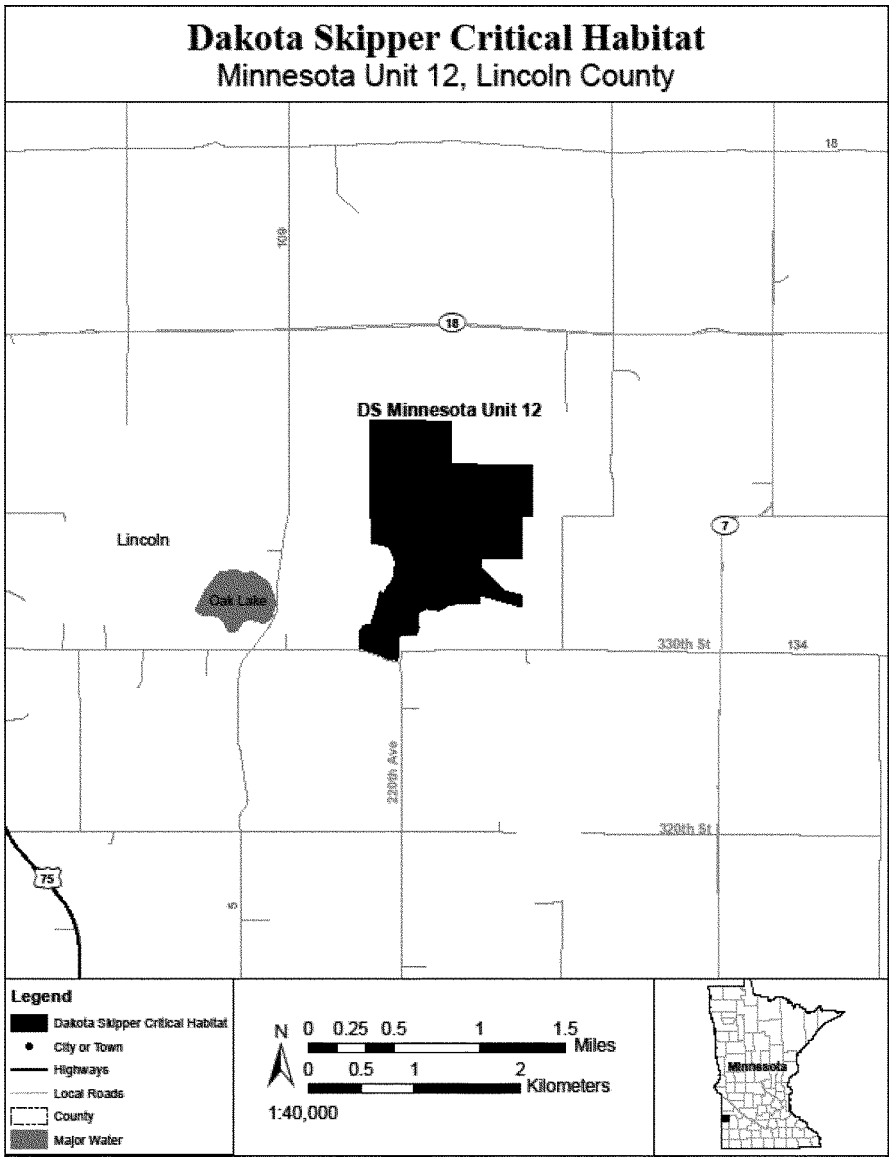
(14) DS Minnesota Unit 9, Pipestone County, Minnesota. Map of DS Minnesota Unit 9 follows:



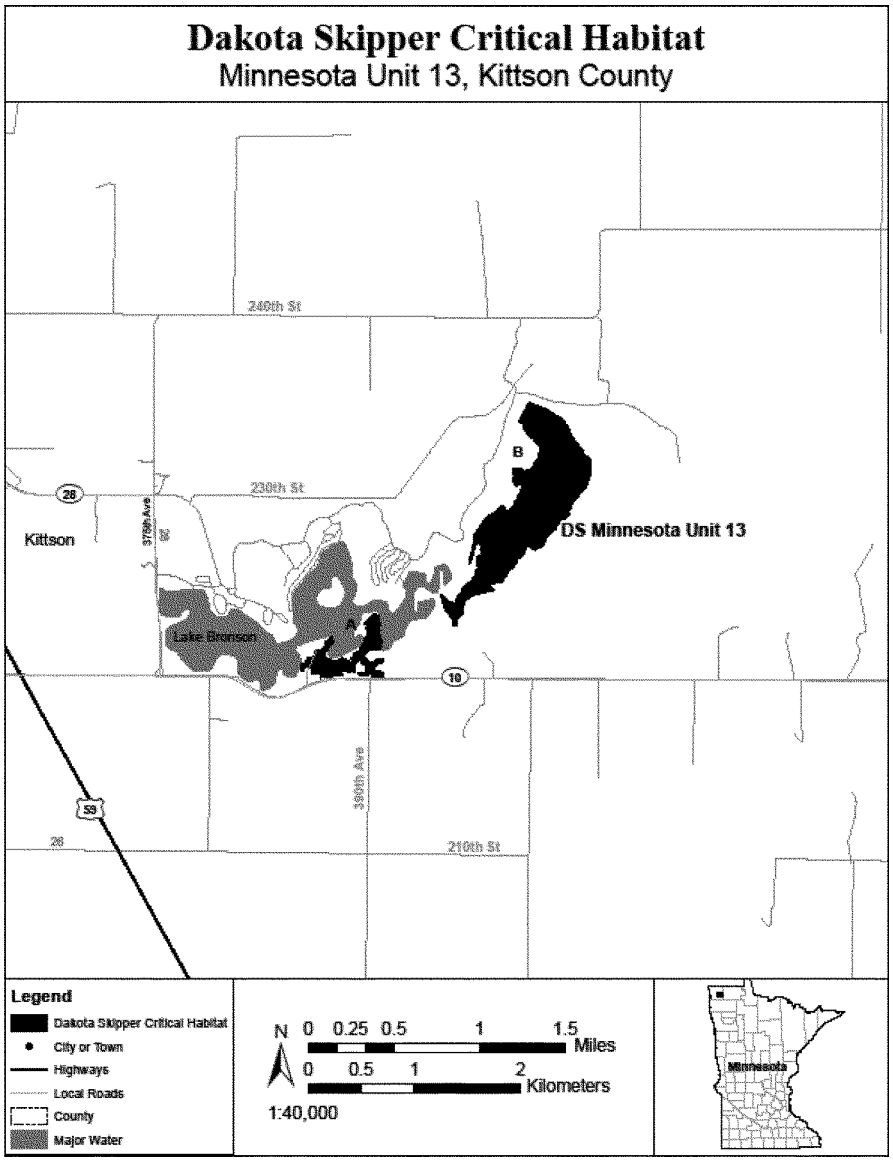
(15) DS Minnesota Unit 10, Chippewa County and Swift County, Minnesota.
Map of DS Minnesota Unit 10 follows:



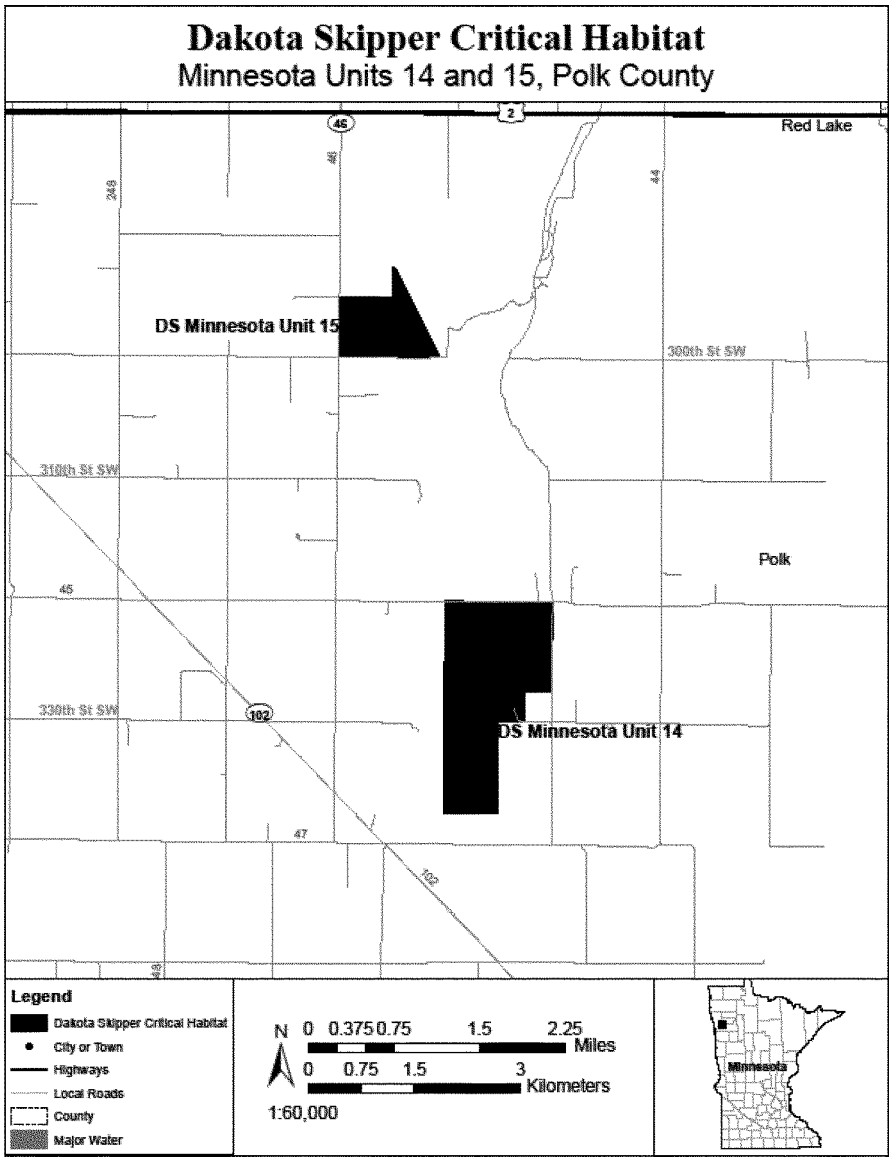
(16) DS Minnesota Unit 12, Lincoln County, Minnesota. Map of DS Minnesota Unit 12 follows:



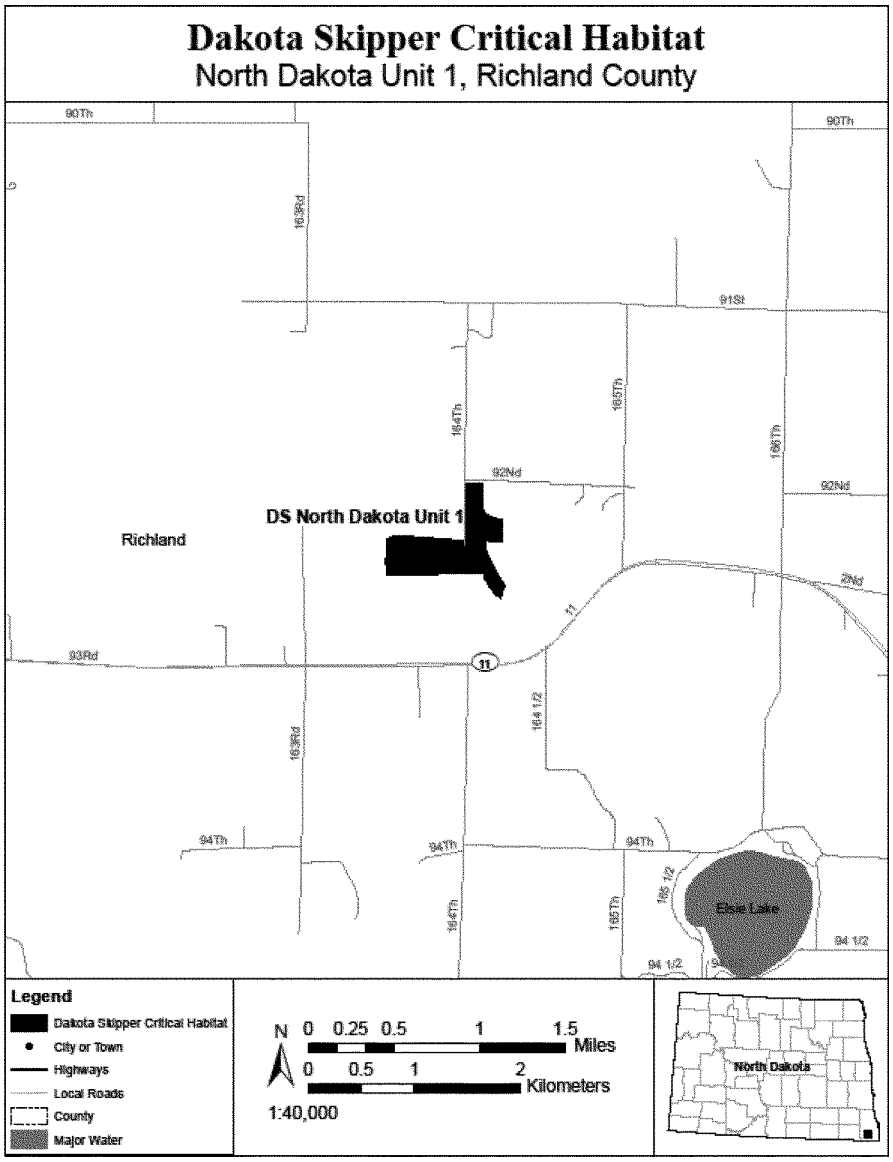
(17) DS Minnesota Unit 13, Kittison County, Minnesota. Map of DS Minnesota Unit 13 follows:



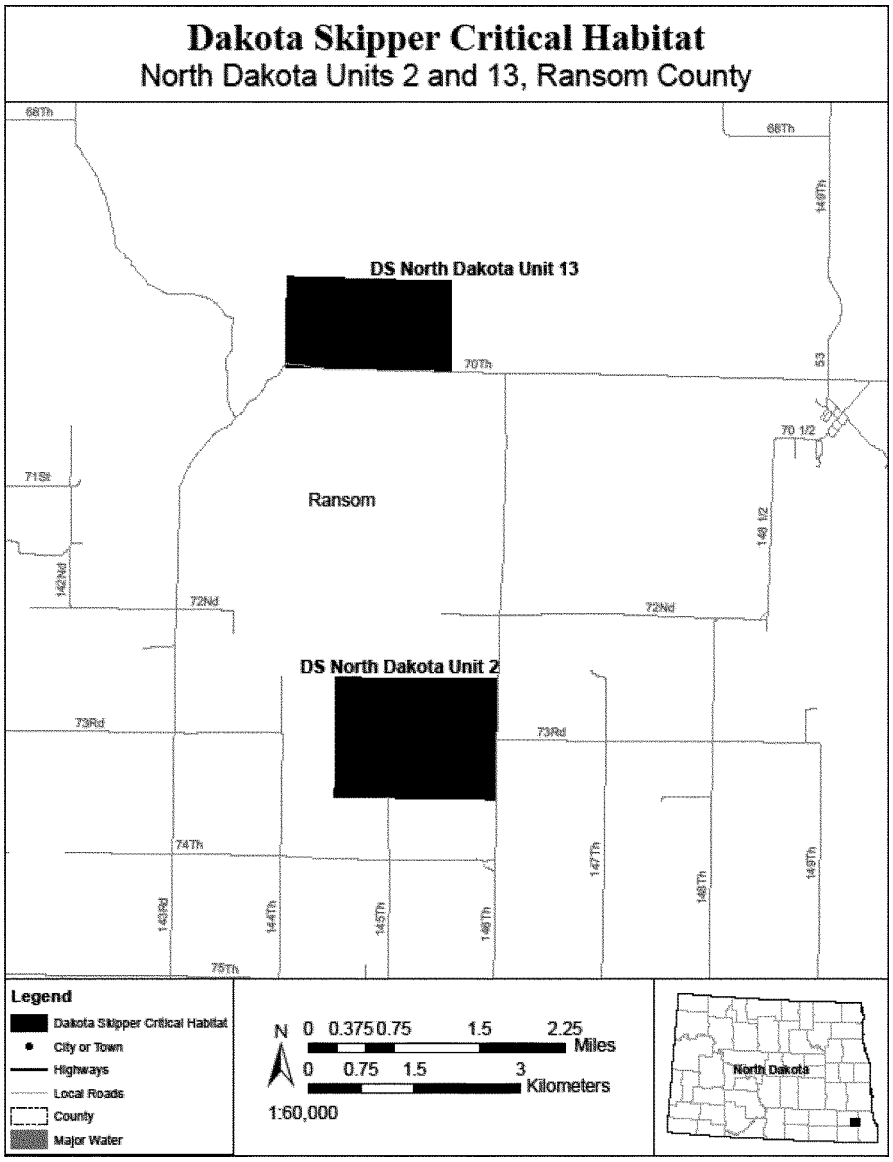
(18) DS Minnesota Units 14 and 15, Polk County, Minnesota. Map of DS Minnesota Units 14 and 15 follows:



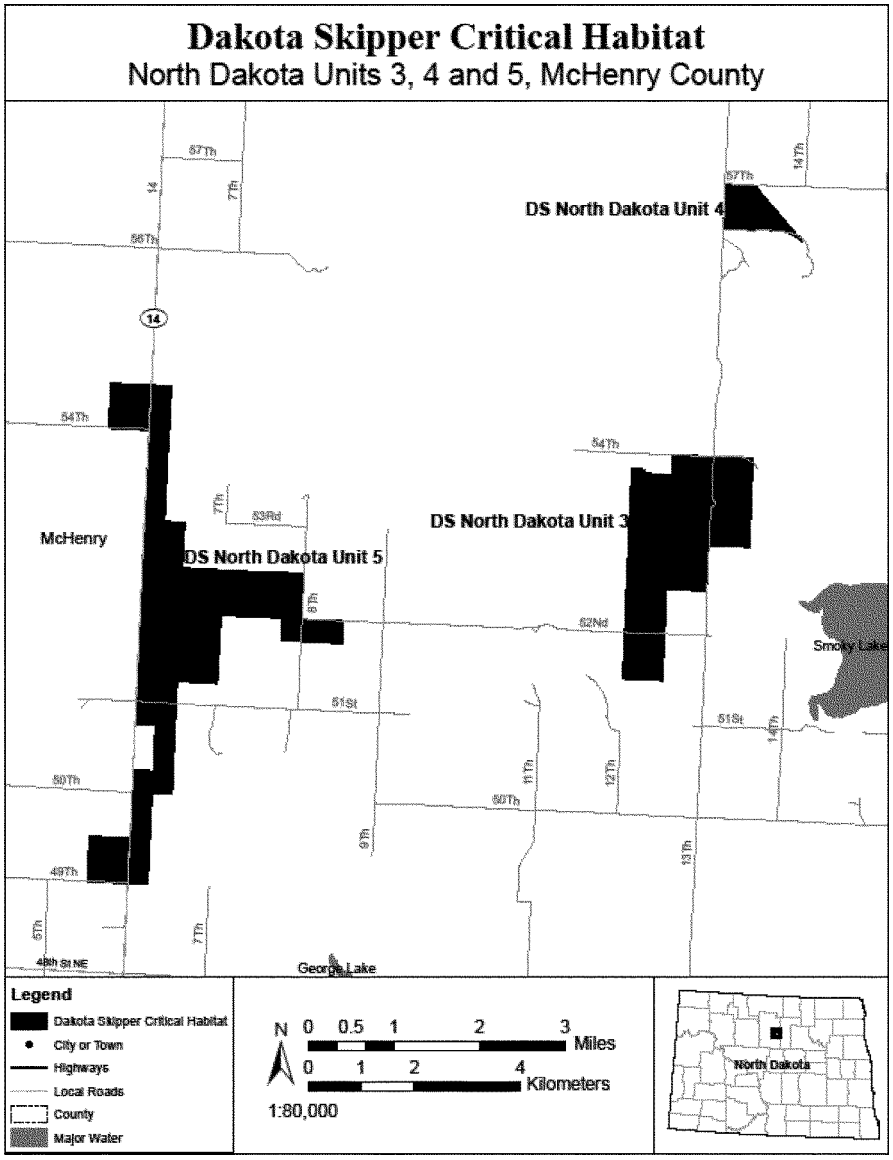
(19) DS North Dakota Unit 1, Richland County, North Dakota. Map of DS North Dakota Unit 1 follows:



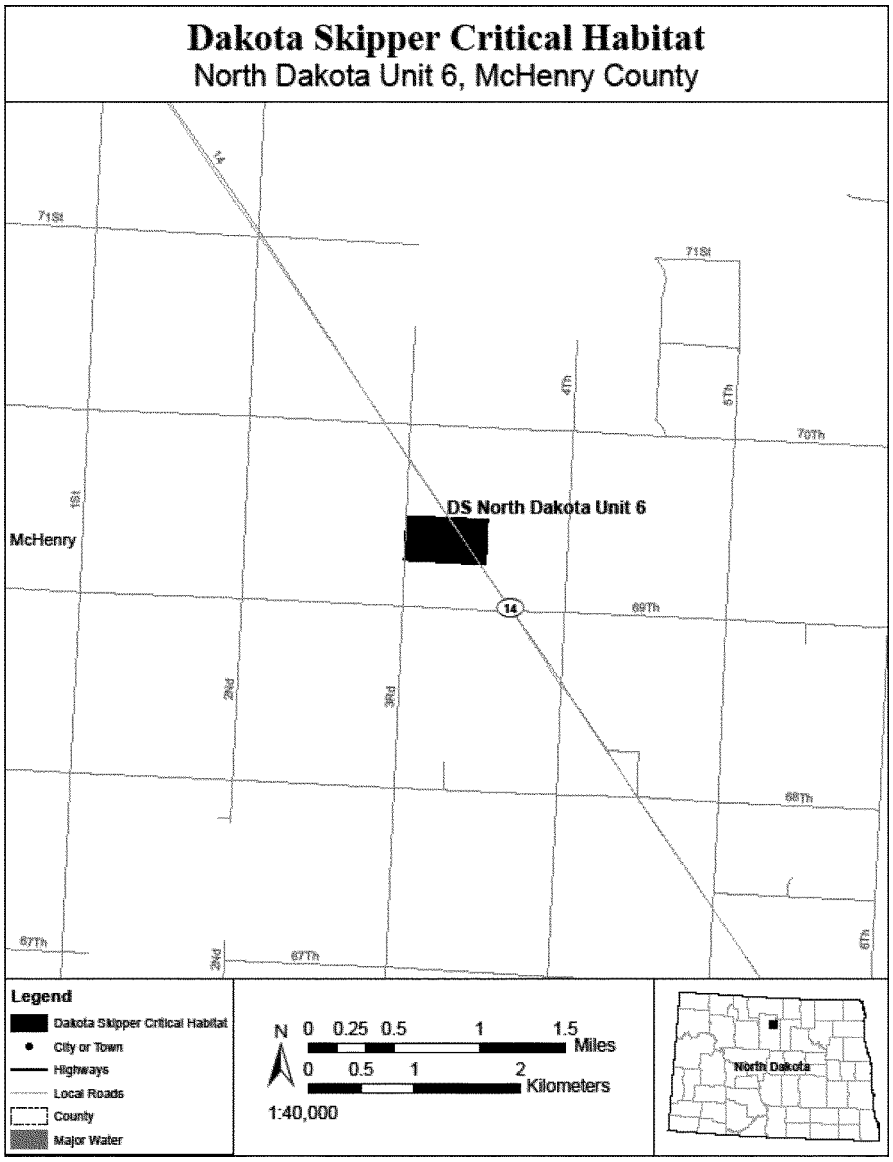
(20) DS North Dakota Units 2 and 13, Ransom County, North Dakota. Map of DS North Dakota Units 2 and 13 follows:



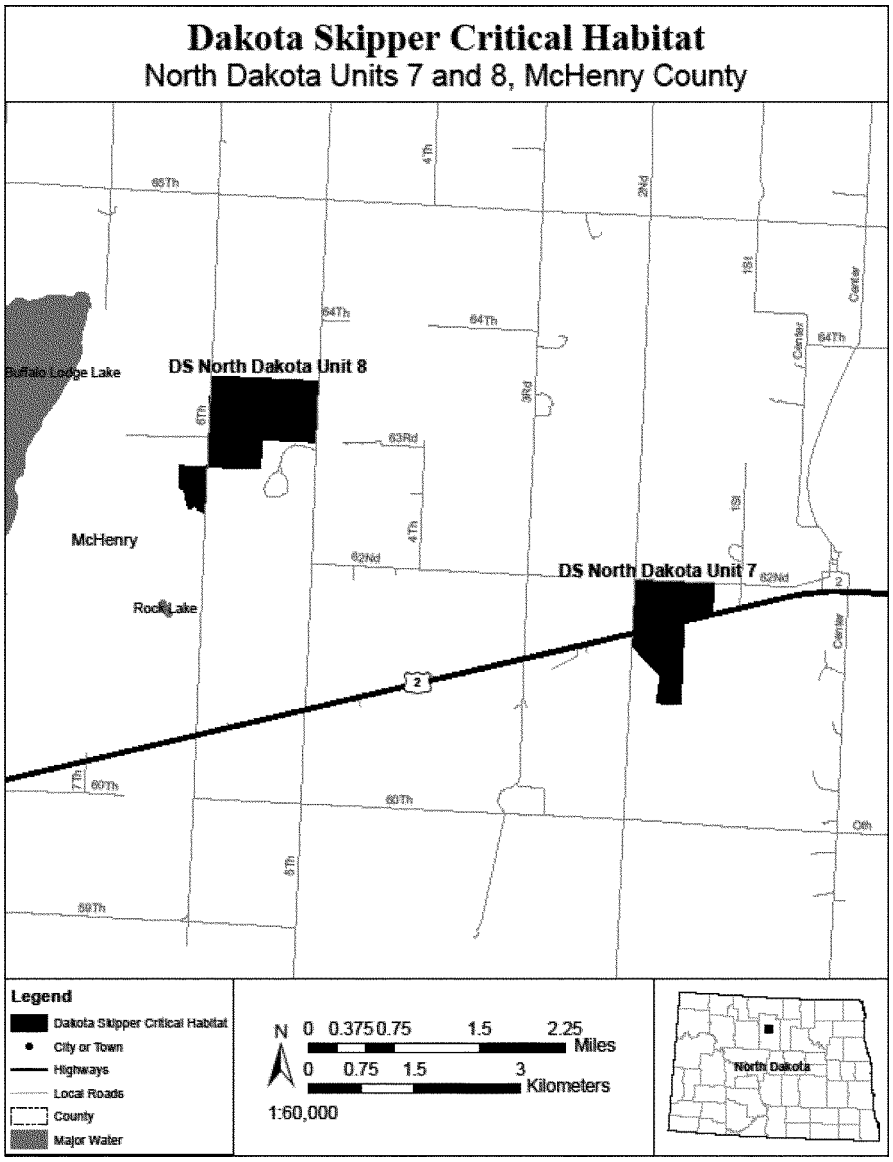
(21) DS North Dakota Units 3, 4, and 5, McHenry County, North Dakota. Map of DS North Dakota Units 3, 4, and 5 follows:



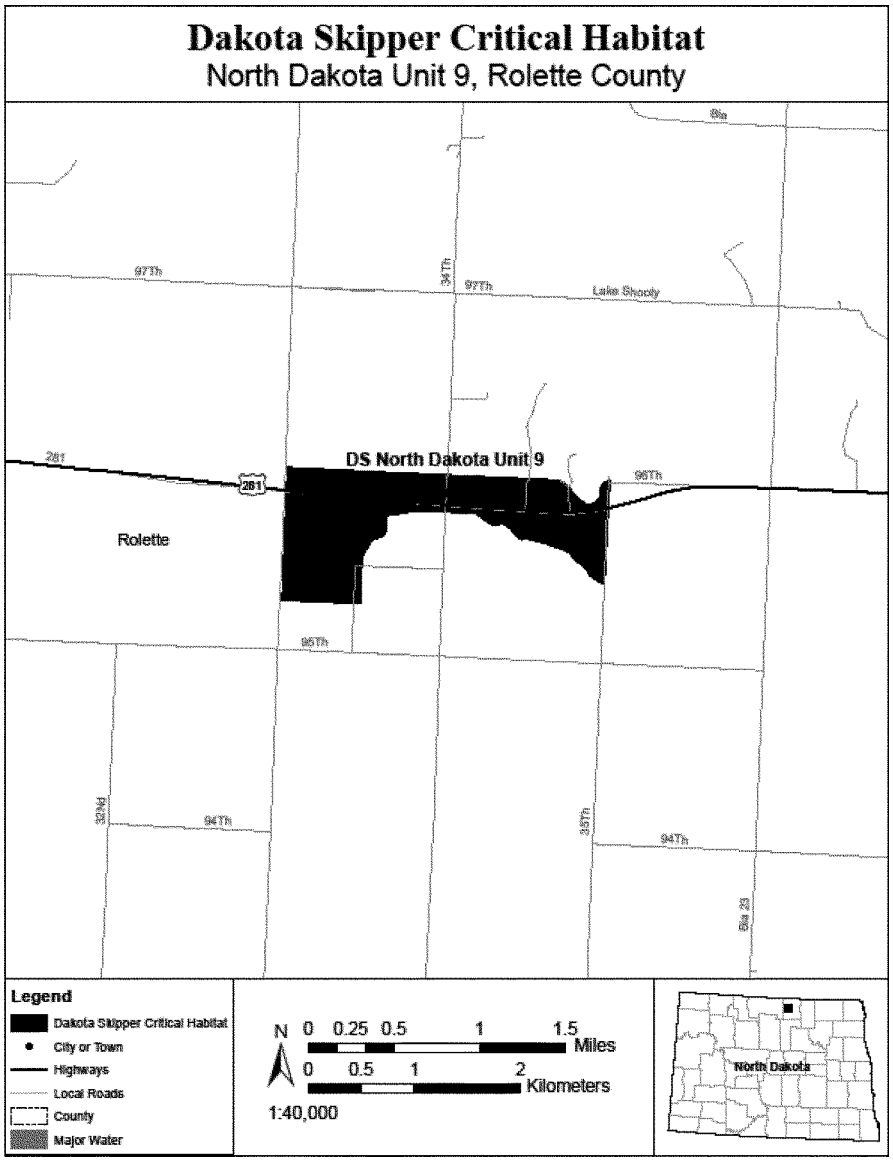
(22) DS North Dakota Unit 6, McHenry County, North Dakota. Map of DS North Dakota Unit 6 follows:



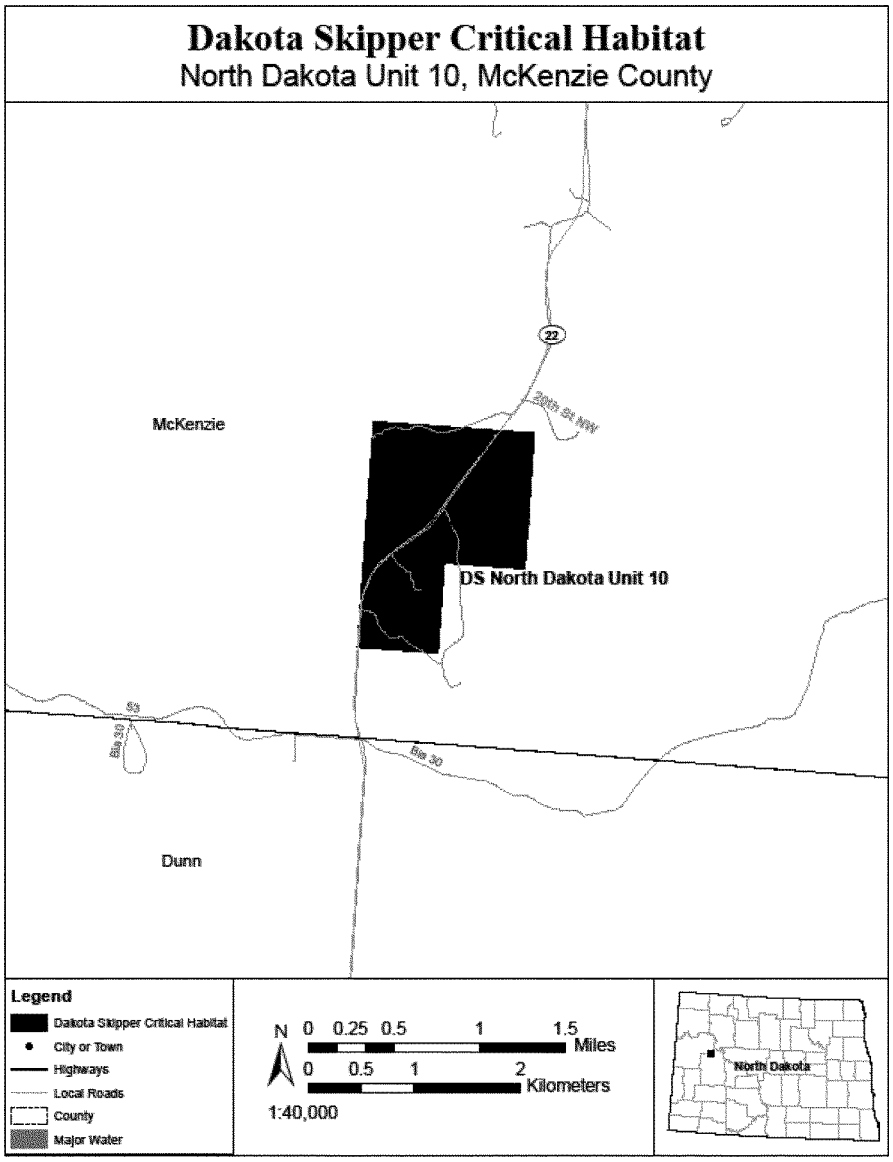
(23) DS North Dakota Units 7 and 8, McHenry County, North Dakota. Map of DS North Dakota Units 7 and 8 follows:



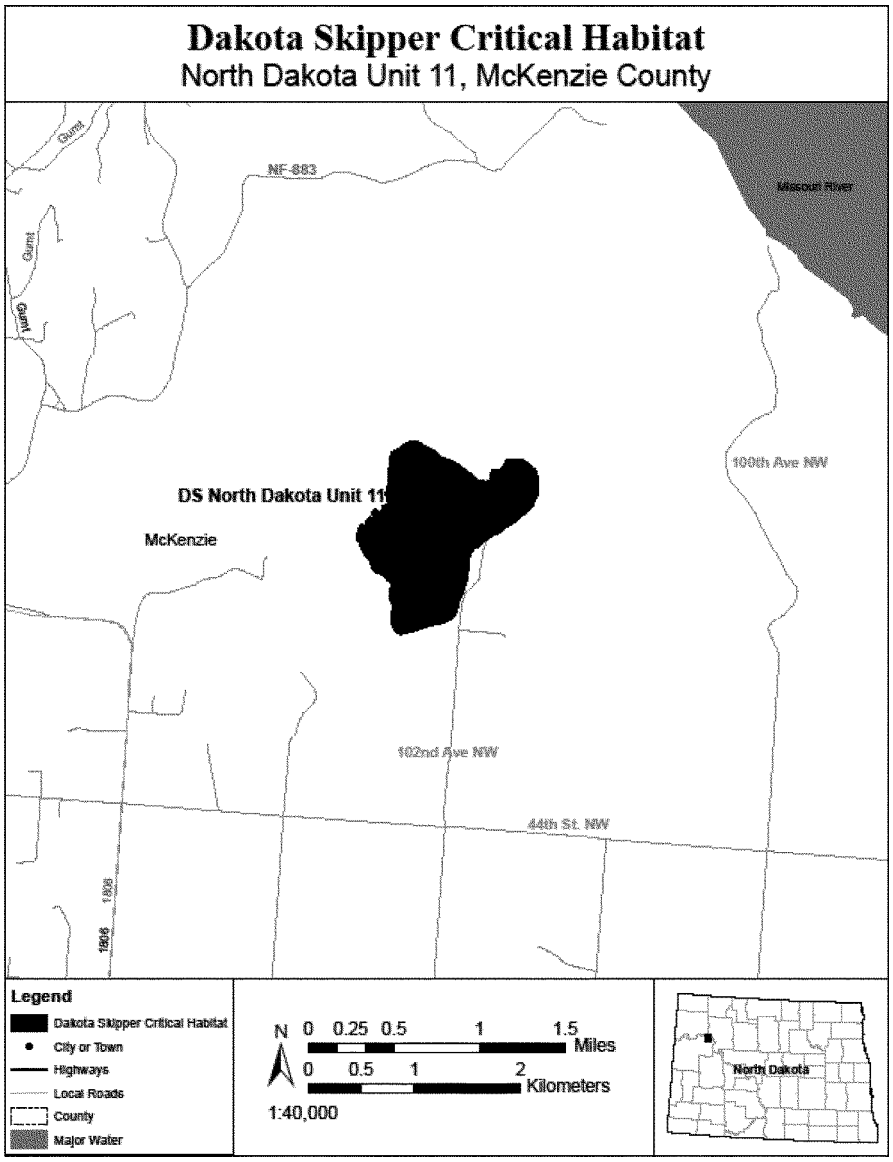
(24) DS North Dakota Unit 9, Rolette County, North Dakota. Map of DS North Dakota Unit 9 follows:



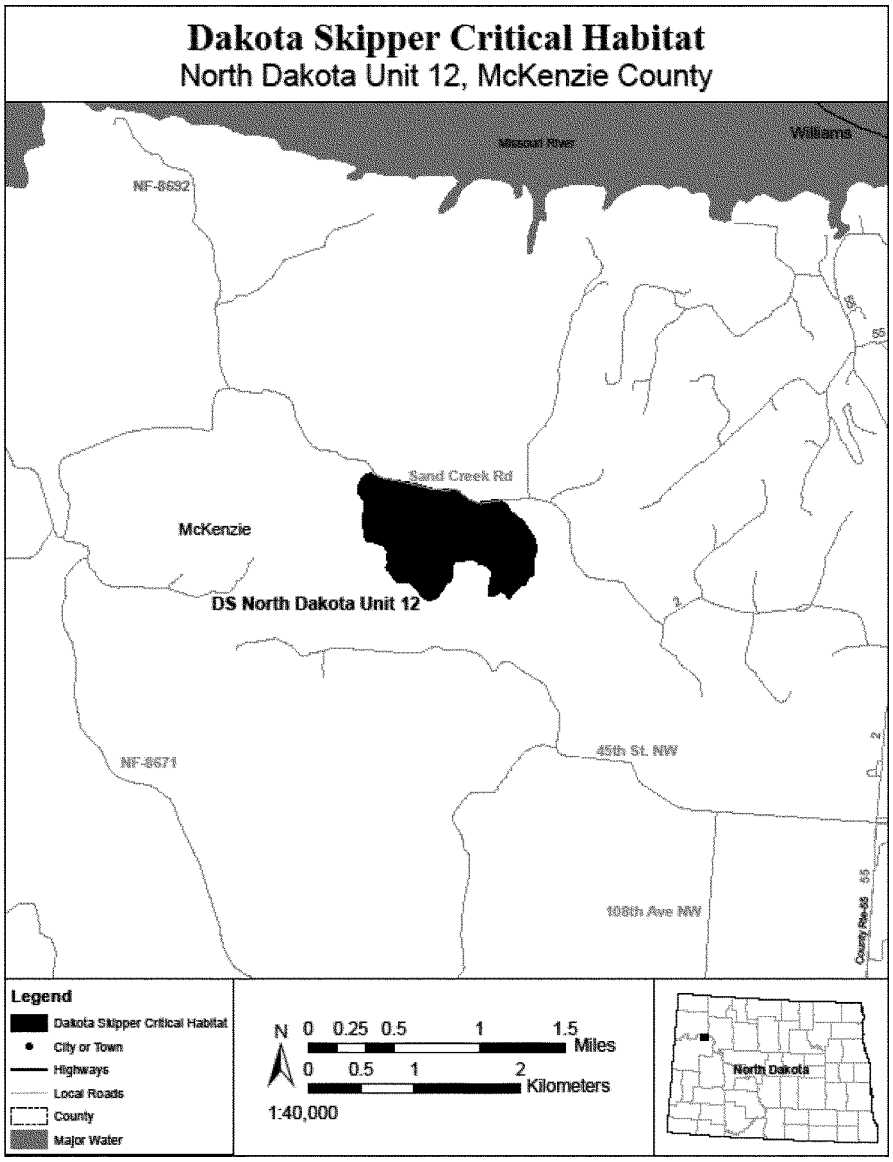
(25) DS North Dakota Unit 10, McKenzie County, North Dakota. Map of DS North Dakota Unit 10 follows:



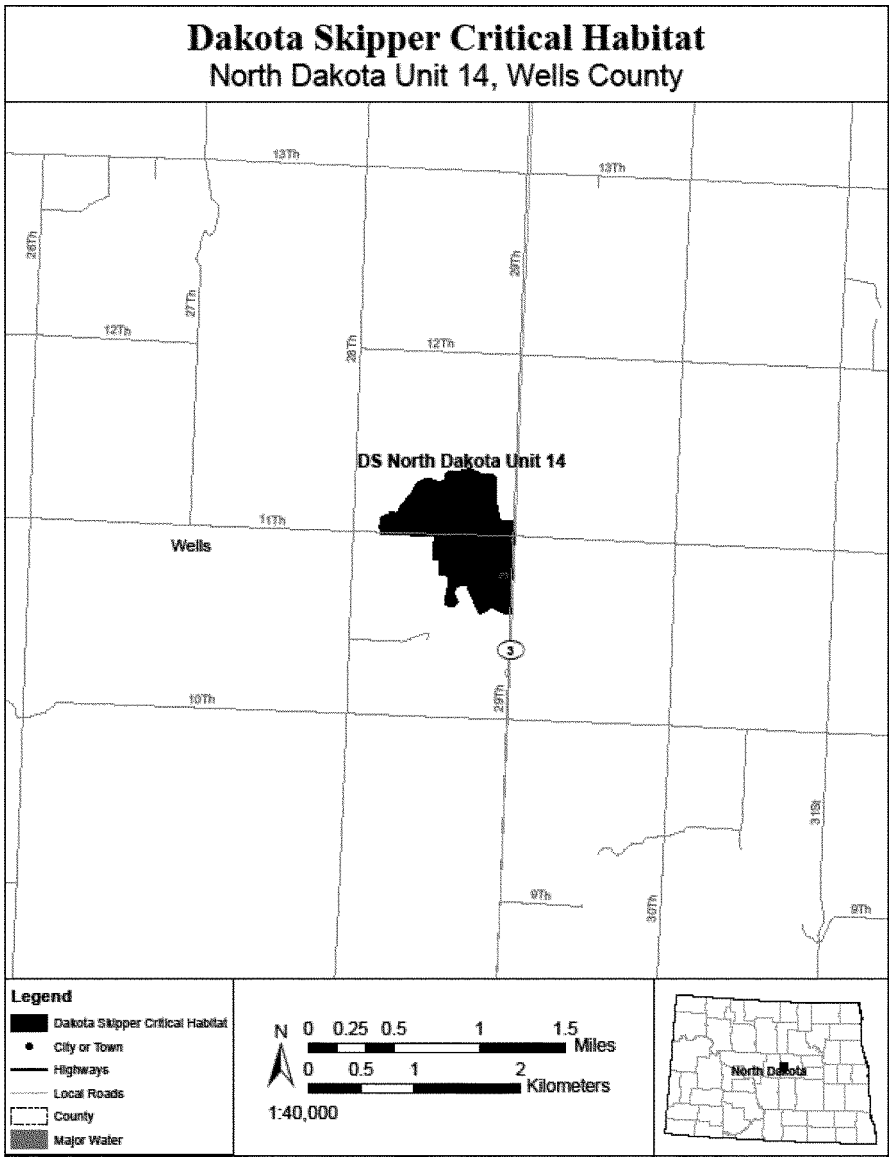
(26) DS North Dakota Unit 11, McKenzie County, North Dakota. Map of DS North Dakota Unit 11 follows:



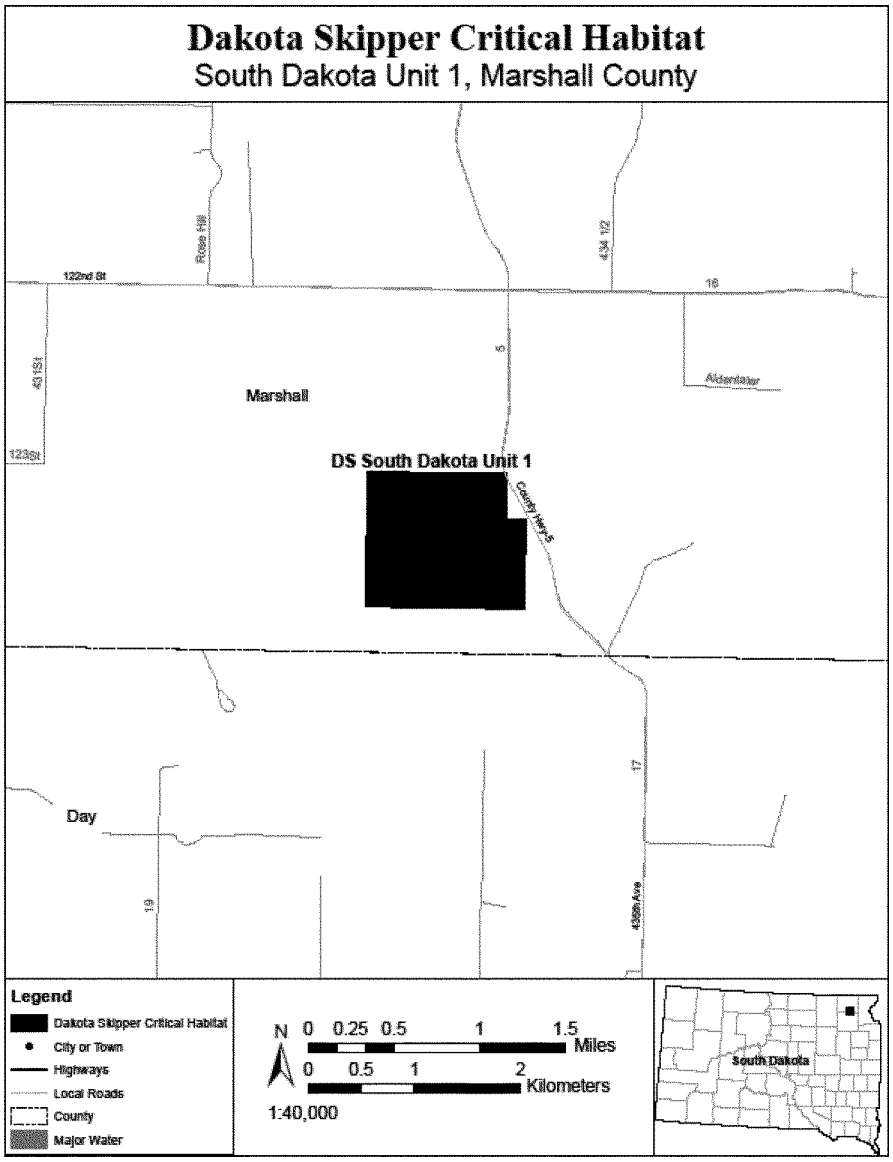
(27) DS North Dakota Unit 12, McKenzie County, North Dakota. Map of DS North Dakota Unit 12 follows:



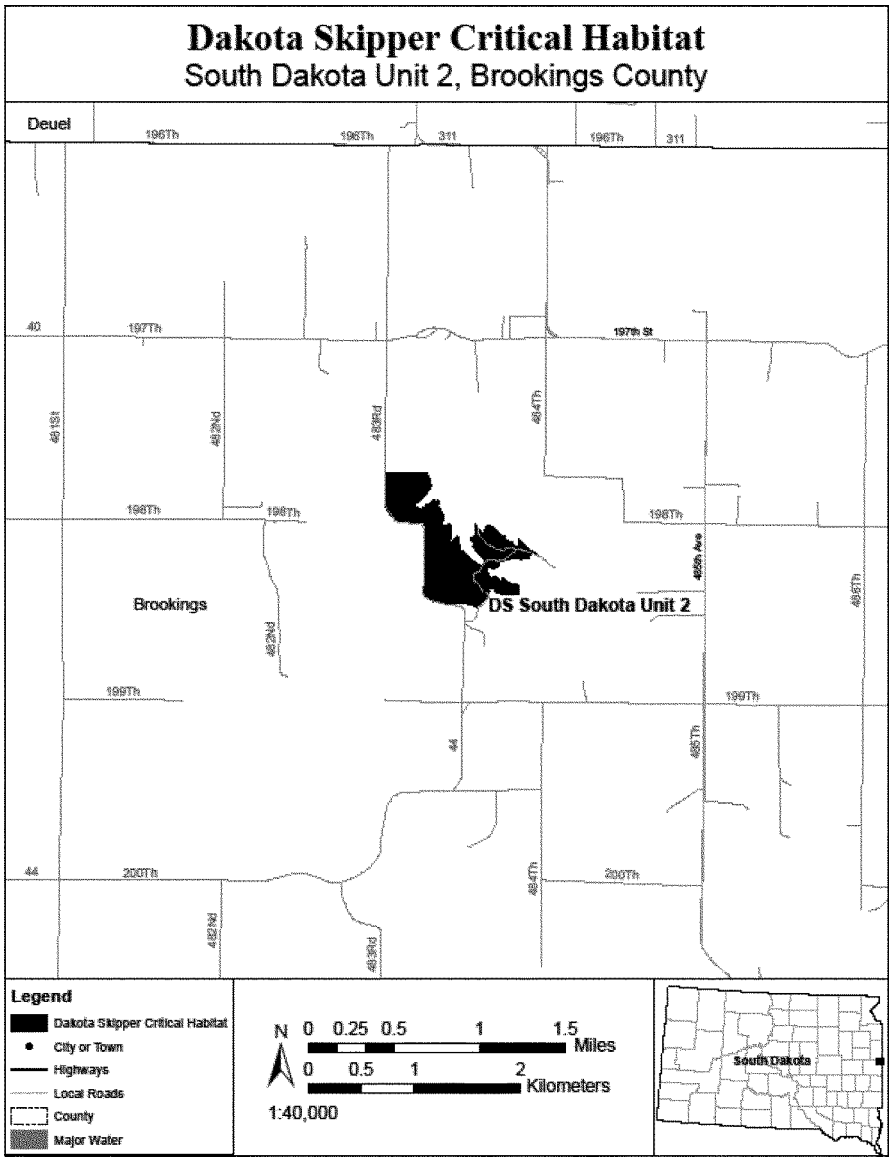
(28) DS North Dakota Unit 14, Wells County, North Dakota. Map of DS North Dakota Unit 14 follows:



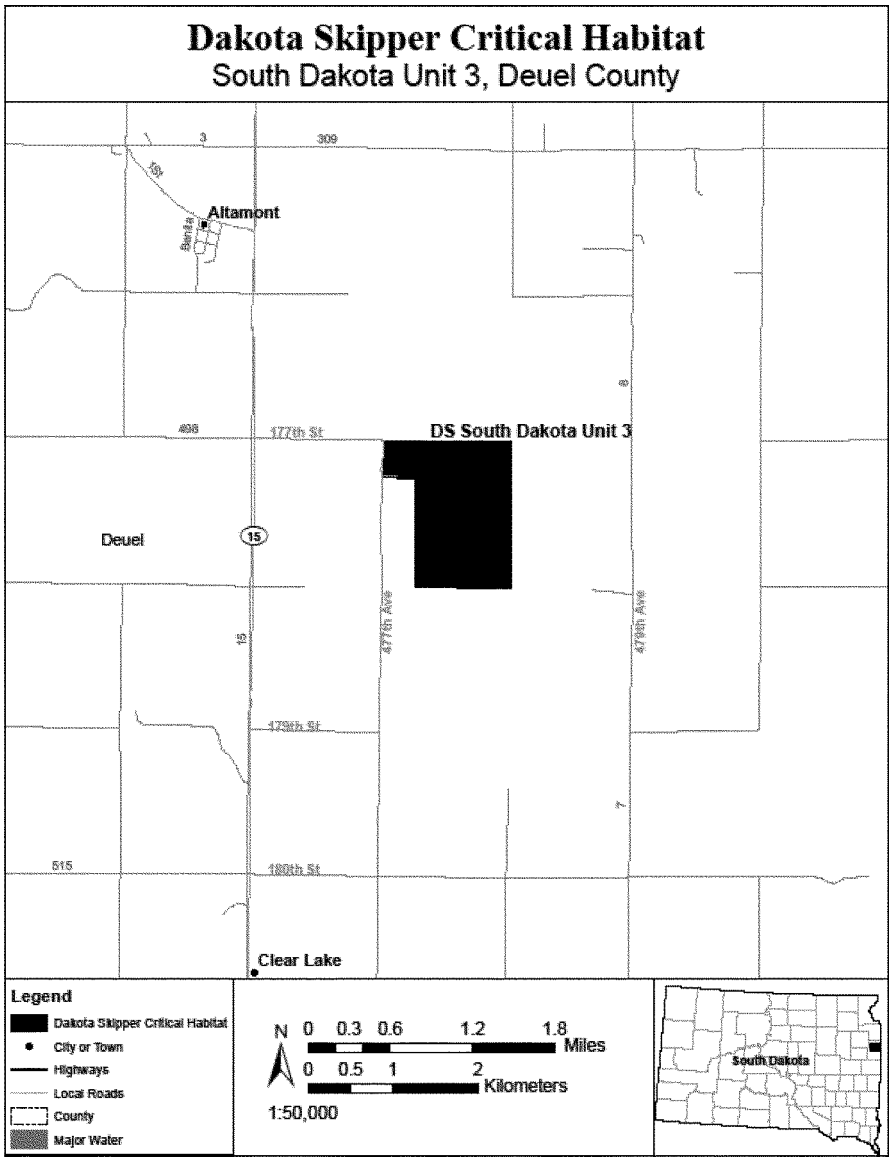
(29) DS South Dakota Unit 1, Marshall County, South Dakota. Map of DS South Dakota Unit 1 follows:



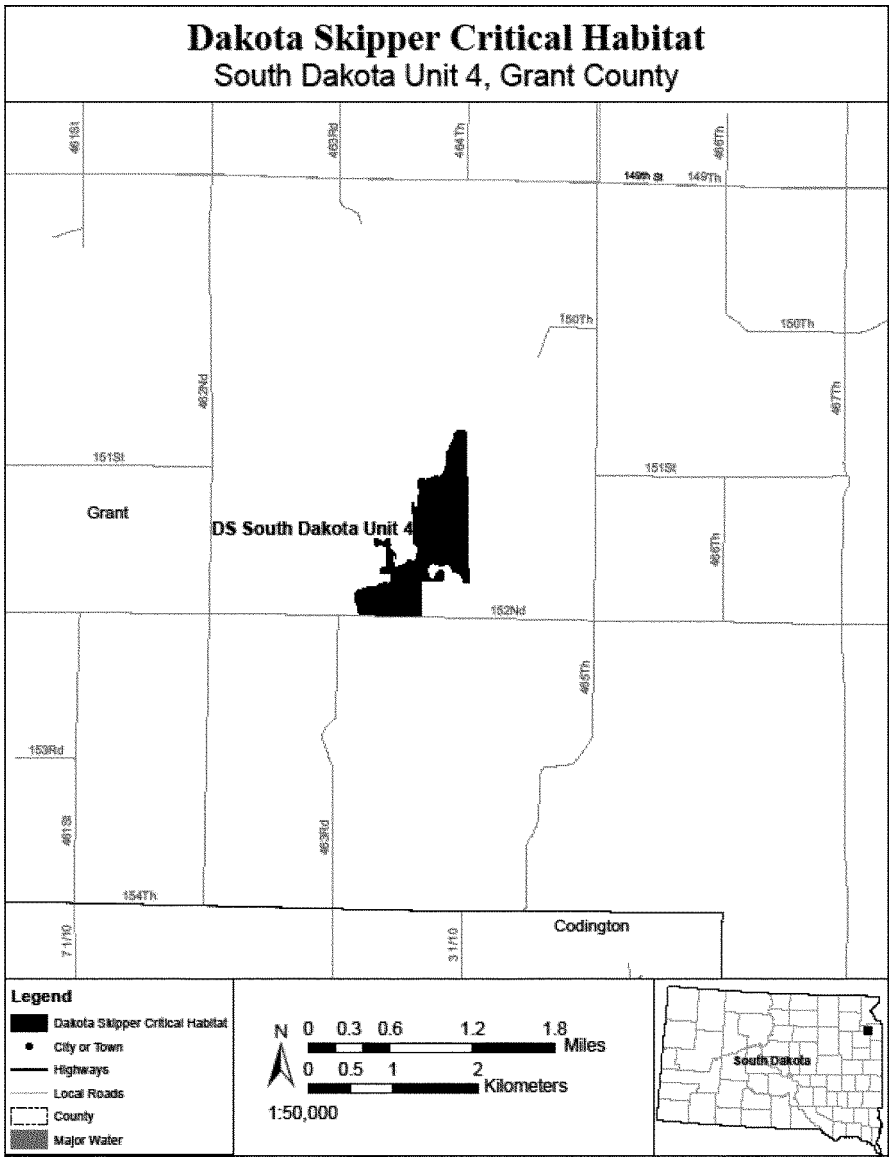
(30) DS South Dakota Unit 2, Brookings County, South Dakota. Map of DS South Dakota Unit 2 follows:



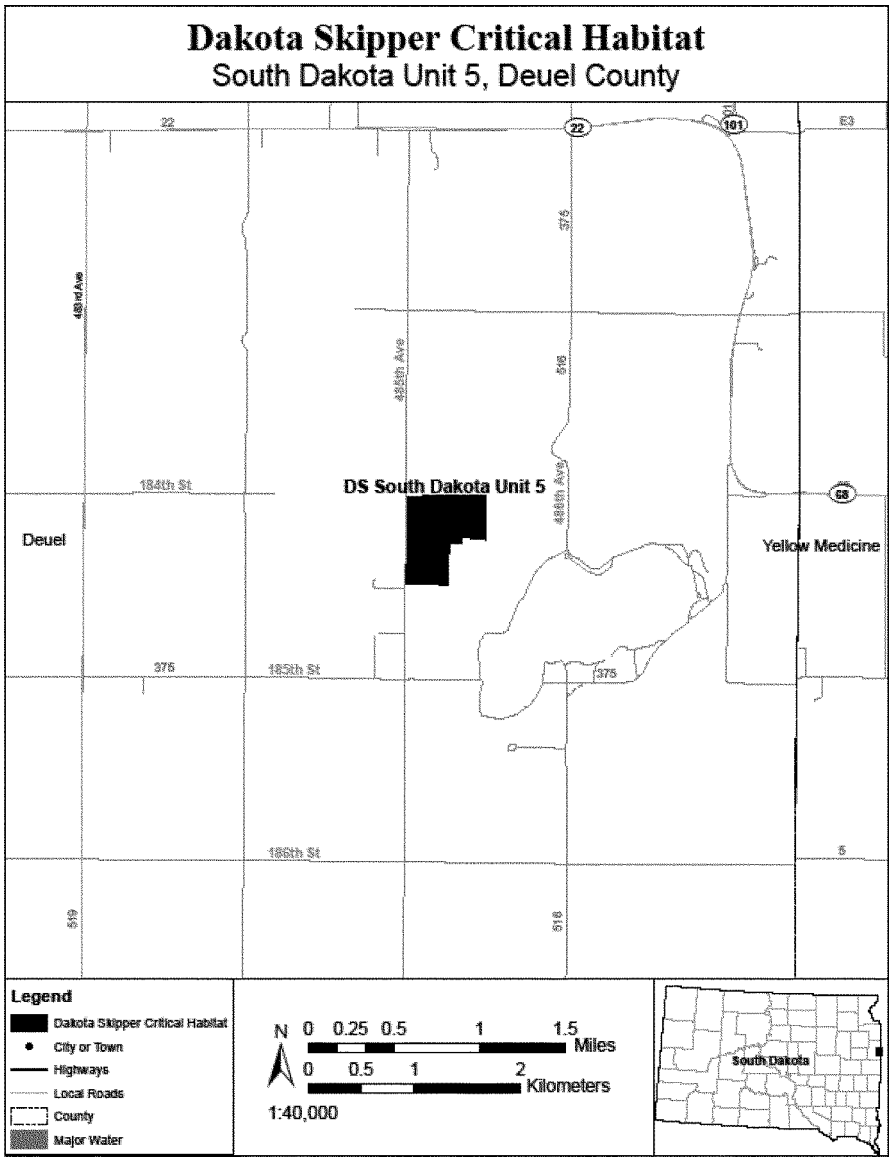
(31) DS South Dakota Unit 3, Deuel County, South Dakota. Map of DS South Dakota Unit 3 follows:



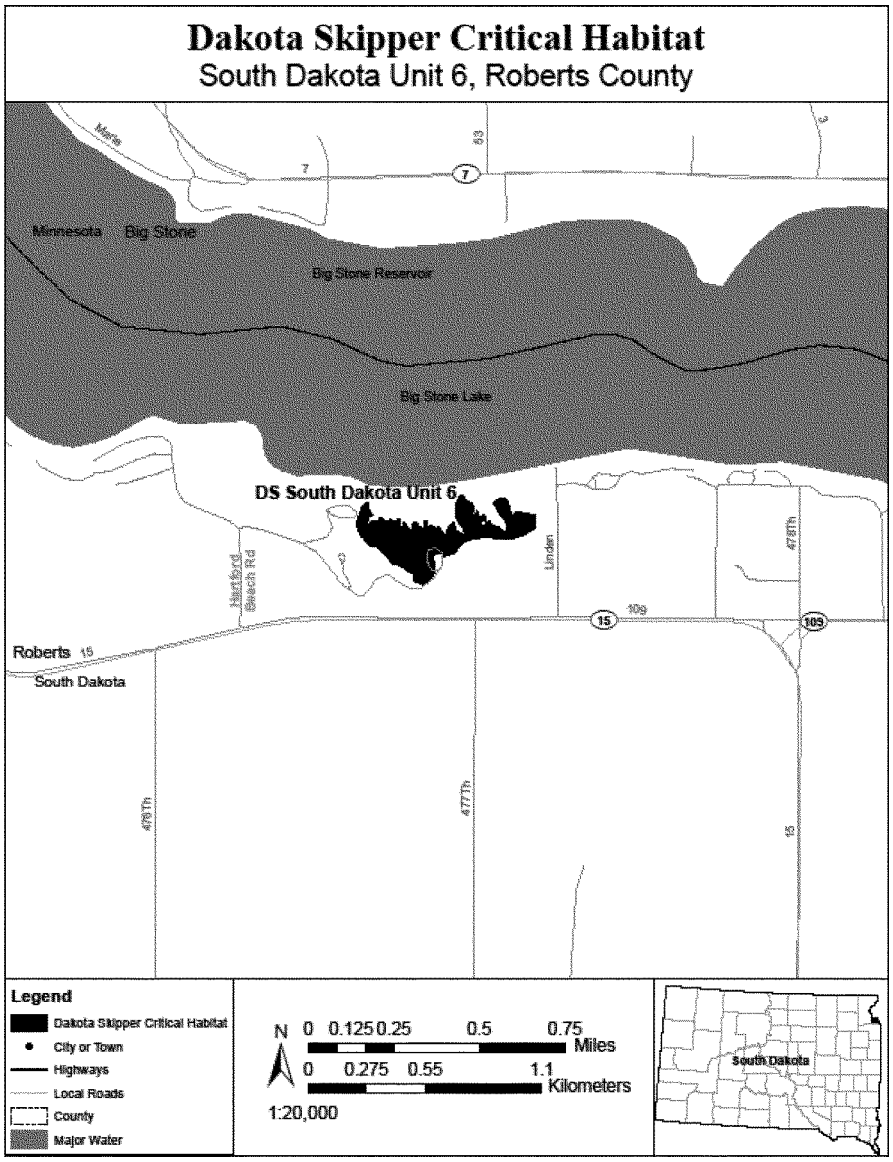
(32) DS South Dakota Unit 4, Grant County, South Dakota. Map of DS South Dakota Unit 4 follows:



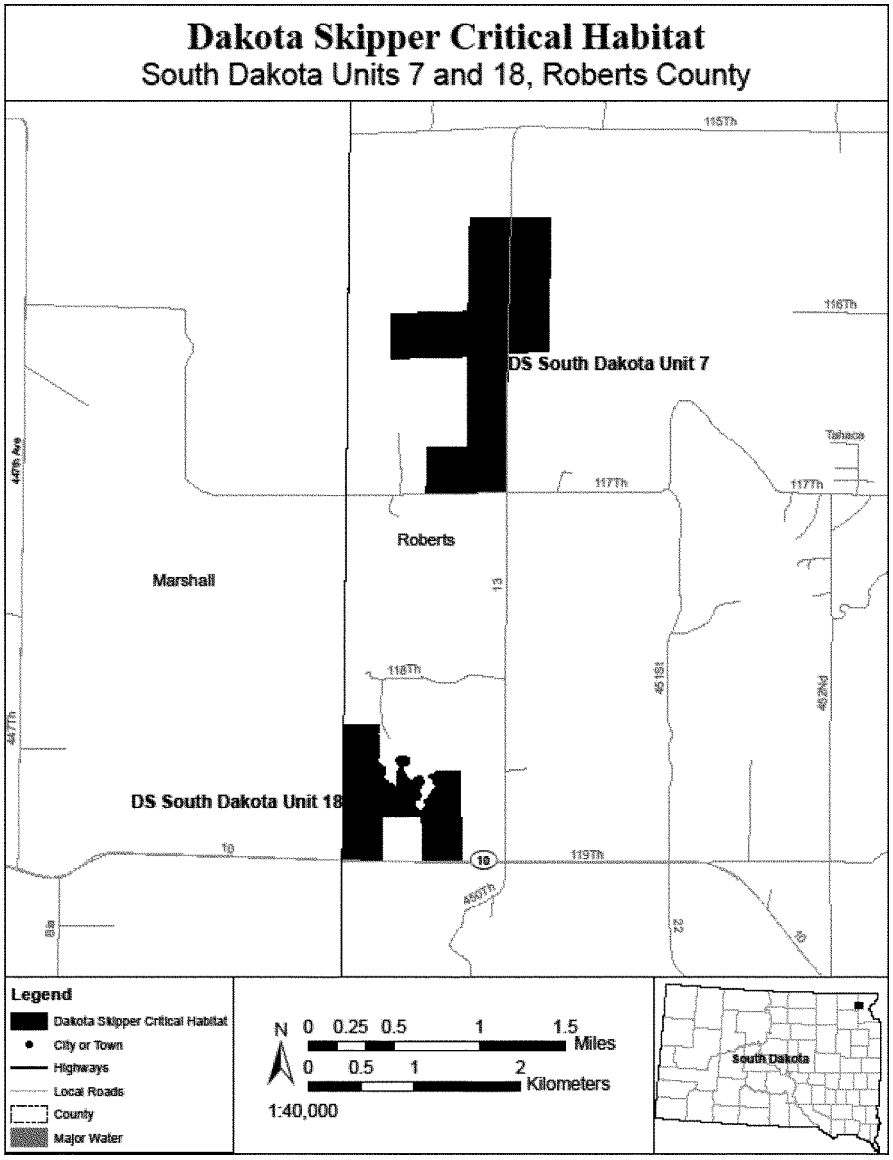
(33) DS South Dakota Unit 5, Deuel County, South Dakota. Map of DS South Dakota Unit 5 follows:



(34) DS South Dakota Unit 6, Roberts County, South Dakota. Map of DS South Dakota Unit 6 follows:

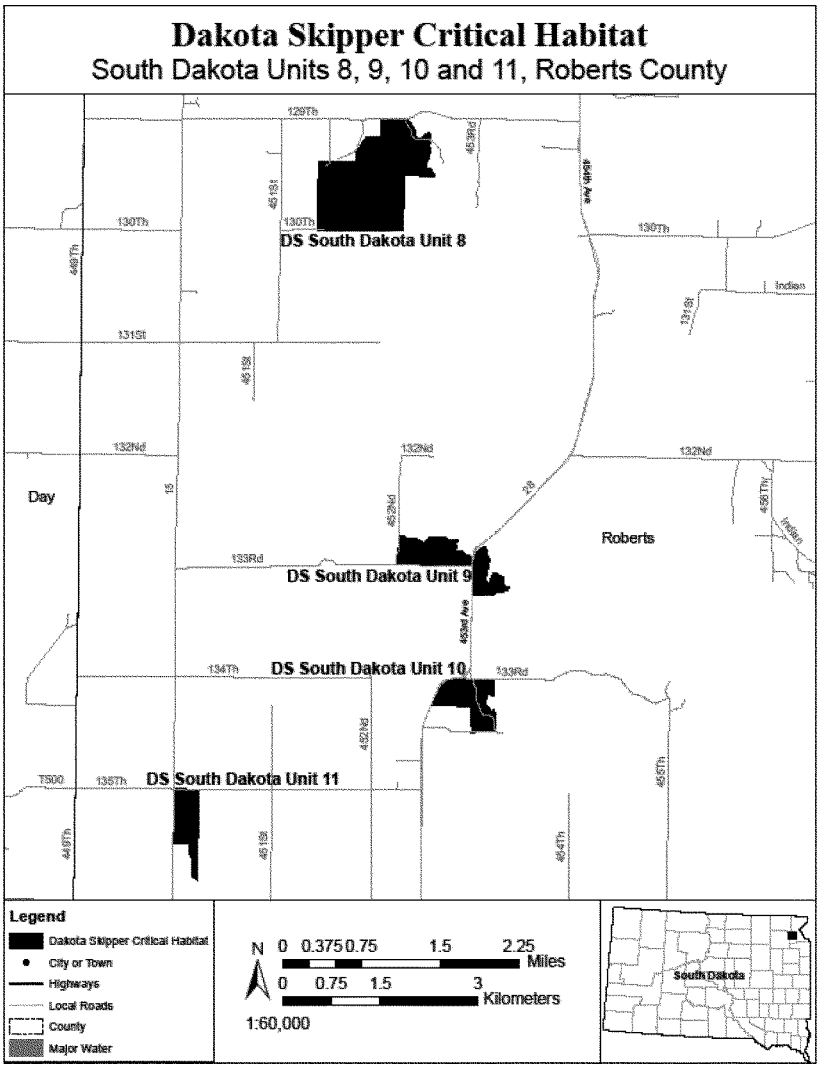


(35) DS South Dakota Units 7 and 18, Roberts County, South Dakota. Map of DS South Dakota Units 7 and 18 follows:

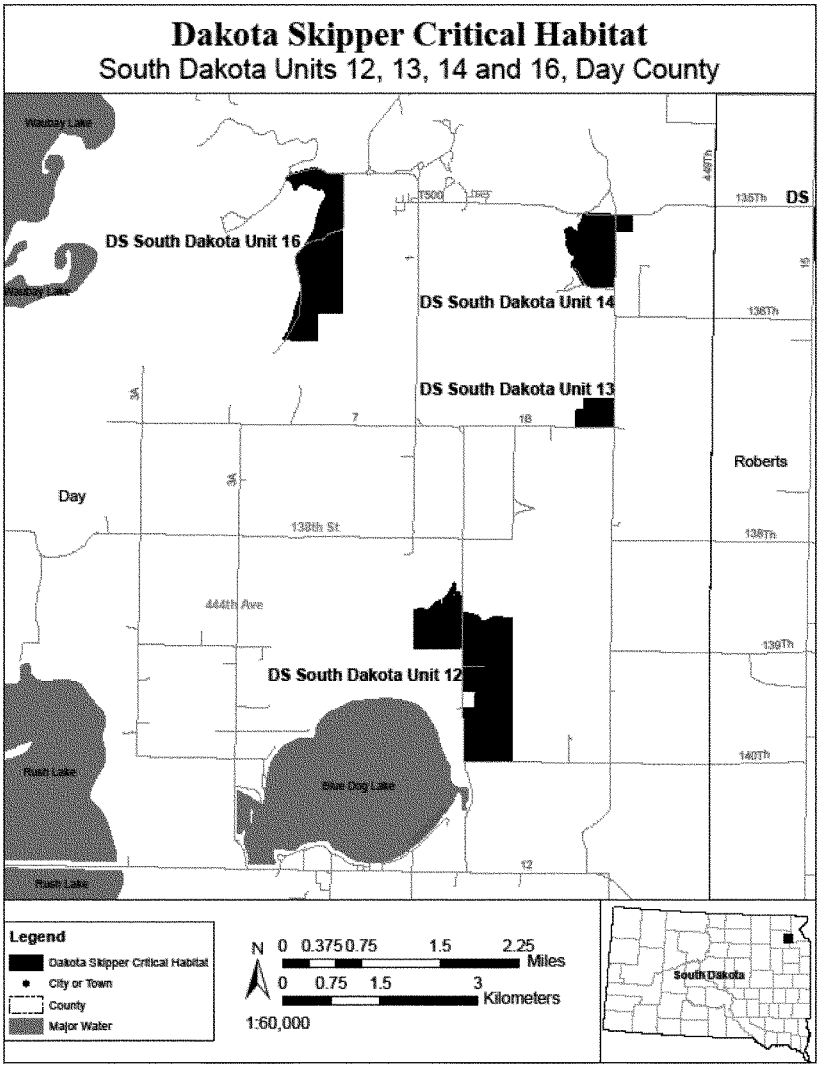


(36) DS South Dakota Units 8, 9, 10, and 11, Roberts County, South Dakota.

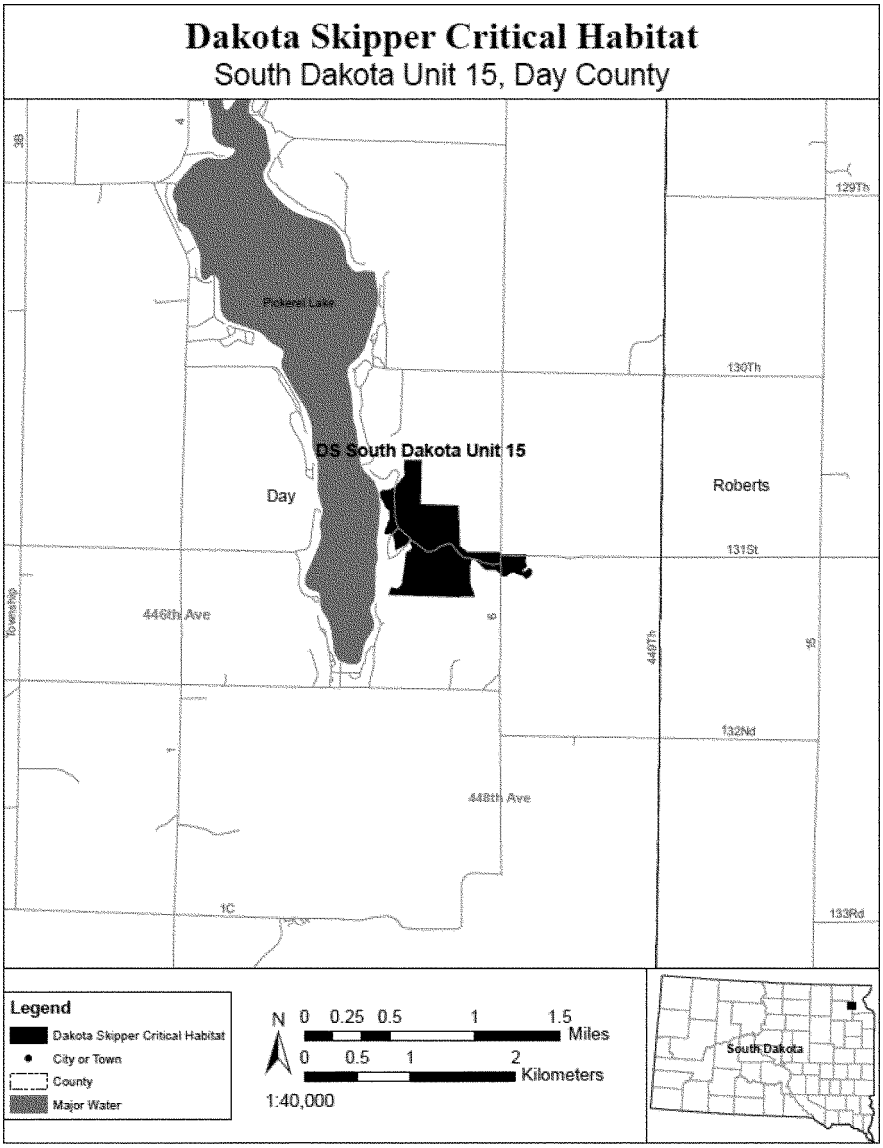
Map of DS South Dakota Unit 8, 9, 10, and 11 follows:



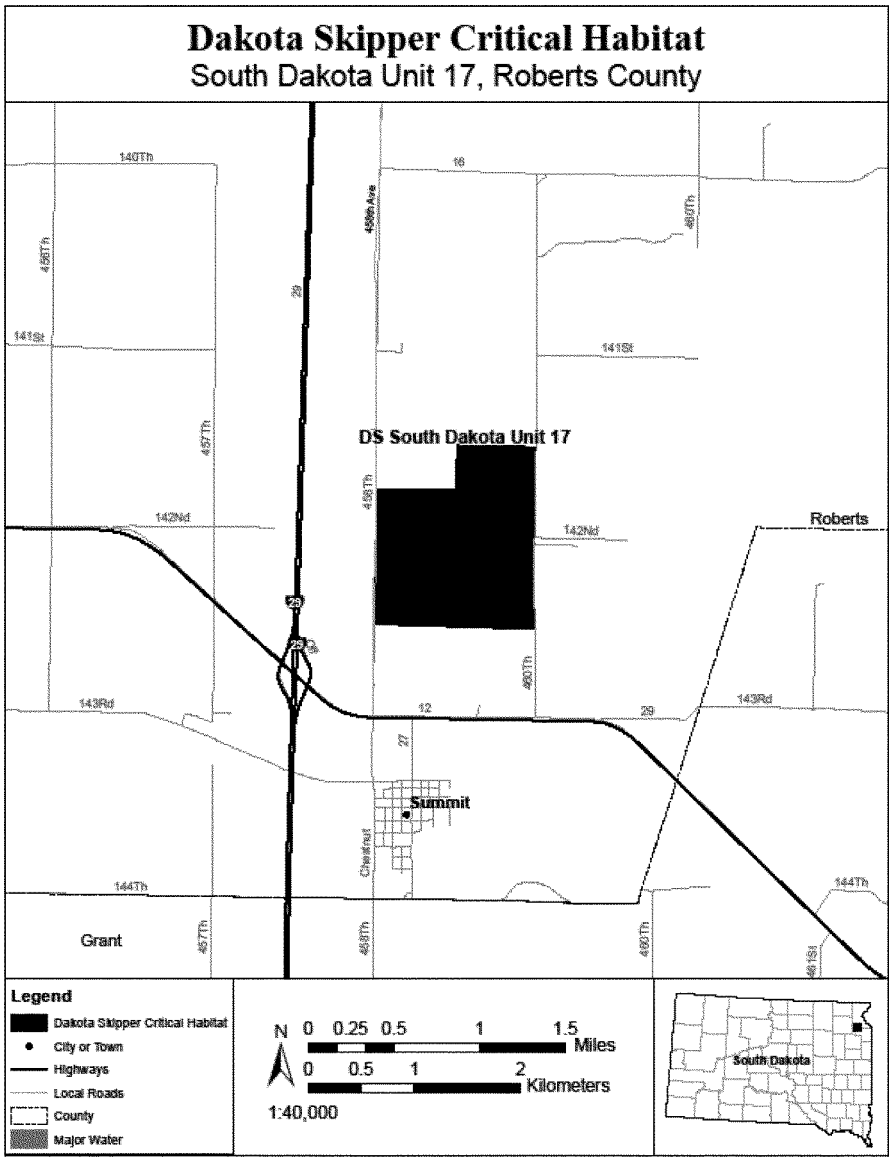
(37) DS South Dakota Unit 12, 13, 14, and 16, Day County, South Dakota. Map of DS South Dakota Unit 12, 13, 14, and 16 follows:



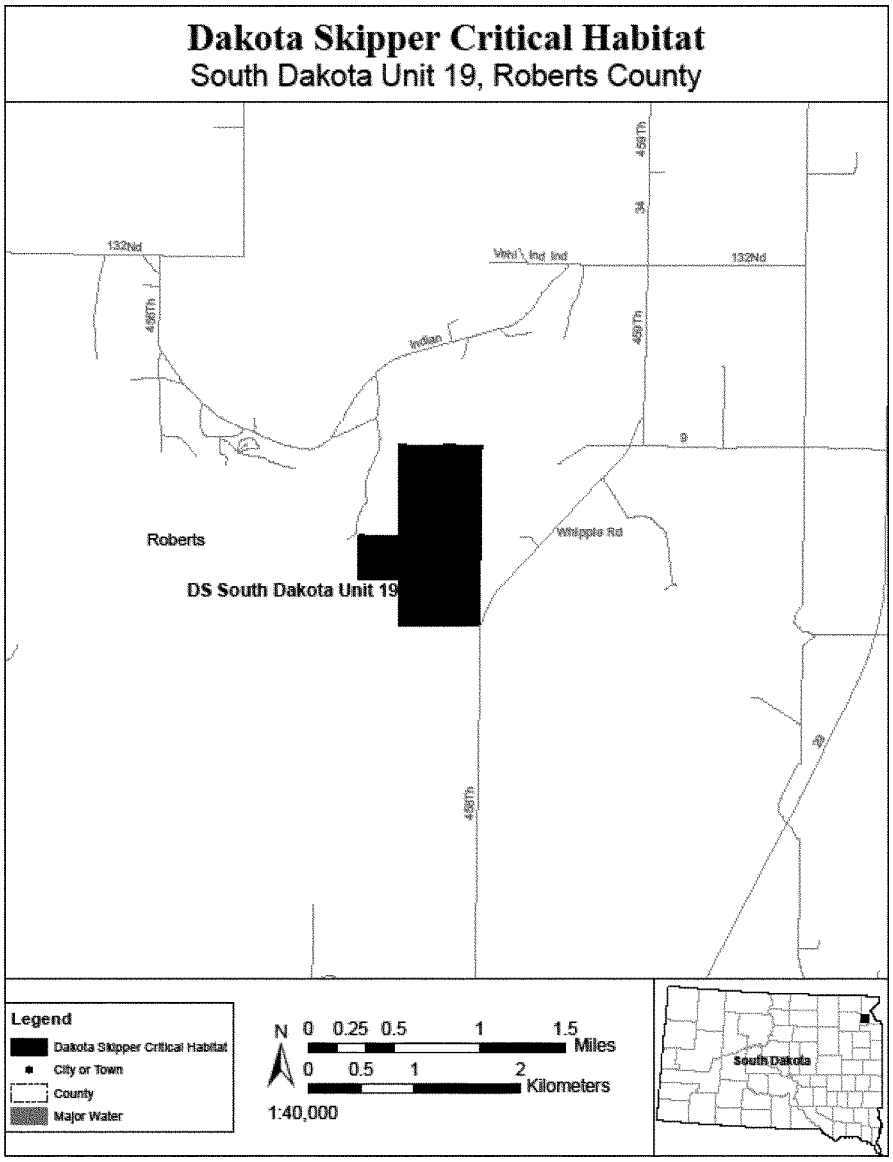
(38) DS South Dakota Unit 15, Day County, South Dakota. Map of DS South Dakota Unit 15 follows:



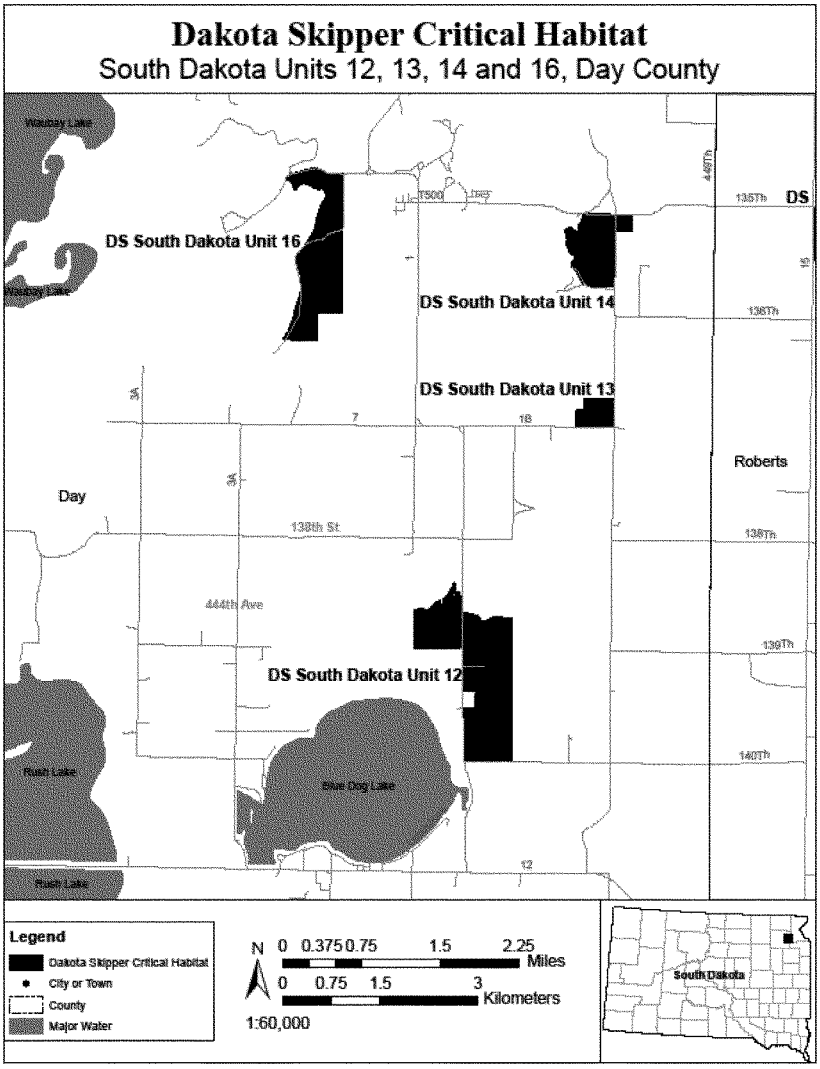
(39) DS South Dakota Unit 17, Roberts County, South Dakota. Map of DS South Dakota Unit 17 follows:



(40) DS South Dakota Unit 19, Roberts County, South Dakota. Map of DS South Dakota Unit 19 follows:



(41) DS South Dakota Units 20, 21, and 22, Brookings County, South Dakota. Map of DS South Dakota Units 20, 21, and 22 follows:



* * * * *

Poweshiek Skipperling *(Oarisma poweshiek)*

(1) Critical habitat units are designated for Cerro Gordo, Dickinson, Emmet, Howard, Kossuth, and Osceola Counties in Iowa; in Hilsdale, Jackson, Lenawee, Livingston, Oakland, and Washtenaw Counties in Michigan; Chippewa, Clay, Cottonwood, Douglas, La Qui Parle, Lincoln, Lyon, Mahnomen, Murray, Norman, Pipestone, Pope, Swift, and Wilkin Counties in Minnesota; Ransom, Richland, and Sargent Counties in North Dakota; Brookings, Day, Deuel, Grant, Marshall, Moody, and Roberts Counties in South Dakota; and Green Lake and Waukesha Counties in Wisconsin.

(2) Within these areas, the primary constituent elements of the physical or biological features essential to the conservation of Poweshiek skipperling consist of four components:

(i) Primary Constituent Element 1—Wet-mesic to dry tallgrass remnant untilled prairies or remnant moist meadows containing:

(A) A predominance of native grasses and native flowering forbs;

(B) Undisturbed (untilled) glacial soil types including, but not limited to, loam, sandy loam, loamy sand, gravel, organic soils (peat), or marl that provide the edaphic features conducive to Poweshiek skipperling larval survival and native-prairie vegetation;

(C) Depressional wetlands or low wet areas, within or adjacent to prairies that provide shelter from high summer temperatures and fire;

(D) If present, trees or large shrub cover less than 5 percent of area in dry prairies and less than 25 percent in wet-mesic prairies and prairie fens; and

(E) If present, nonnative invasive plant species occurring in less than 5 percent of area.

(ii) Primary Constituent Element 2—Prairie fen habitats containing:

(A) A predominance of native grasses and native flowering forbs;

(B) Undisturbed (untilled) glacial soil types including, but not limited to, organic soils (peat), or marl that provide the edaphic features conducive to Poweshiek skipperling larval survival and native-prairie vegetation;

(C) Depressional wetlands or low wet areas, within or adjacent to prairies that provide shelter from high summer temperatures and fire;

(D) Hydraulic features necessary to maintain prairie fen groundwater flow and prairie fen plant communities;

(E) If present, trees or large shrub cover less than 25 percent of the unit; and

(F) If present, nonnative invasive plant species occurring in less than 5 percent of area.

(iii) Primary Constituent Element 3—Native grasses and native flowering forbs for larval and adult food and shelter, specifically:

(A) At least one of the following native grasses available to provide larval food and shelter sources during Poweshiek skipperling larval stages: prairie dropseed *(Sporobolus heterolepis),* little bluestem *(Schizachyrium scoparium),* sideoats grama *(Bouteloua curtipendula),* or mat muhly *(Muhlenbergia richardsonis);* and

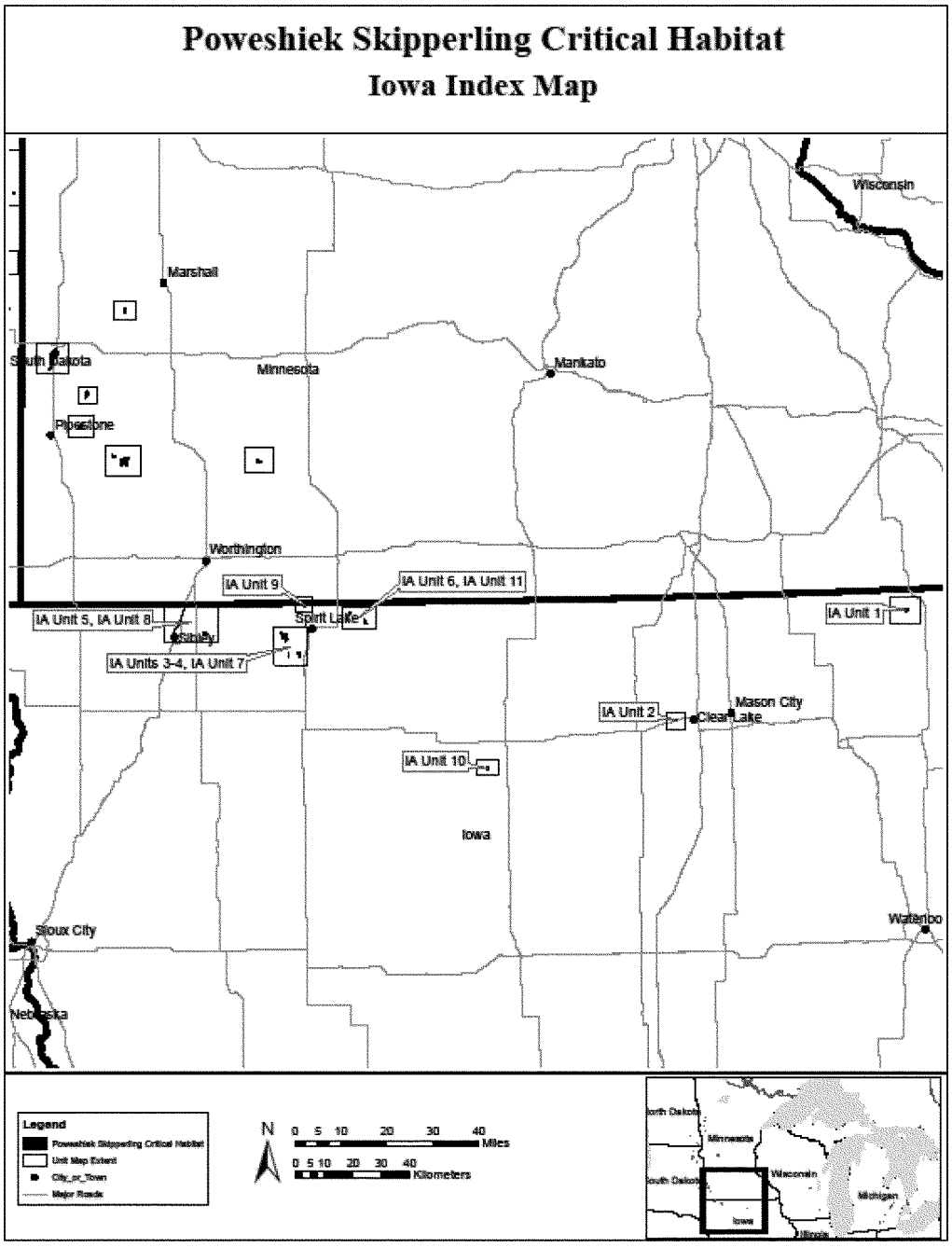
(B) At least one of the following forbs in bloom to provide nectar and water sources during the Poweshiek skipperling flight period: purple coneflower *(Echinacea angustifolia),* black-eyed Susan *(Rudbeckia hirta),* smooth ox-eye *(Heliopsis helianthoides),* stiff tickseed *(Coreopsis palmata),* palespike lobelia *(Lobelia spicata),* sticky tofieldia *(Triantha glutinosa),* or shrubby cinquefoil *(Dasiphora fruticosa* ssp. *floribunda).*

(iv) Primary Constituent Element 4—Dispersal grassland habitat that is within 1 km (0.6 mi) of native high-quality remnant prairie (as defined in Primary Constituent Element 1) that connects high-quality wet-mesic to dry tallgrass prairies, moist meadows, or prairie fen habitats. Dispersal grassland habitat consists of the following physical characteristics appropriate for supporting Poweshiek skipperling dispersal; undeveloped open areas dominated by perennial grassland with limited or no barriers to dispersal including tree or shrub cover less than 25 percent of the area and no row crops such as corn, beans, potatoes, or sunflowers.

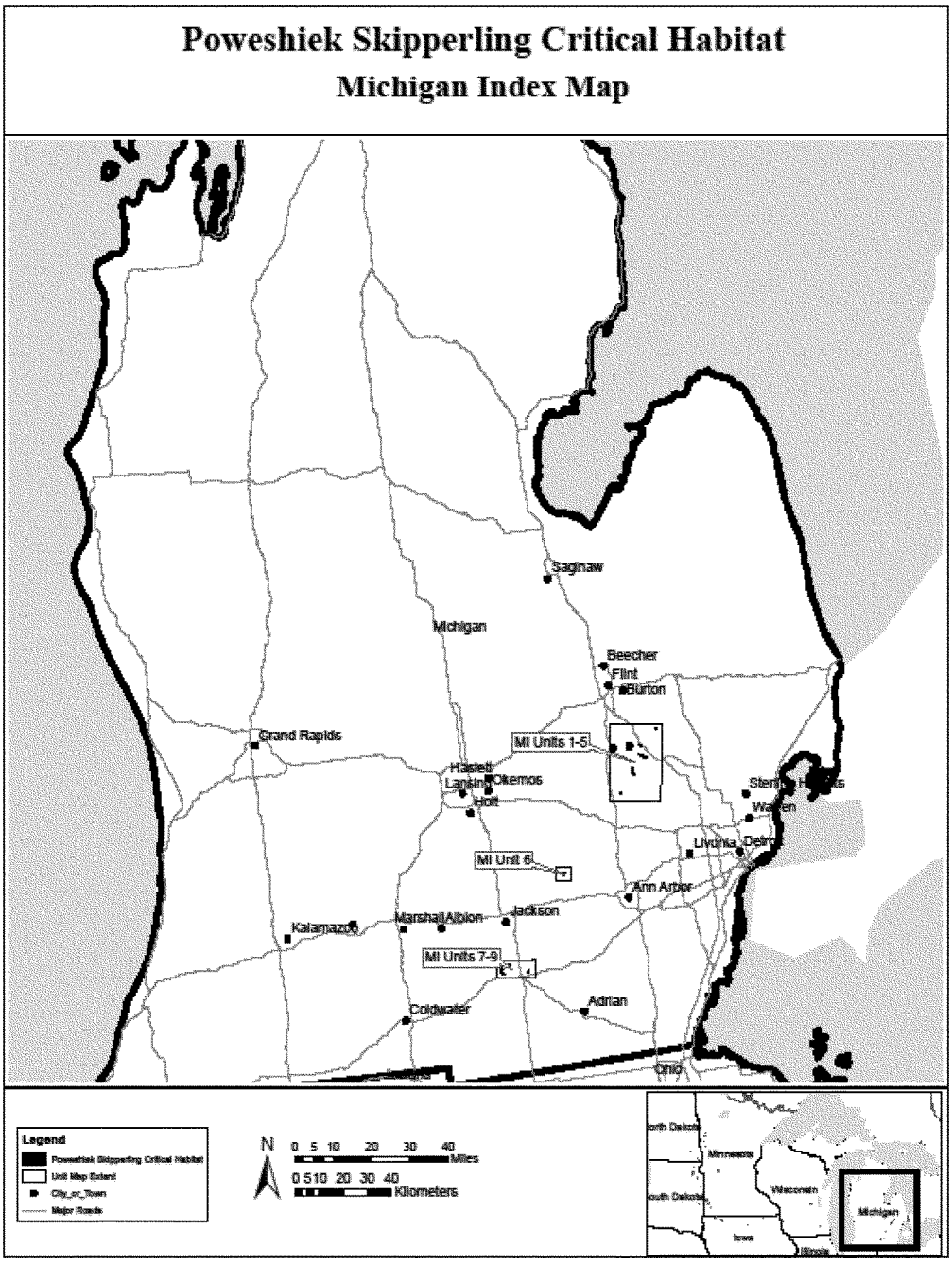
(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on [INSERT EFFECTIVE DATE OF FINAL RULE].

(4) *Critical habitat map units.* Data layers defining map units were created created and digitized using ESRI's ArcMap (version 10.0) and comparing USGS NAIP/FSA high-resolution orthophotography from 2010 or later and previously mapped skipper habitat polygons submitted by contracted researchers or prairie habitat polygons made available from Minnesota Department of Natural Resources' County Biological Survey. Critical habitat units then were mapped in Geographic Coordinate System WGS84. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at the Service's internet site (*http://www.fws.gov/midwest/Endangered/*), at *http://www.regulations.gov* at Docket No. FWS–R3–ES–2013–0017, and at the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

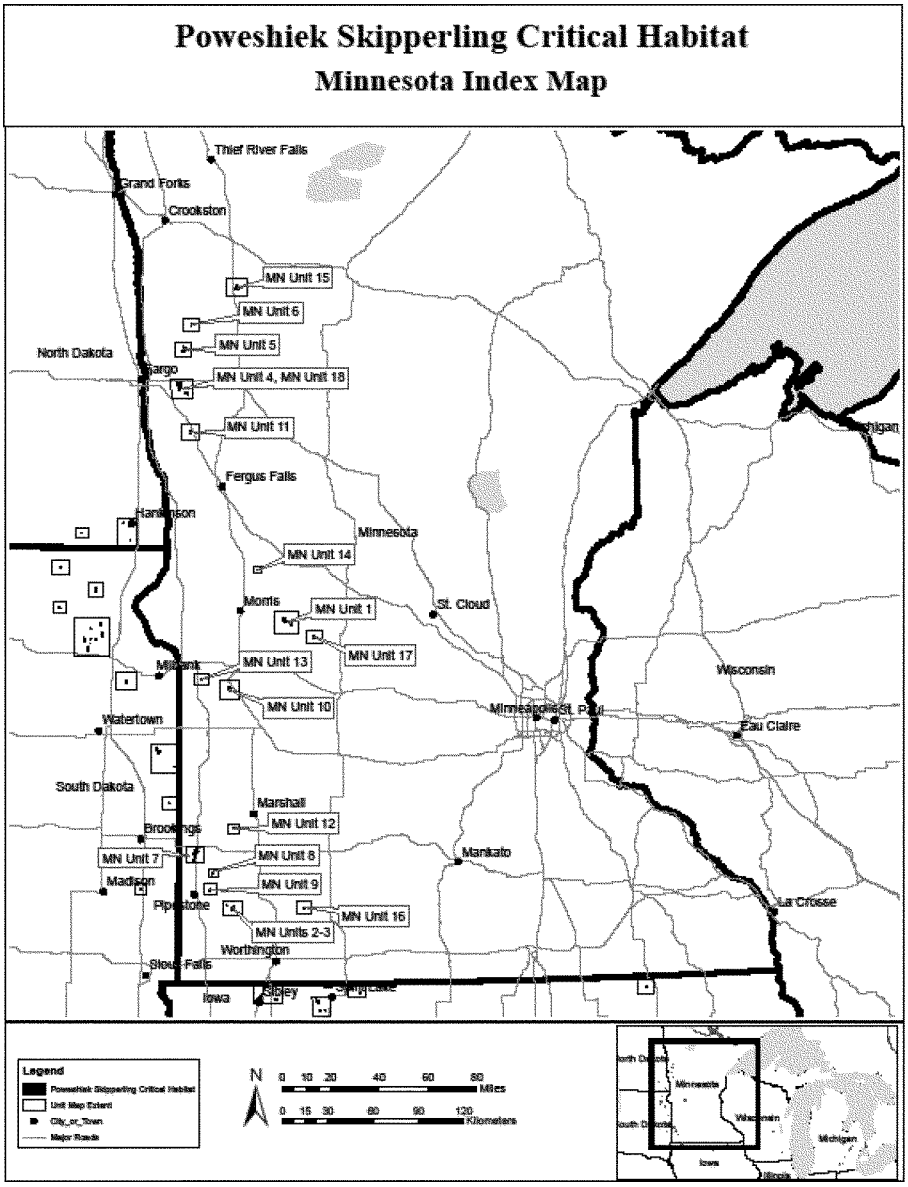
(5) Iowa index map follows:



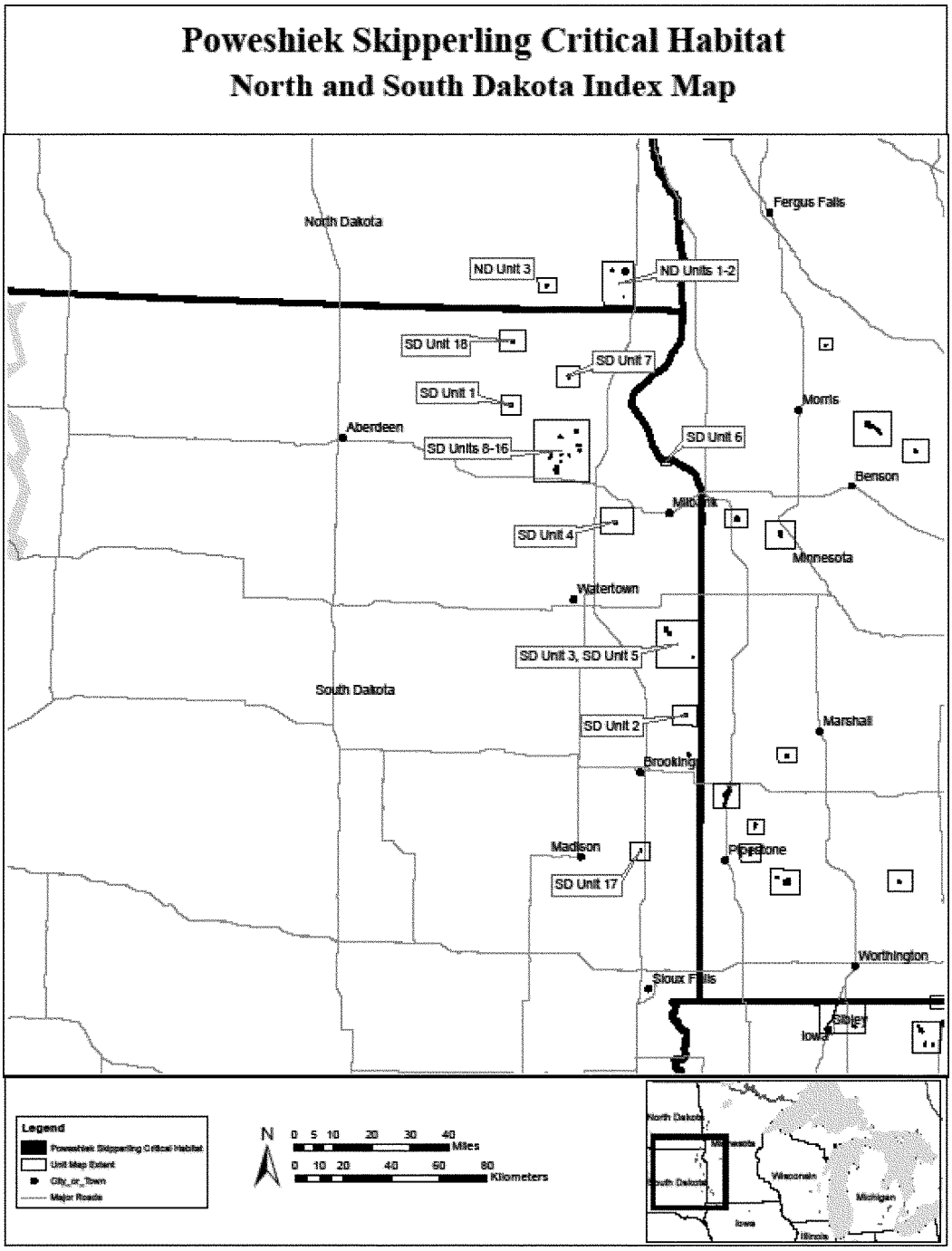
(6) Michigan index map follows:



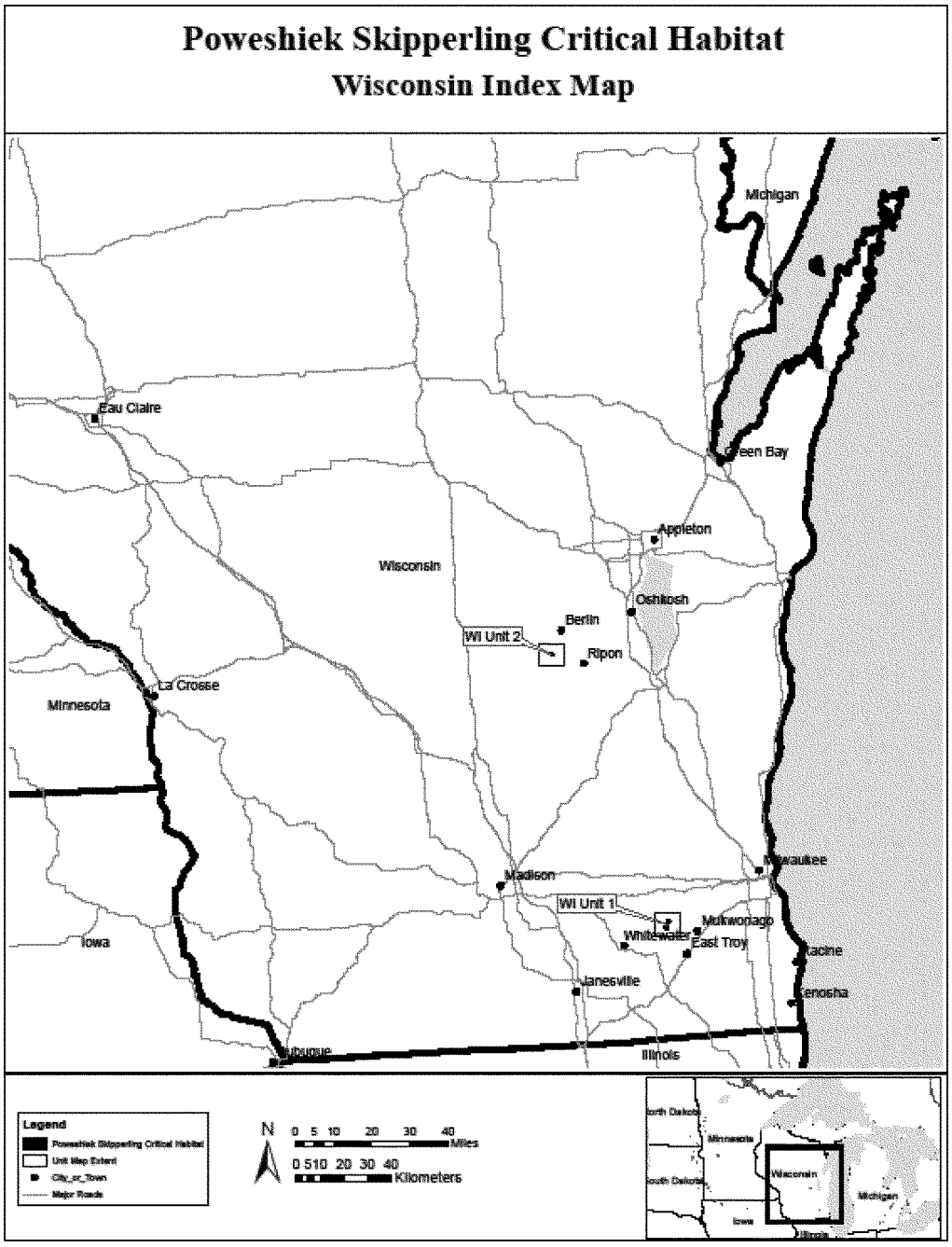
(7) Minnesota index map follows:



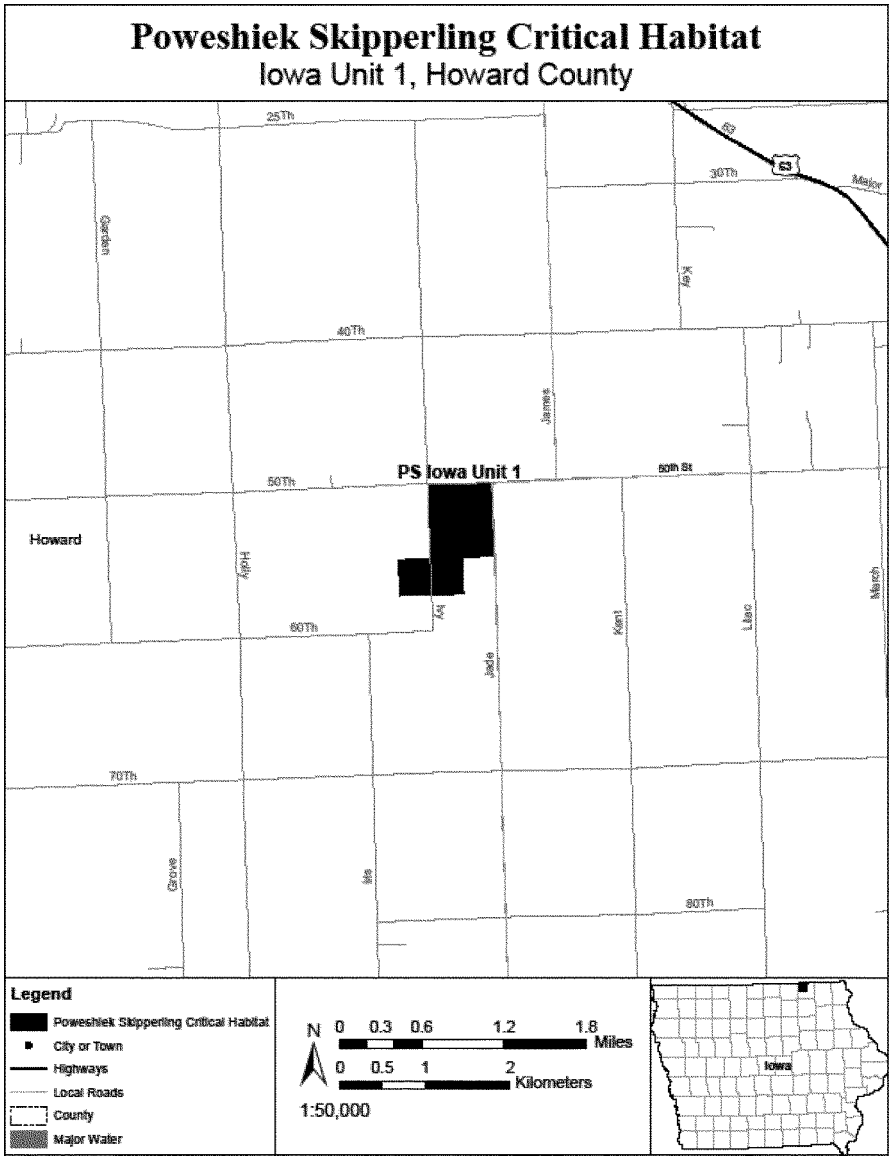
(8) North and South Dakota index map follows:



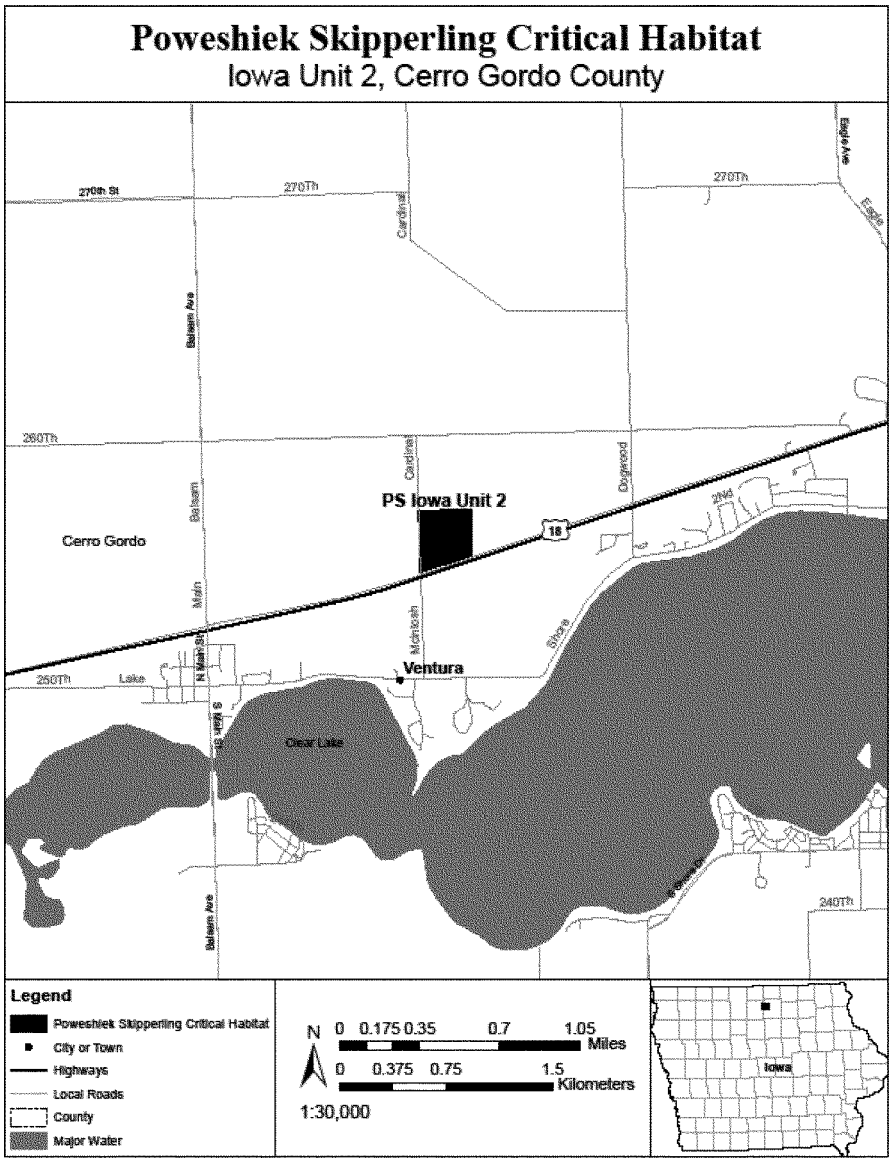
(9) Wisconsin index map follows:



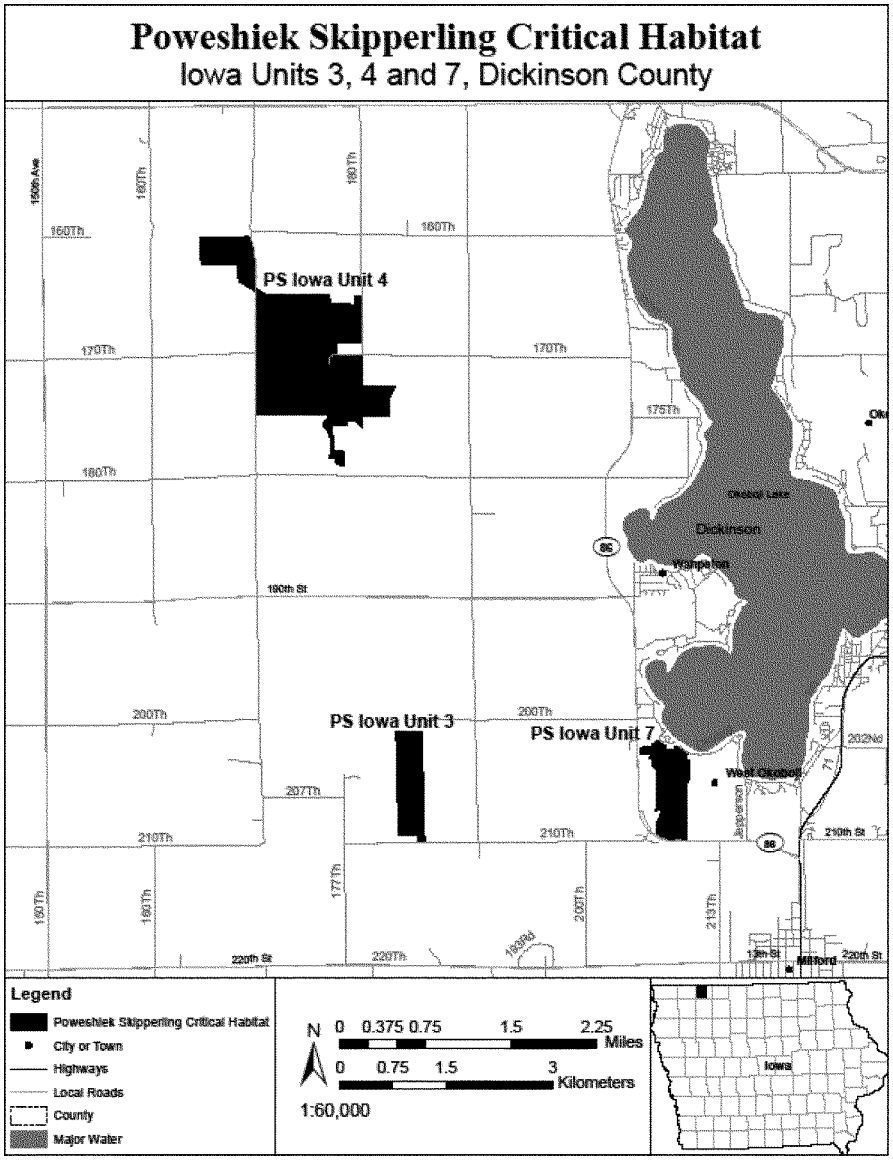
(10) PS Iowa Unit 1, Howard County, Iowa. Map of PS Iowa Unit 1 follows:



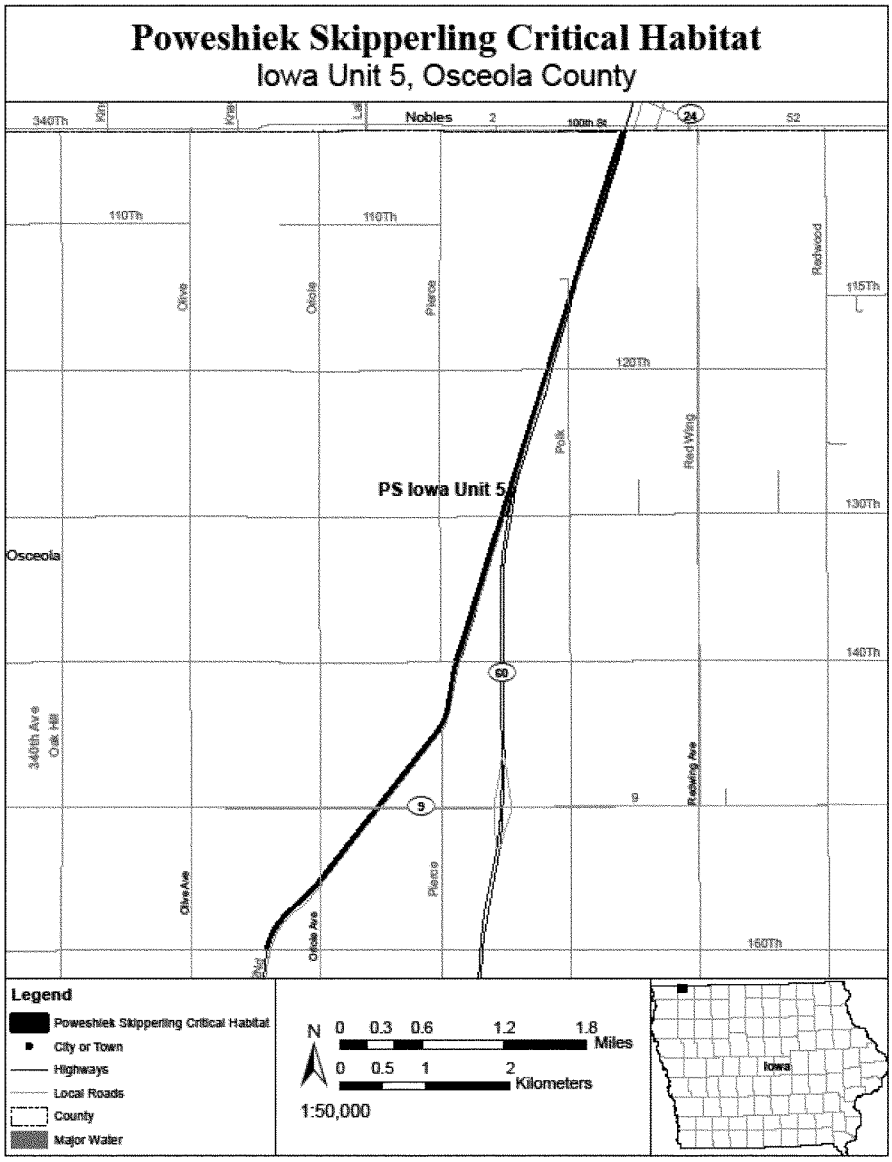
(11) PS Iowa Unit 2, Cerro Gordo County, Iowa. Map of PS Iowa Unit 2 follows:



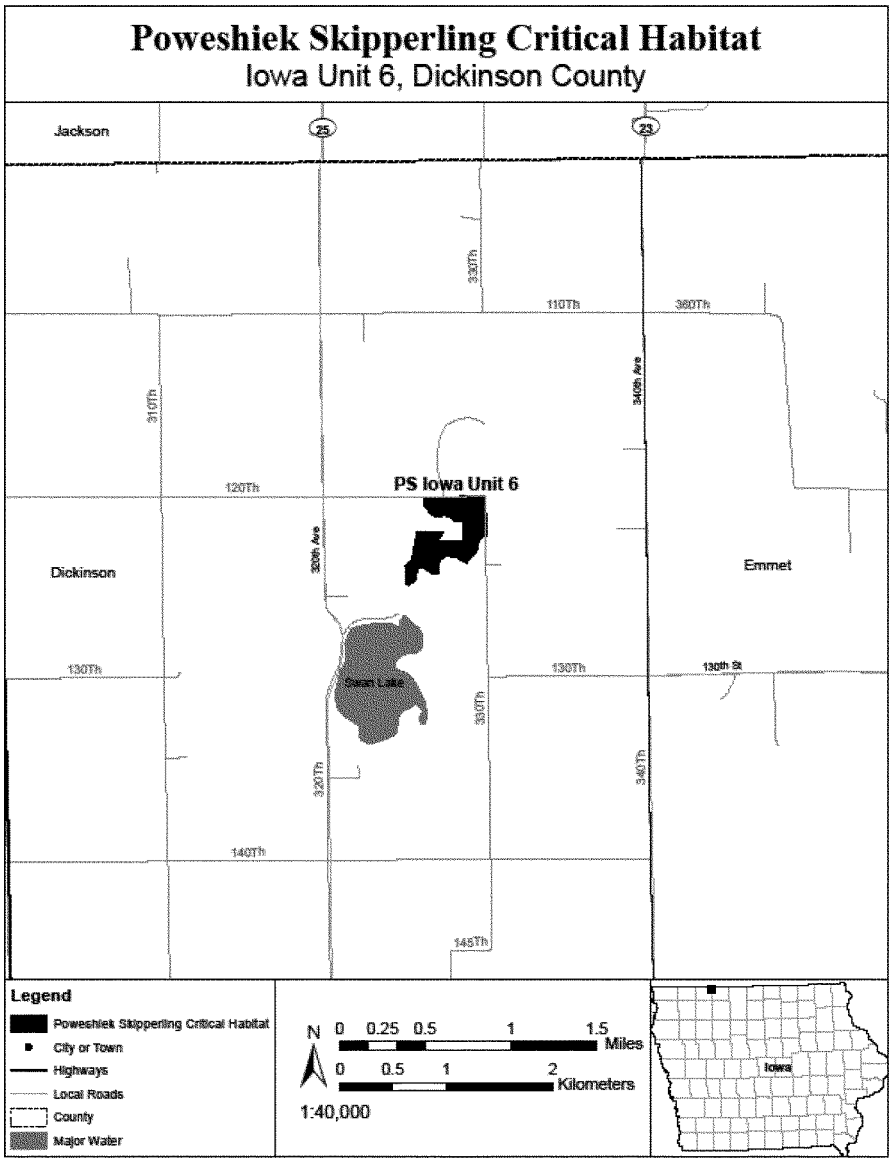
(12) PS Iowa Units 3, 4, and 7, Dickinson County, Iowa. Map of PS Iowa Units 3, 4, and 7 follows:



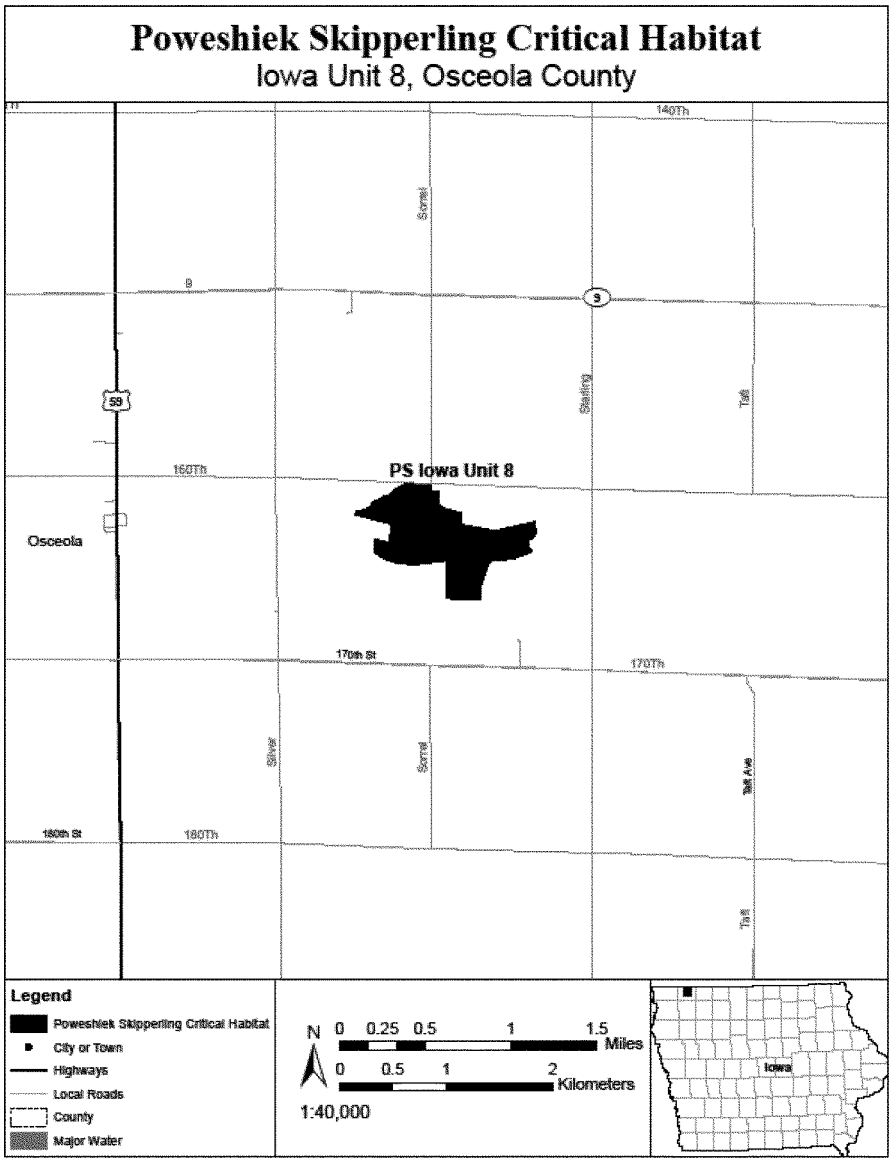
(13) PS Iowa Unit 5, Dickinson County, Iowa. Map of PS Iowa Unit 5 follows:



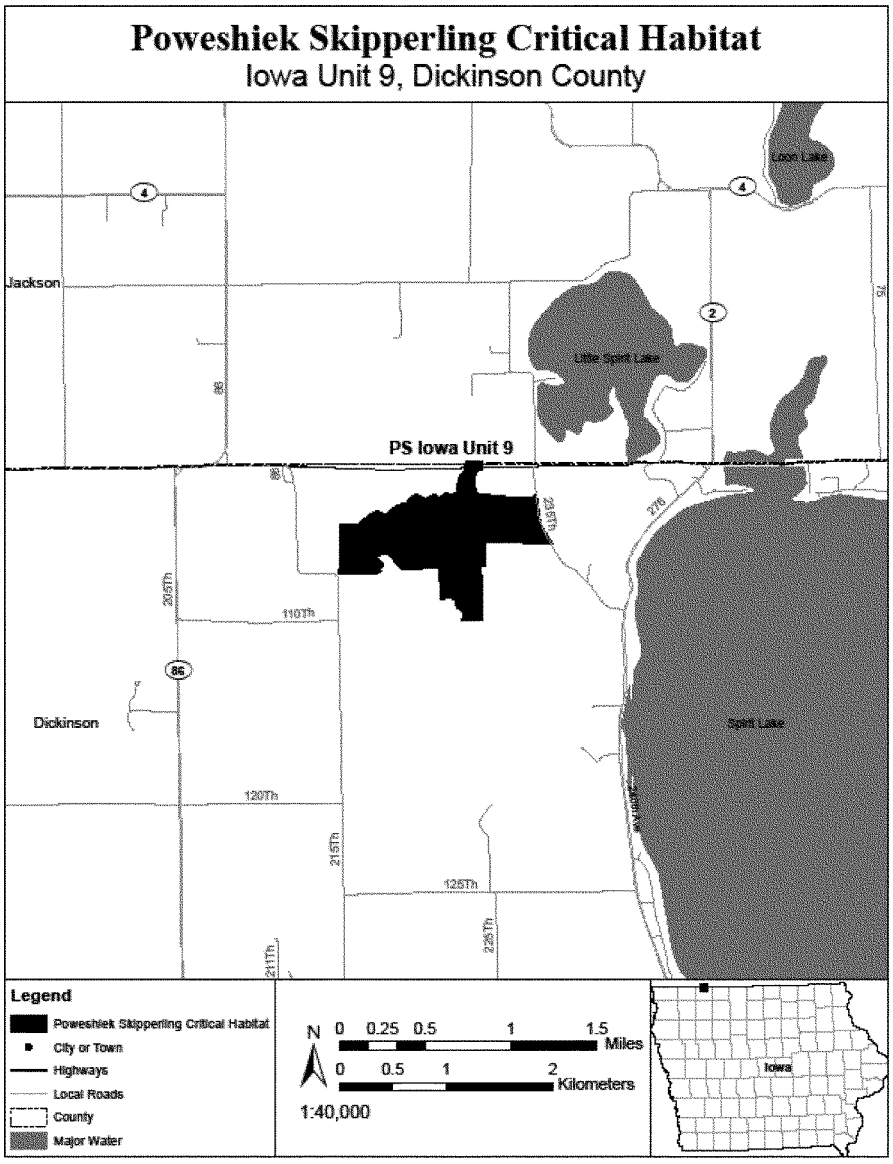
(14) PS Iowa Unit 6, Dickinson County, Iowa. Map of PS Iowa Unit 6 follows:



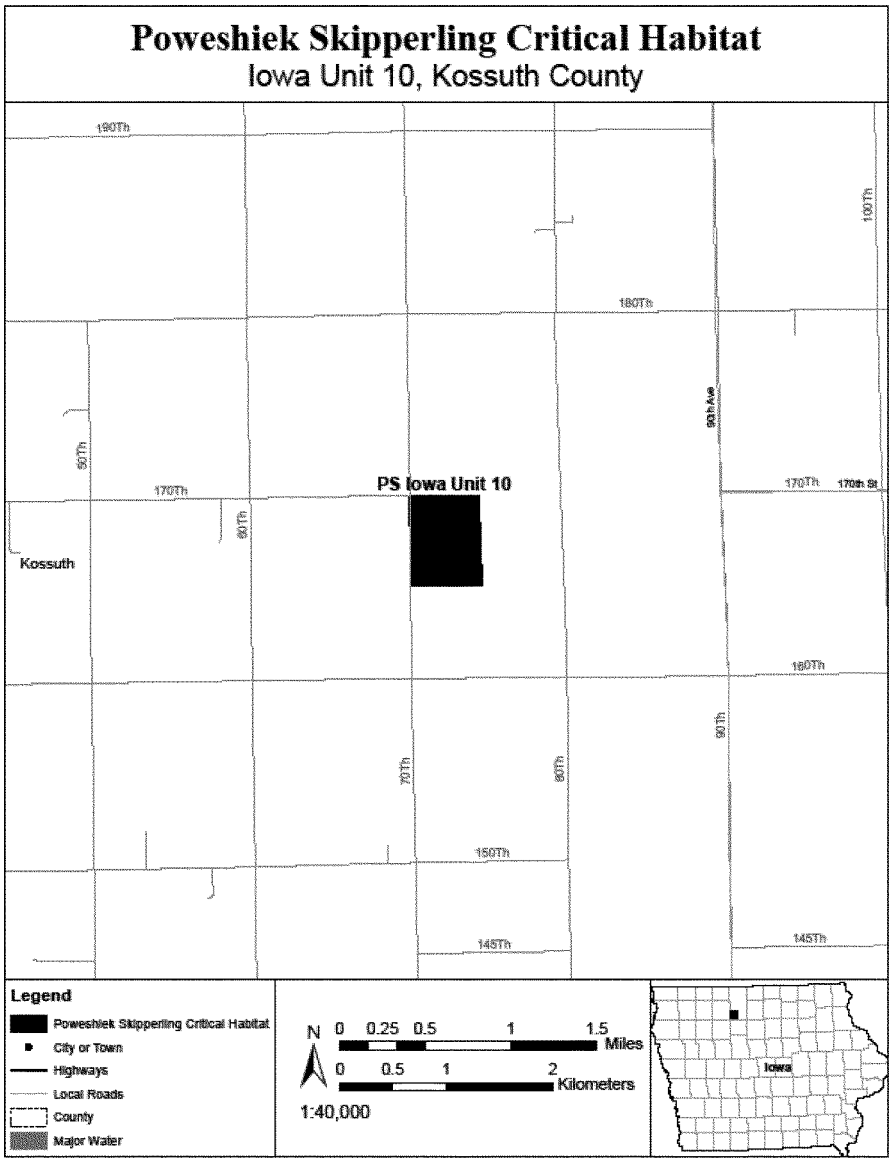
(15) PS Iowa Unit 8, Osceola County, Iowa. Map of PS Iowa Unit 8 follows:



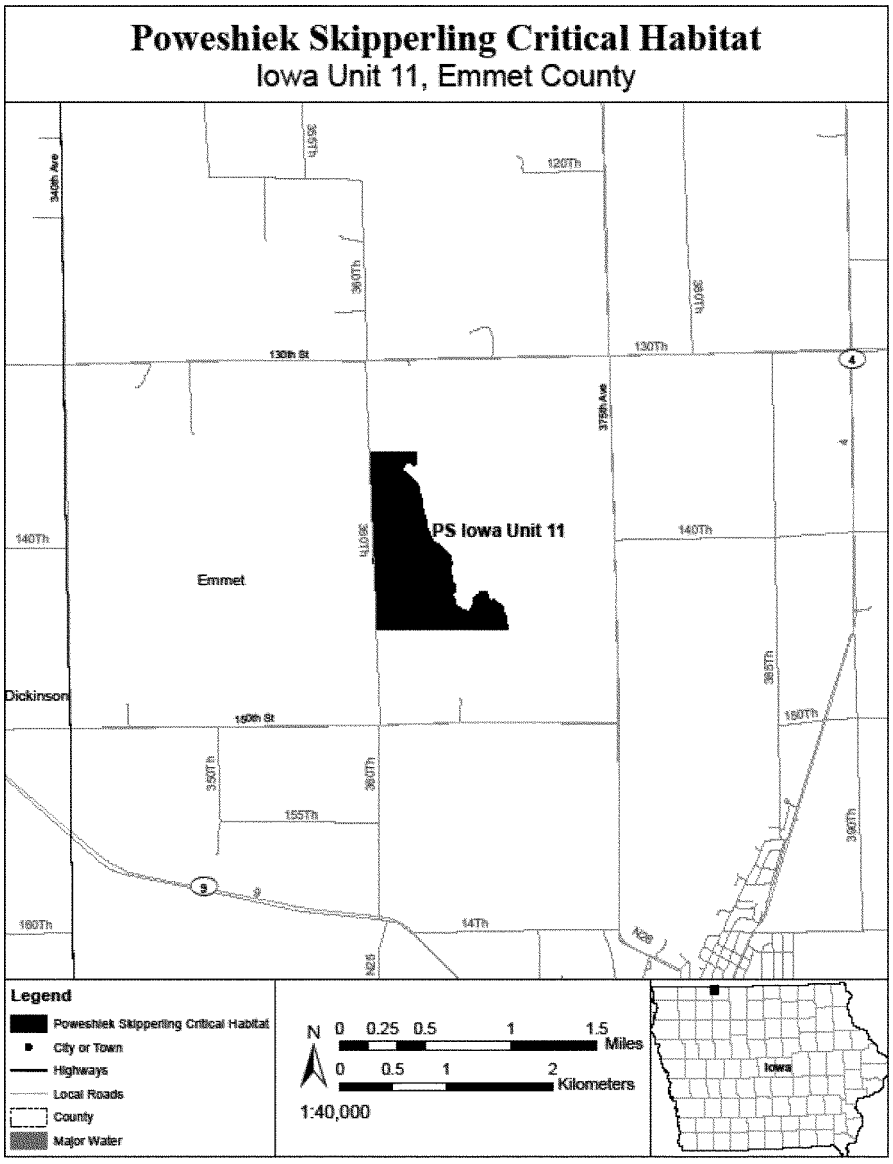
(16) PS Iowa Unit 9, Dickinson County, Iowa. Map of PS Iowa Unit 9 follows:



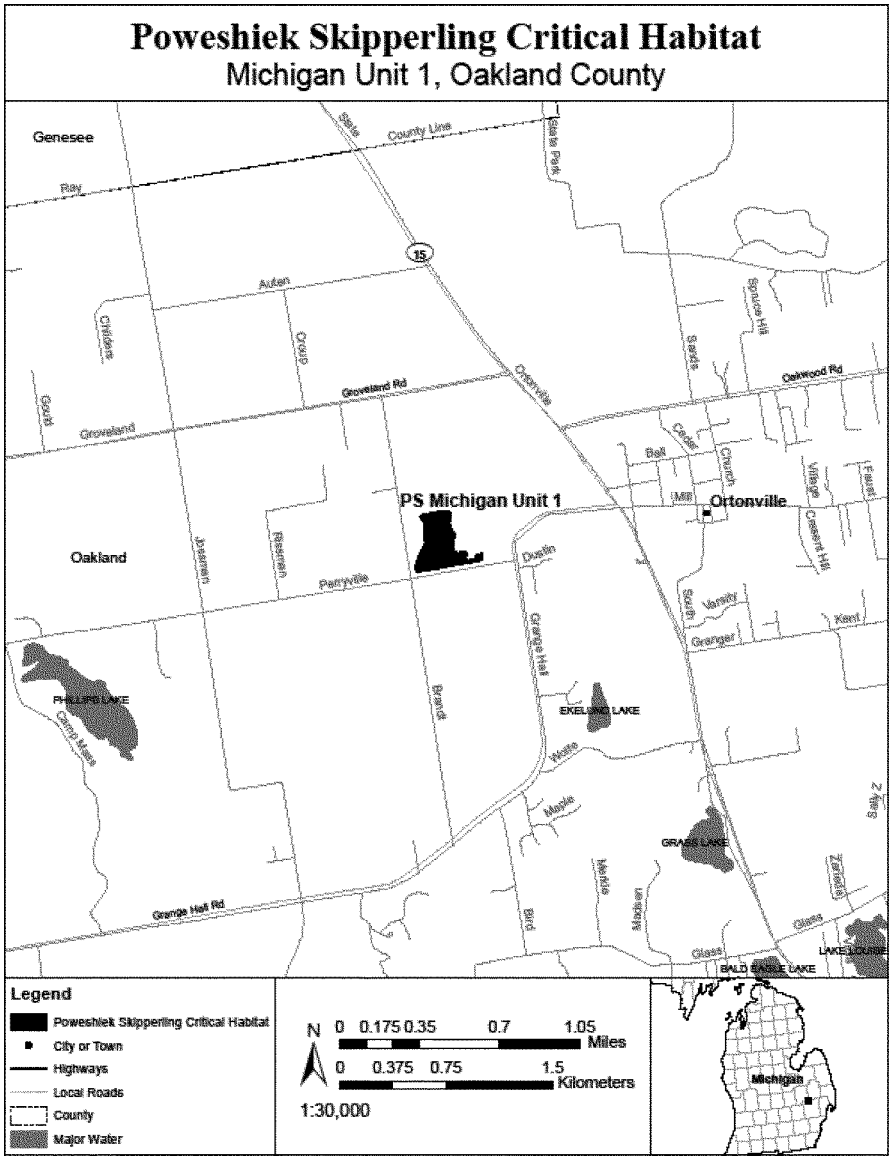
(17) PS Iowa Unit 10, Kossuth County, Iowa. Map of PS Iowa Unit 10 follows:



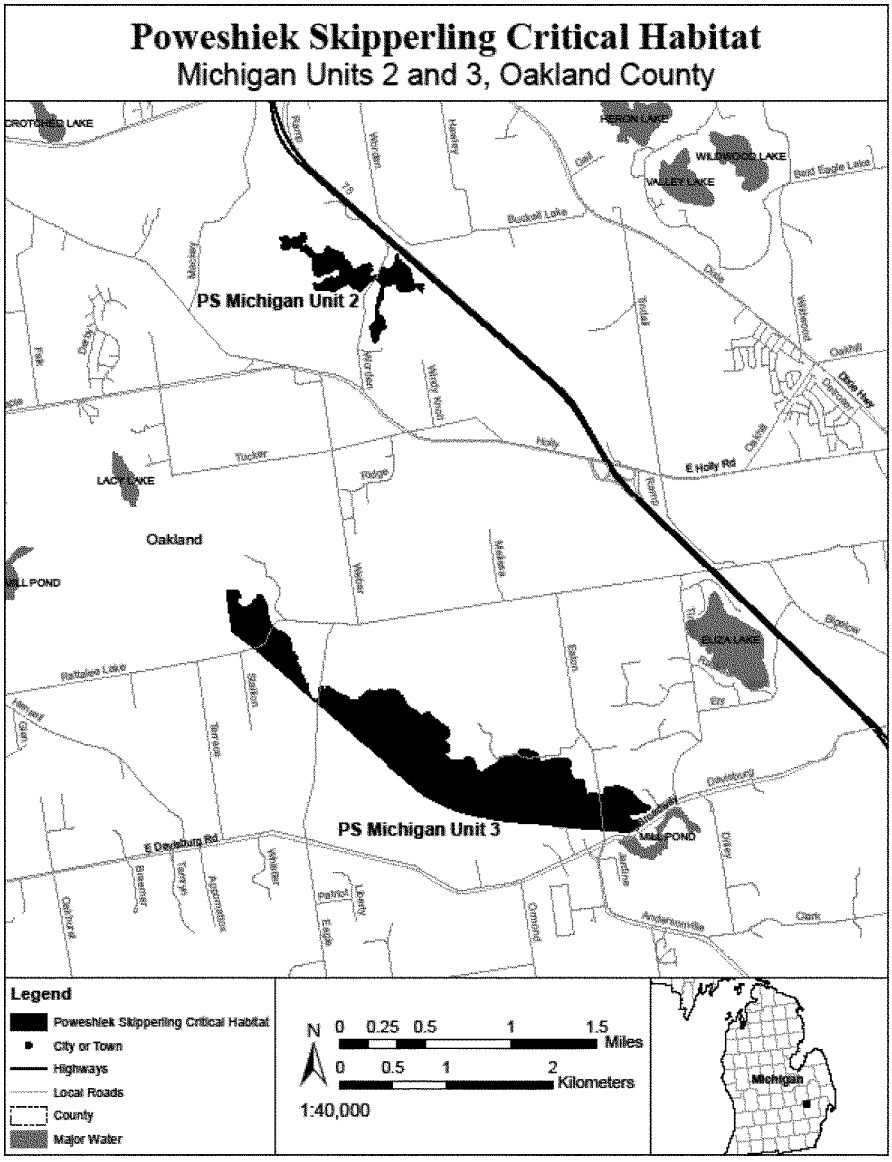
(18) PS Iowa Unit 11, Emmet County, Iowa. Map of PS Iowa Unit 11 follows:



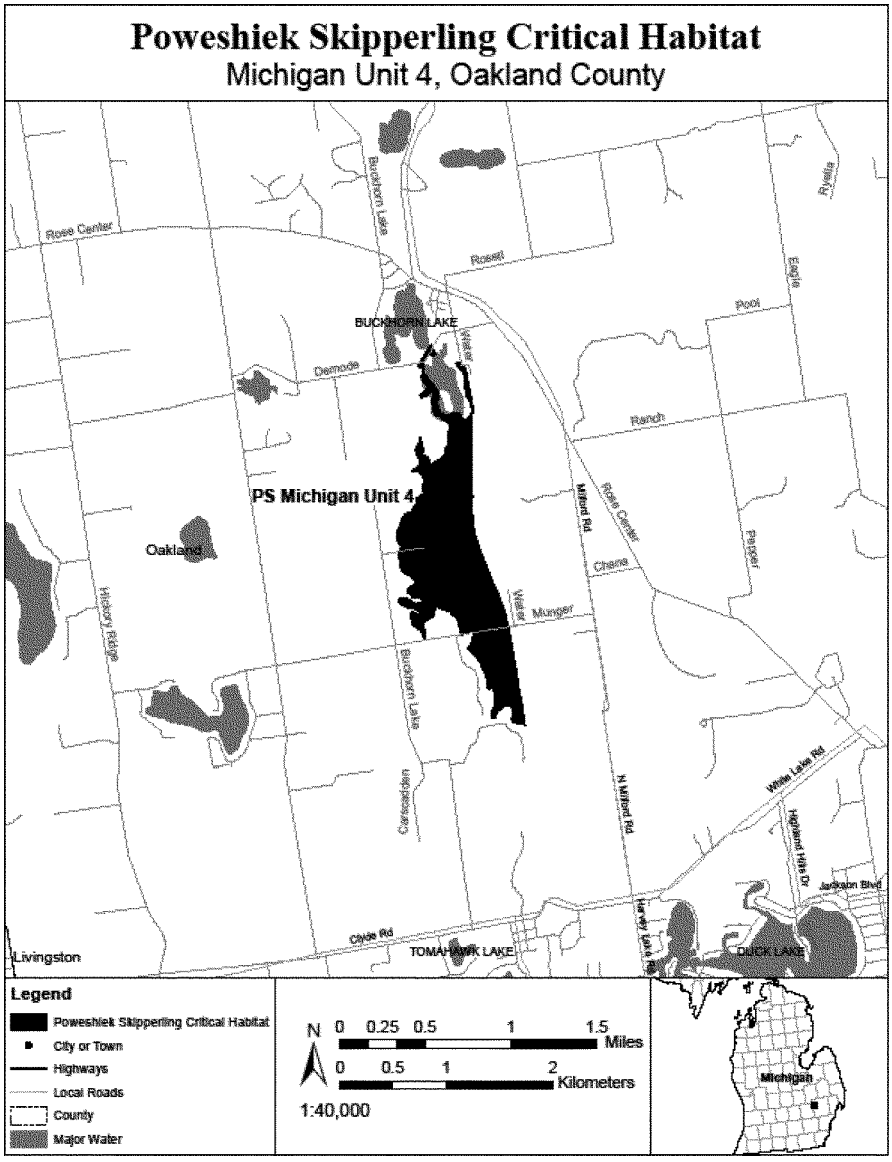
(19) PS Michigan Unit 1, Oakland County, Michigan. Map of PS Michigan Unit 1 follows:



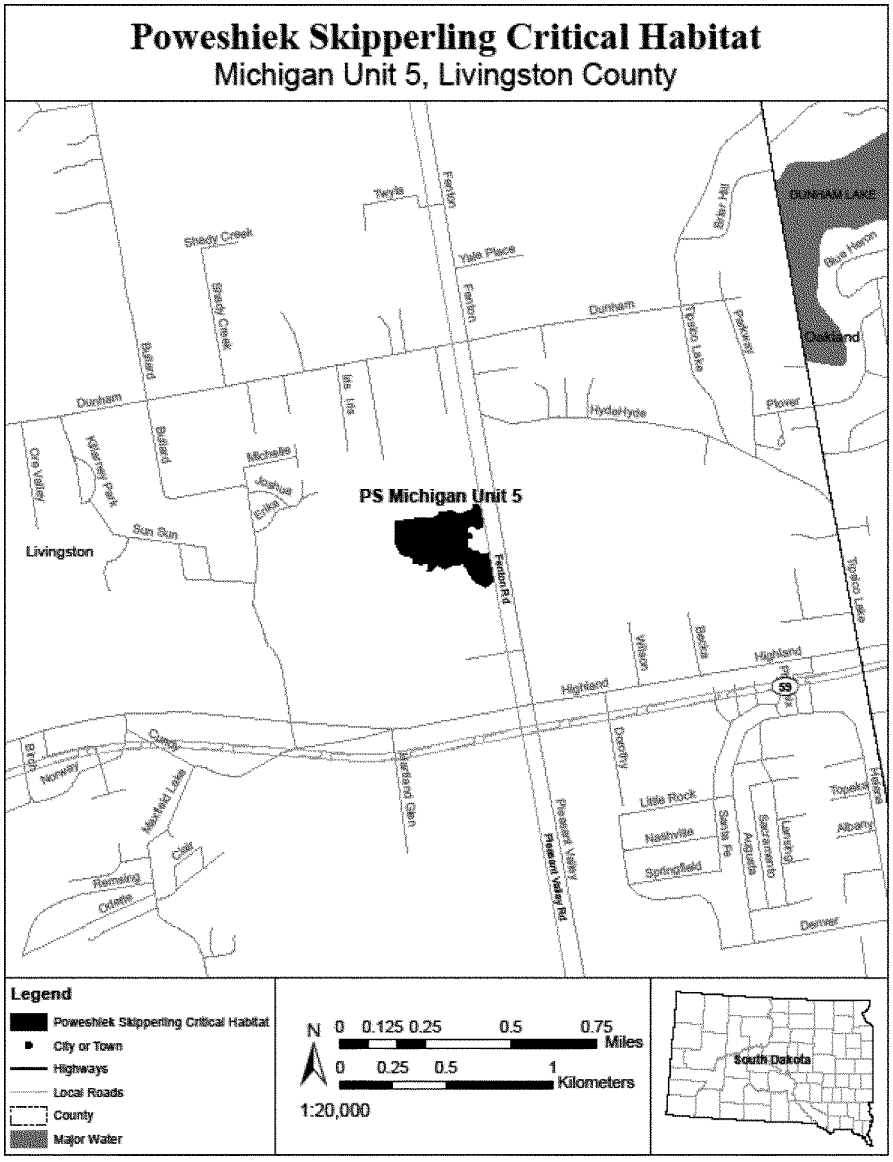
(20) PS Michigan Units 2 and 3, Oakland County, Michigan. Map of PS Michigan Units 2 and 3 follows:



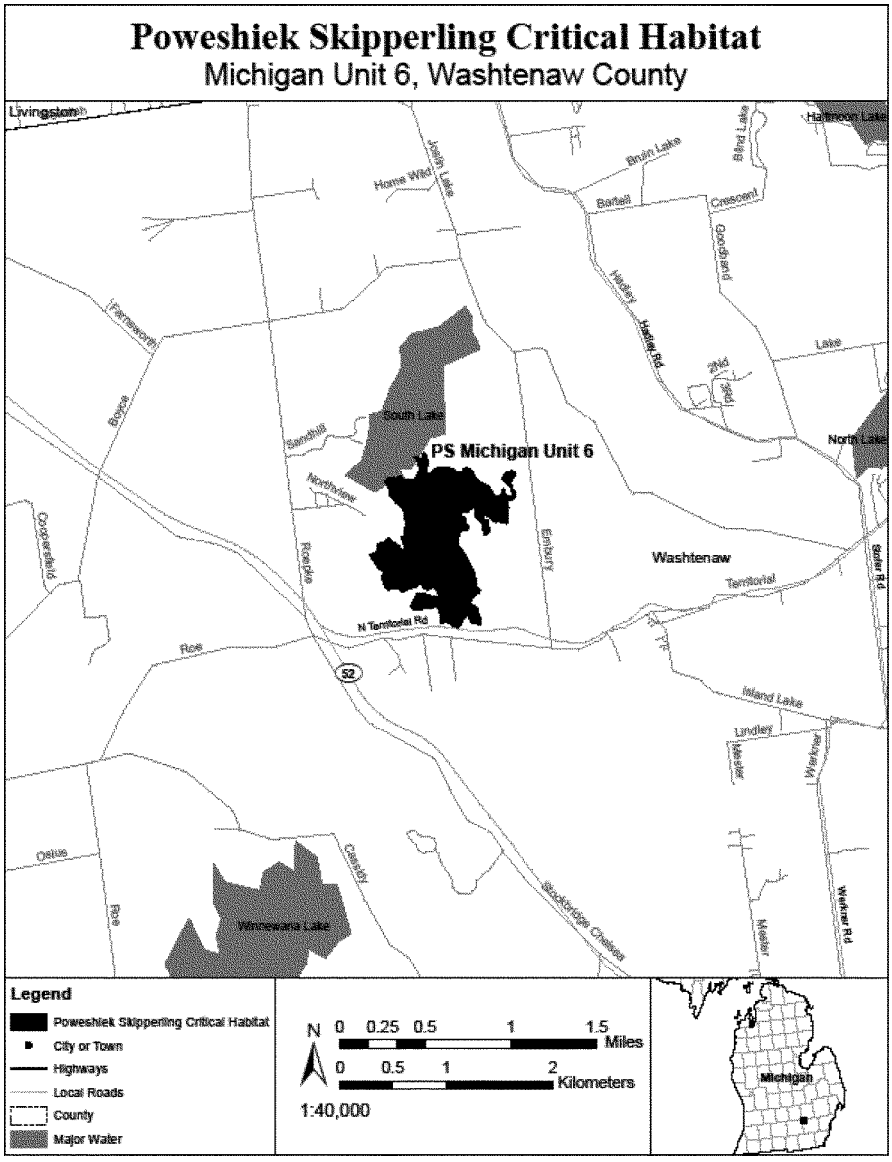
(21) Unit 15: PS Michigan Unit 4, Oakland County, Michigan. Map of PS Michigan Unit 4 follows:



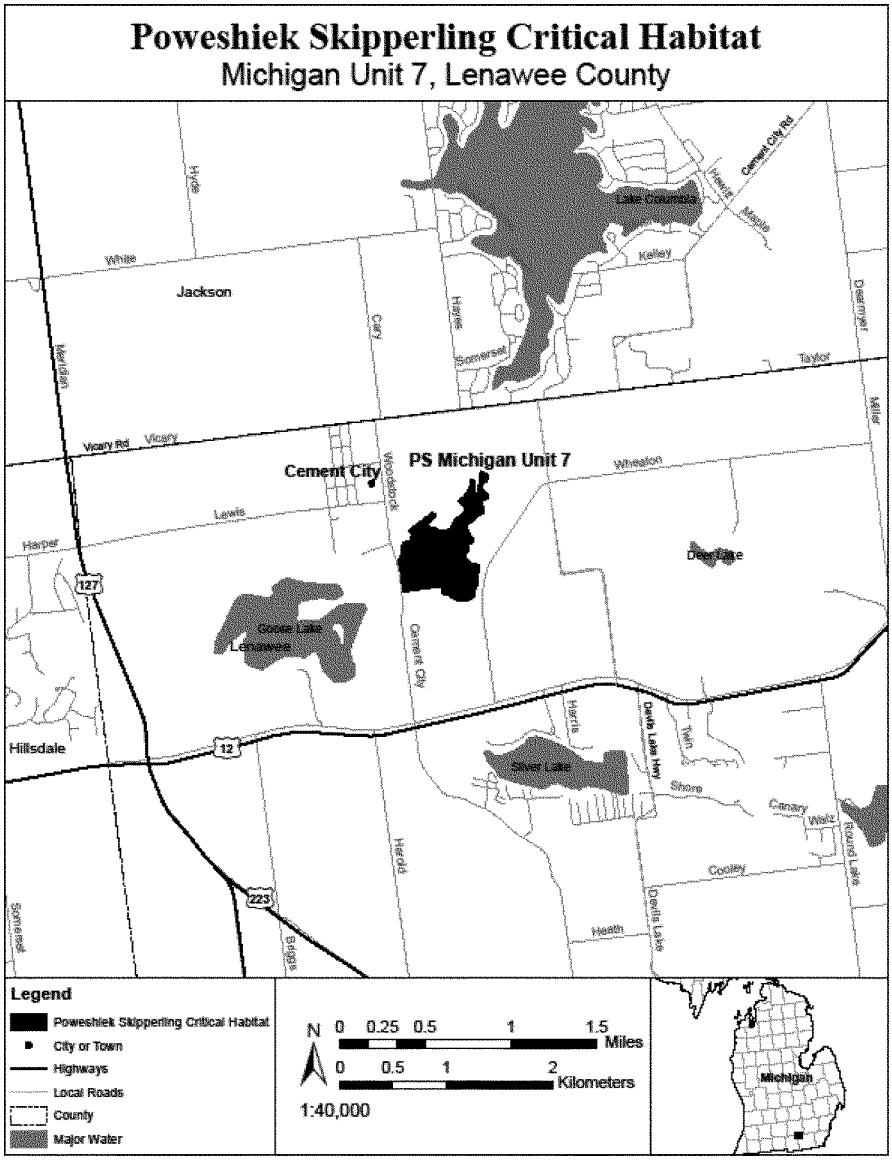
(22) PS Michigan Unit 5, Livingston County, Michigan. Map of PS Michigan Unit 5 follows:



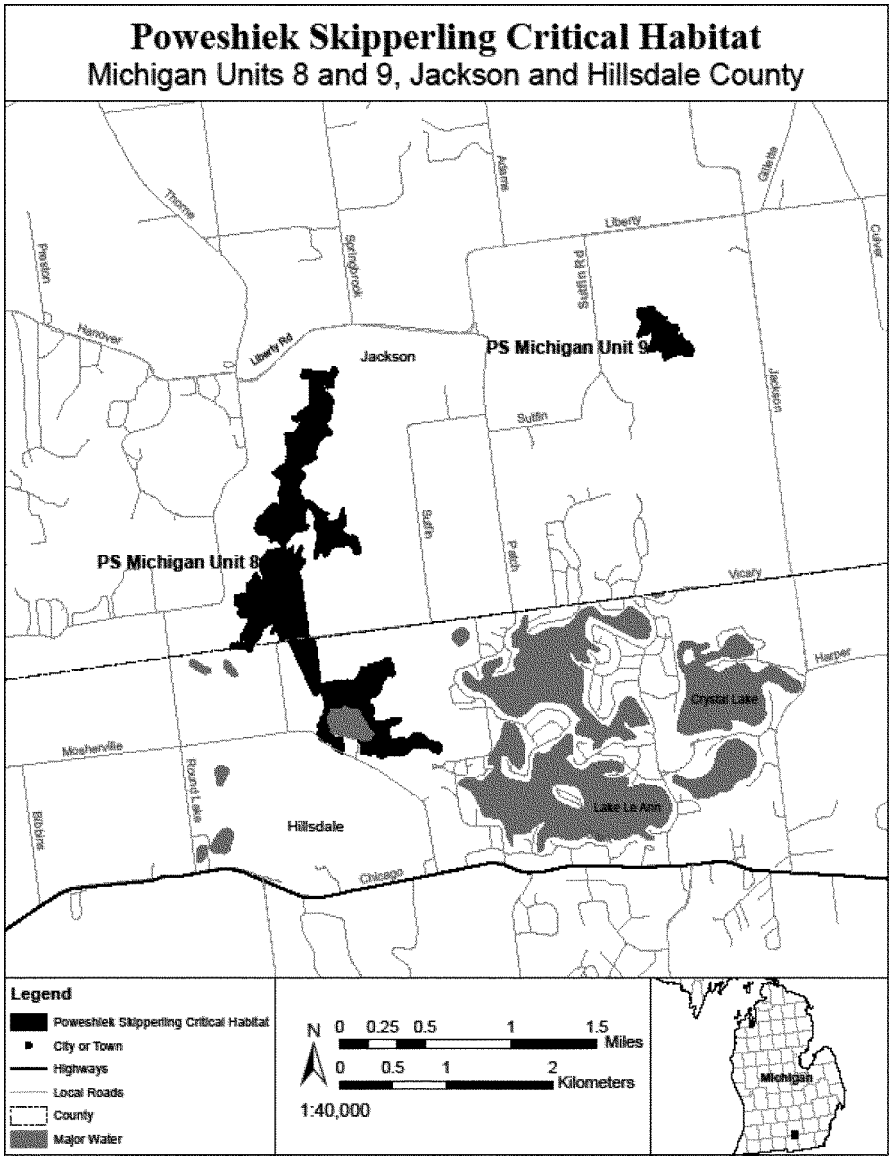
(23) PS Michigan Unit 6, Washtenaw County, Michigan. Map of PS Michigan Unit 6 follows:



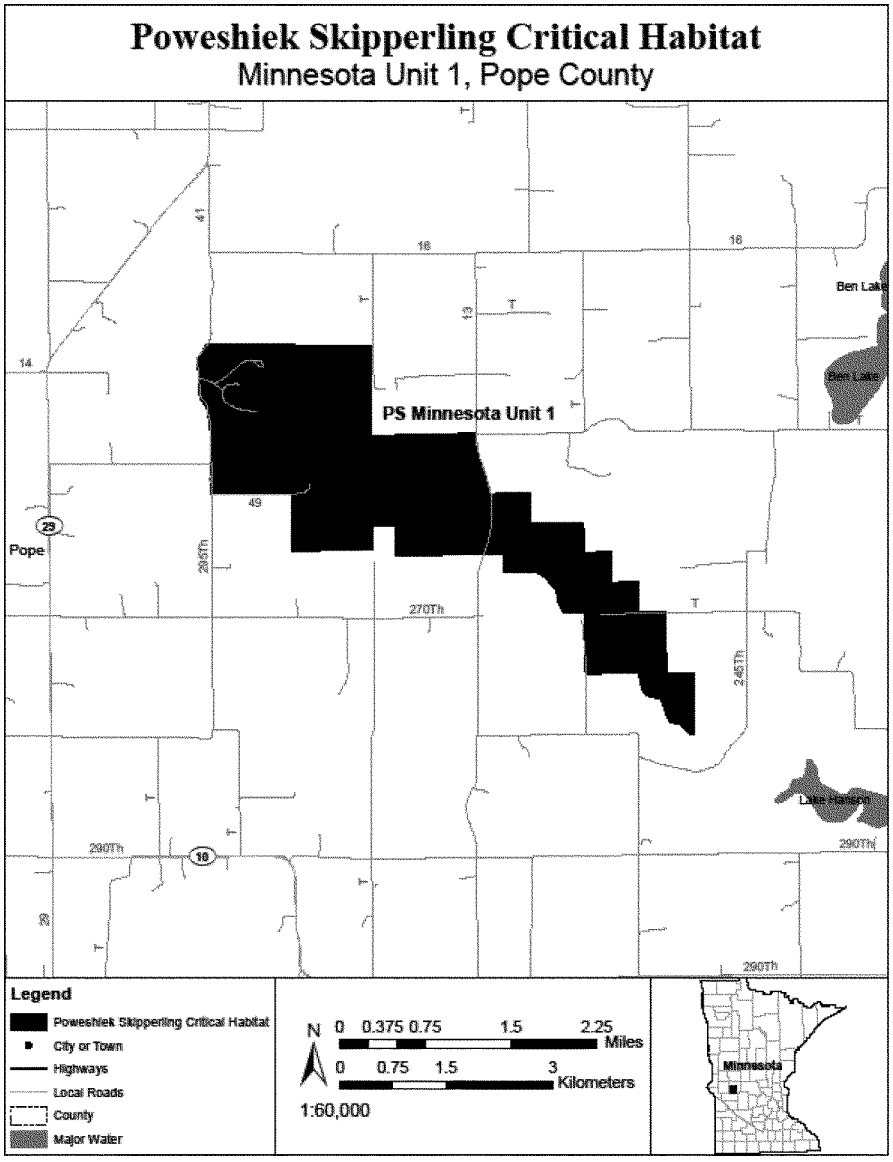
(24) PS Michigan Unit 7, Lenawee County, Michigan. Map of PS Michigan Unit 7 follows:



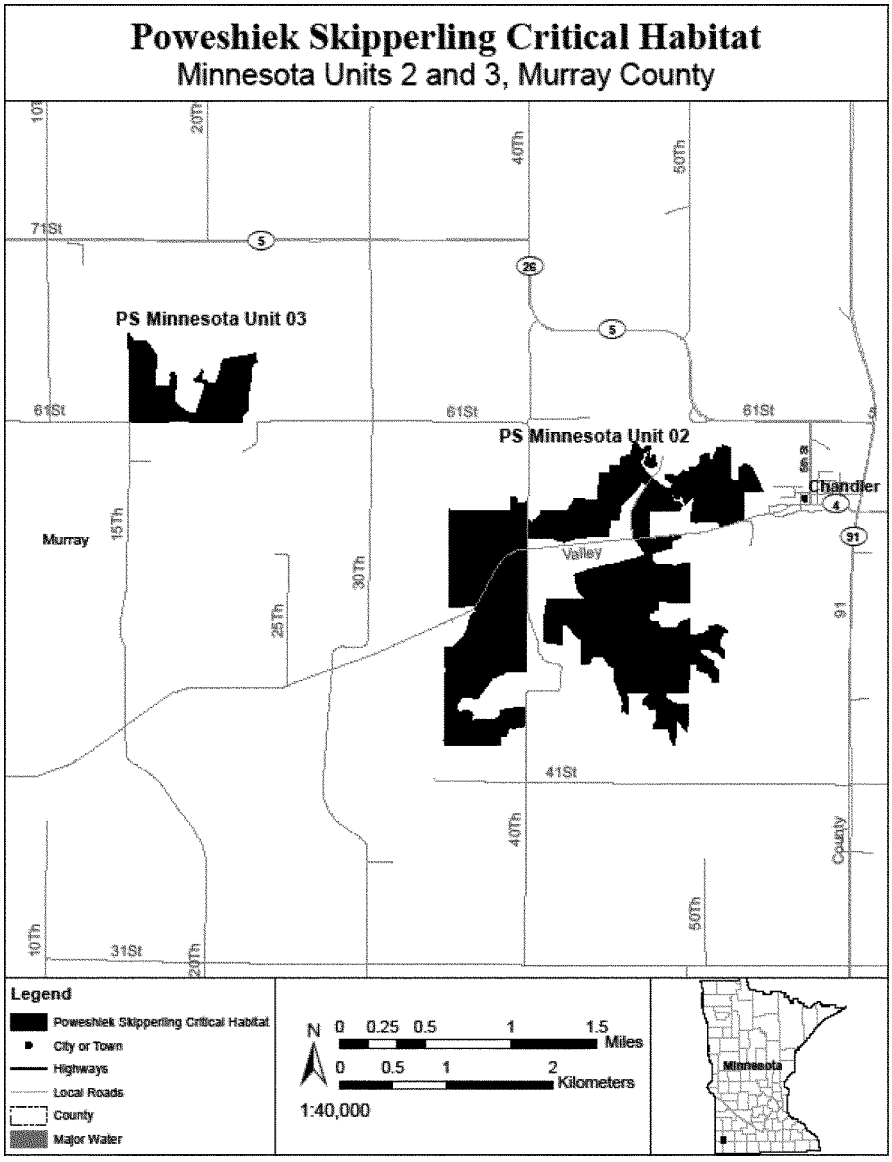
(25) PS Michigan Units 8 and 9, Hillsdale County and Jackson County, Michigan. Map of PS Michigan Units 8 and 9 follows:



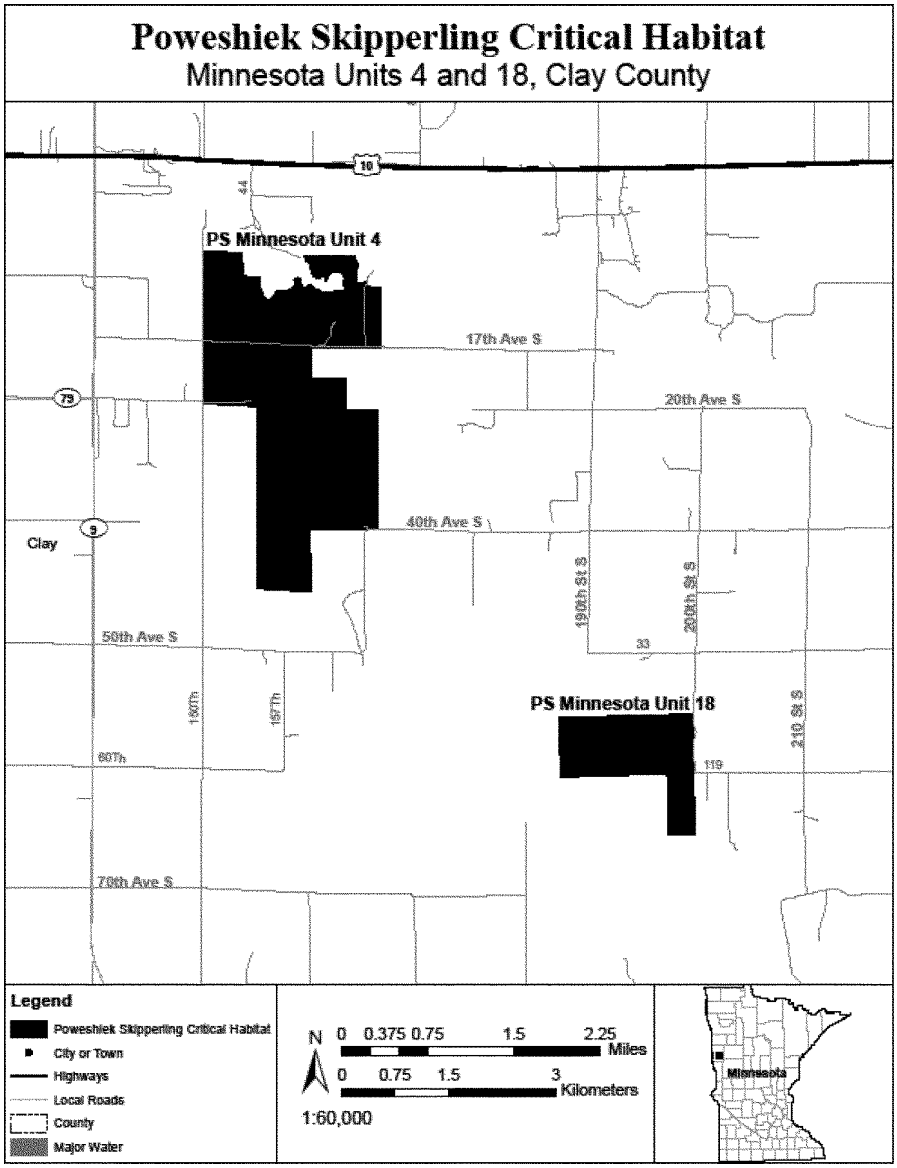
(26) PS Minnesota Unit 1, Pope County, Minnesota. Map of PS Minnesota Unit 1 follows:



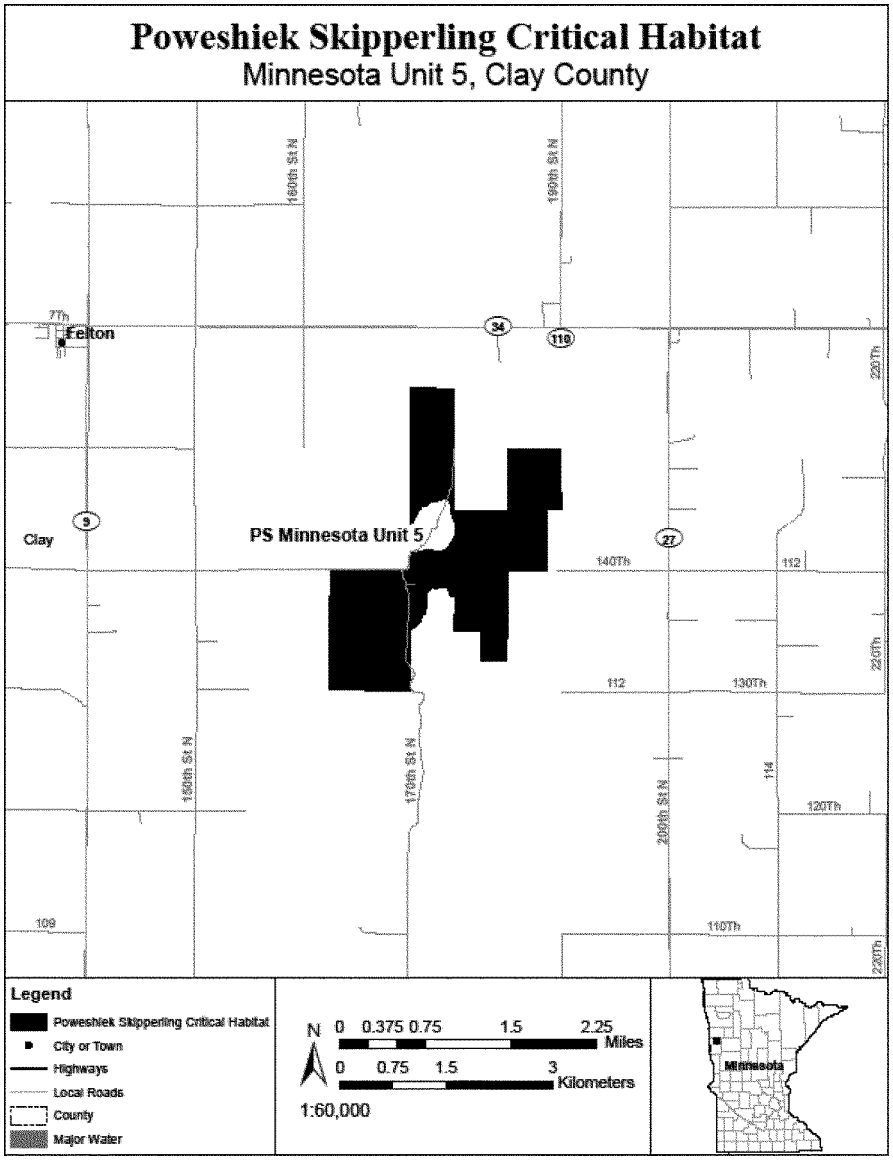
(27) PS Minnesota Units 2 and 3, Murray County, Minnesota. Map of PS Minnesota Units 2 and 3 follows:



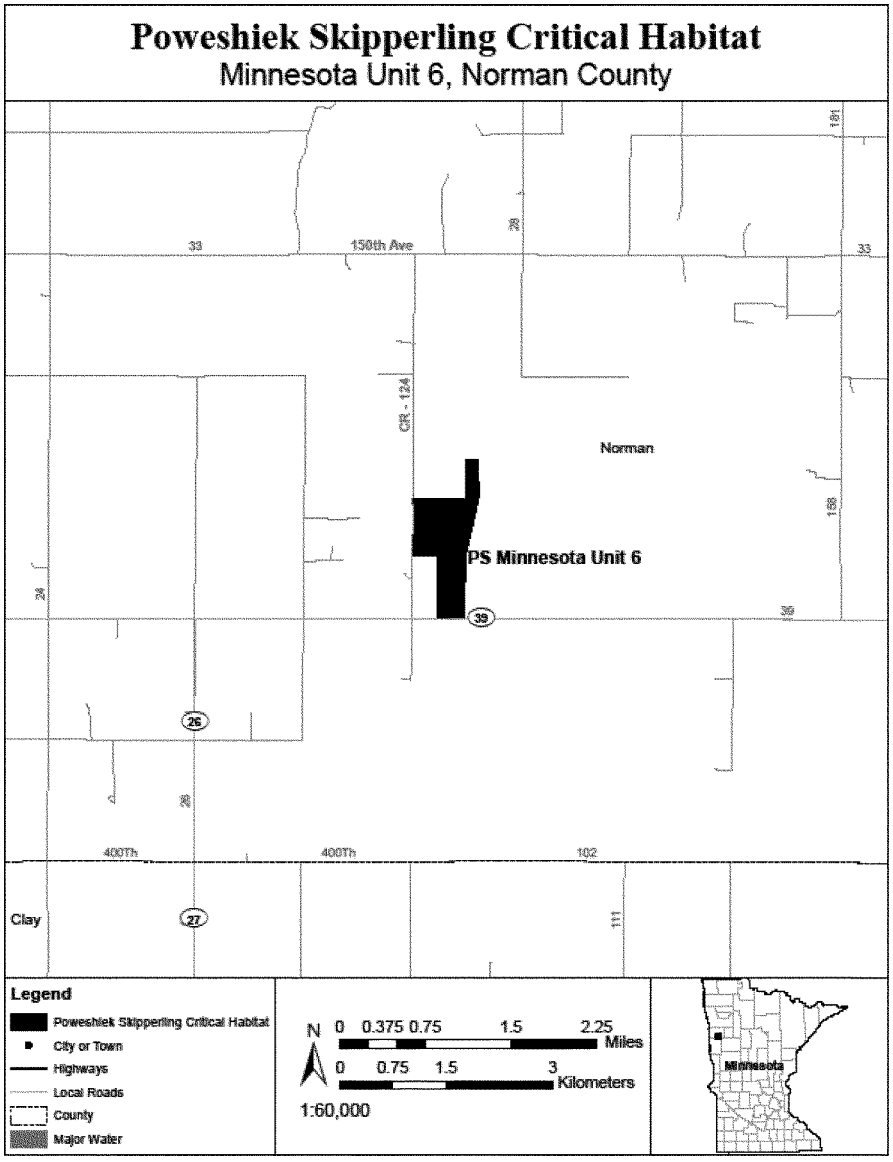
(28) PS Minnesota Units 4 and 18, Clay County, Minnesota. Map of PS Minnesota Units 4 and 18 follows:



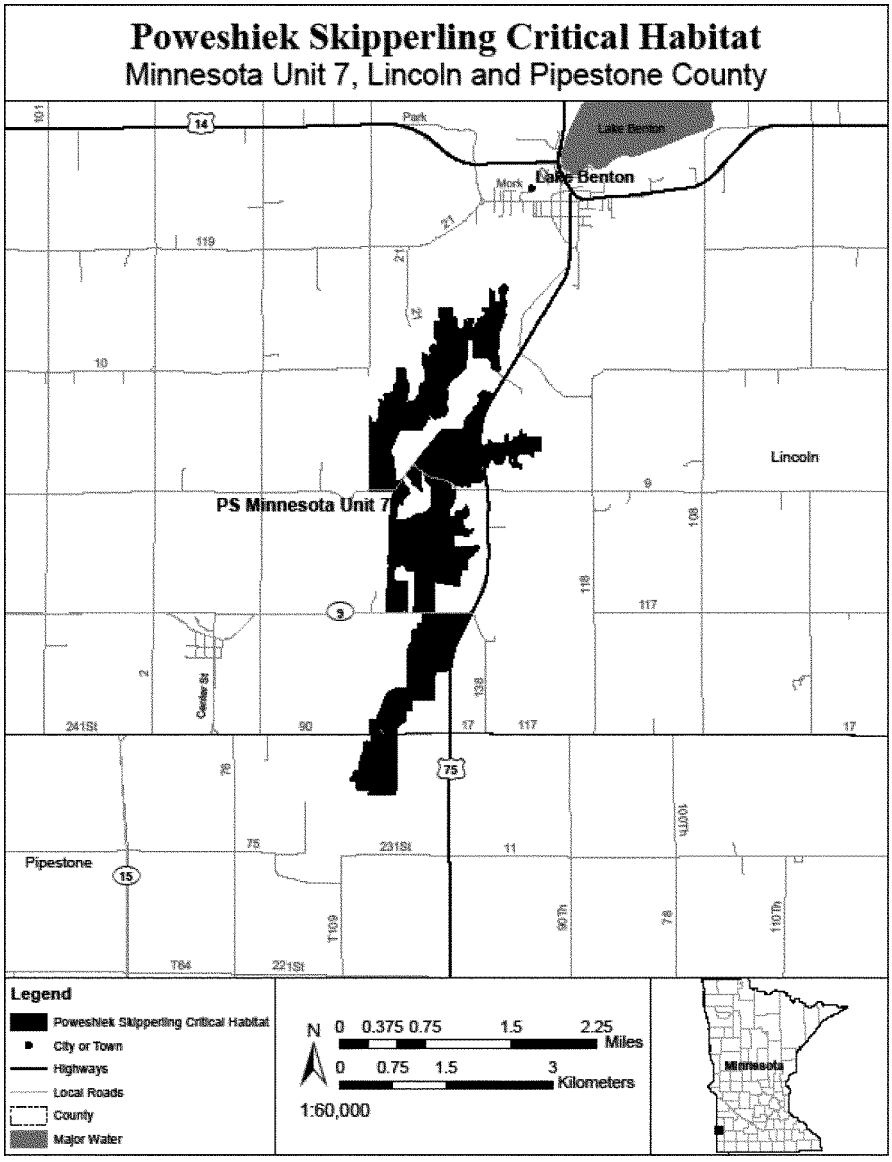
(29) PS Minnesota Unit 5, Clay County, Minnesota. Map of PS Minnesota Unit 5 follows:



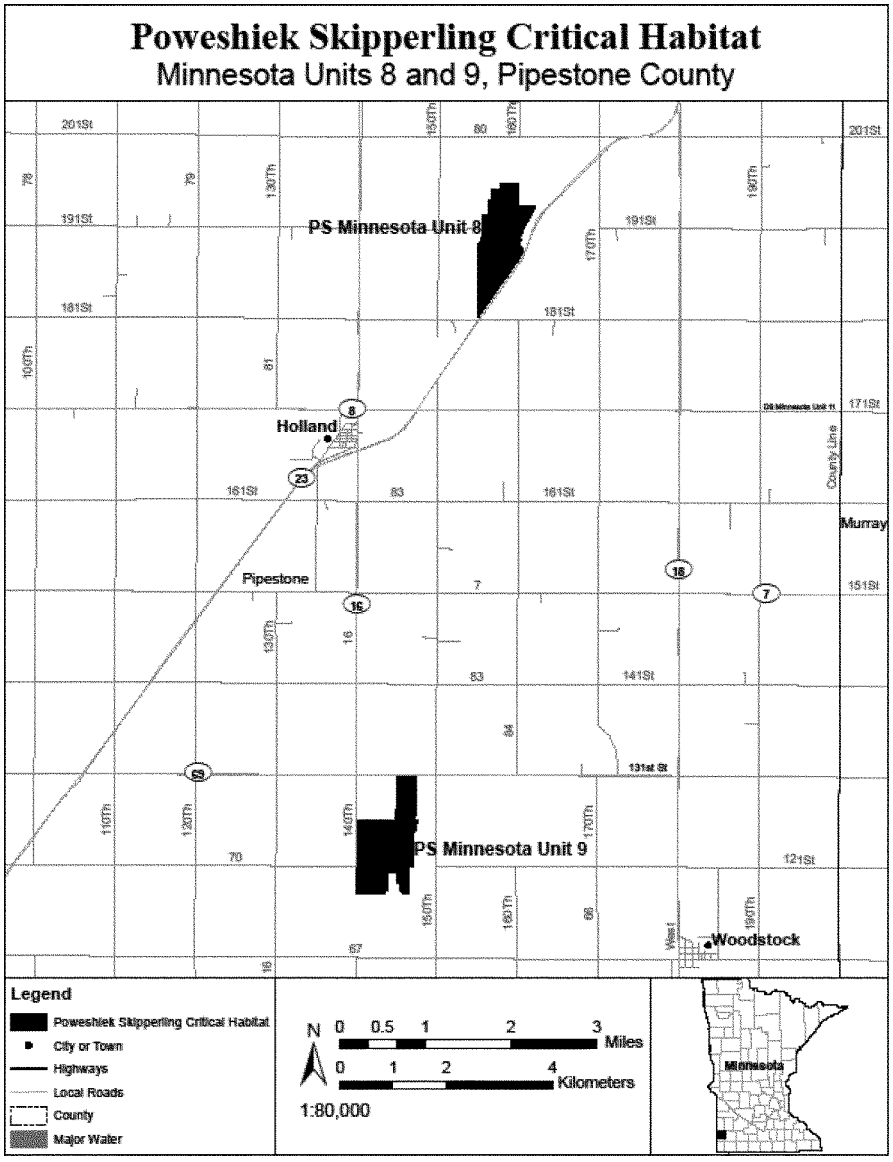
(30) PS Minnesota Unit 6, Norman County, Minnesota. Map of PS Minnesota Unit 6 follows:



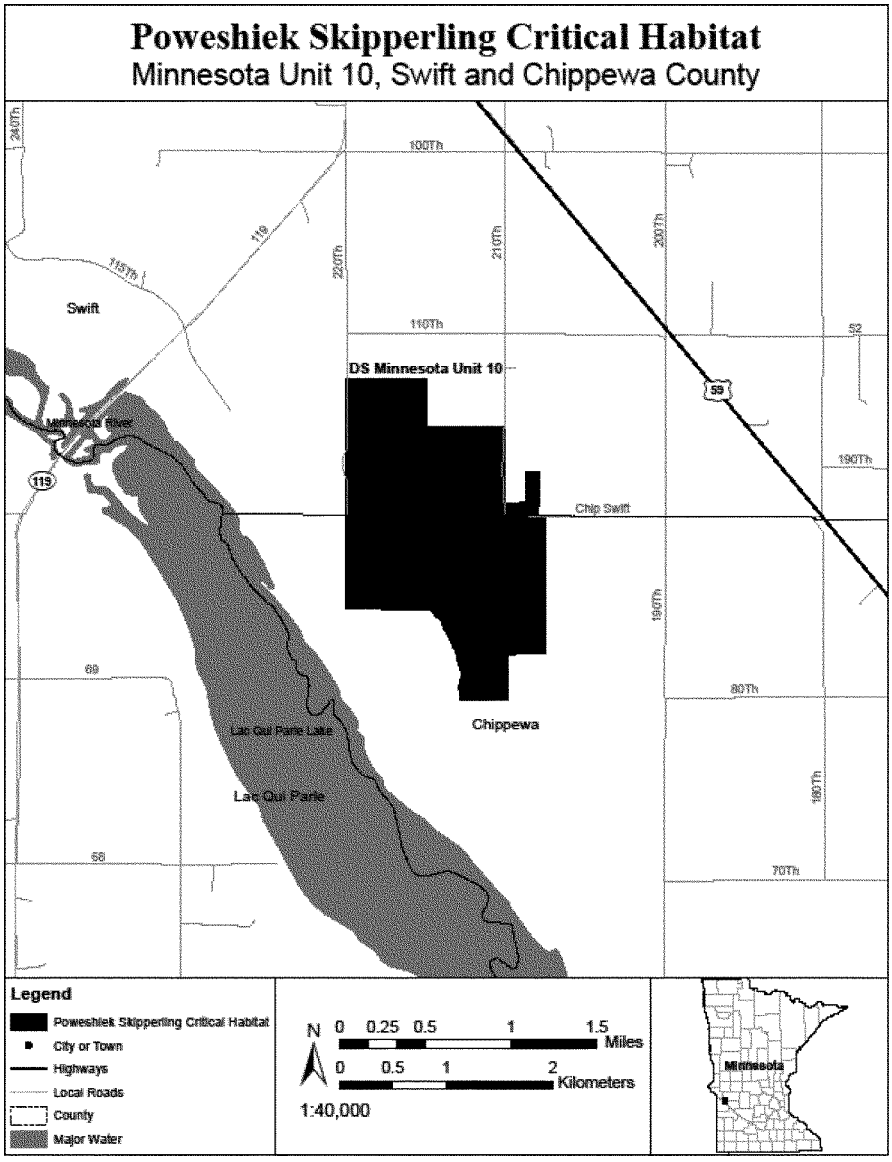
(31) PS Minnesota Unit 7, Lincoln County, Minnesota. Map of PS Minnesota Unit 7 follows:



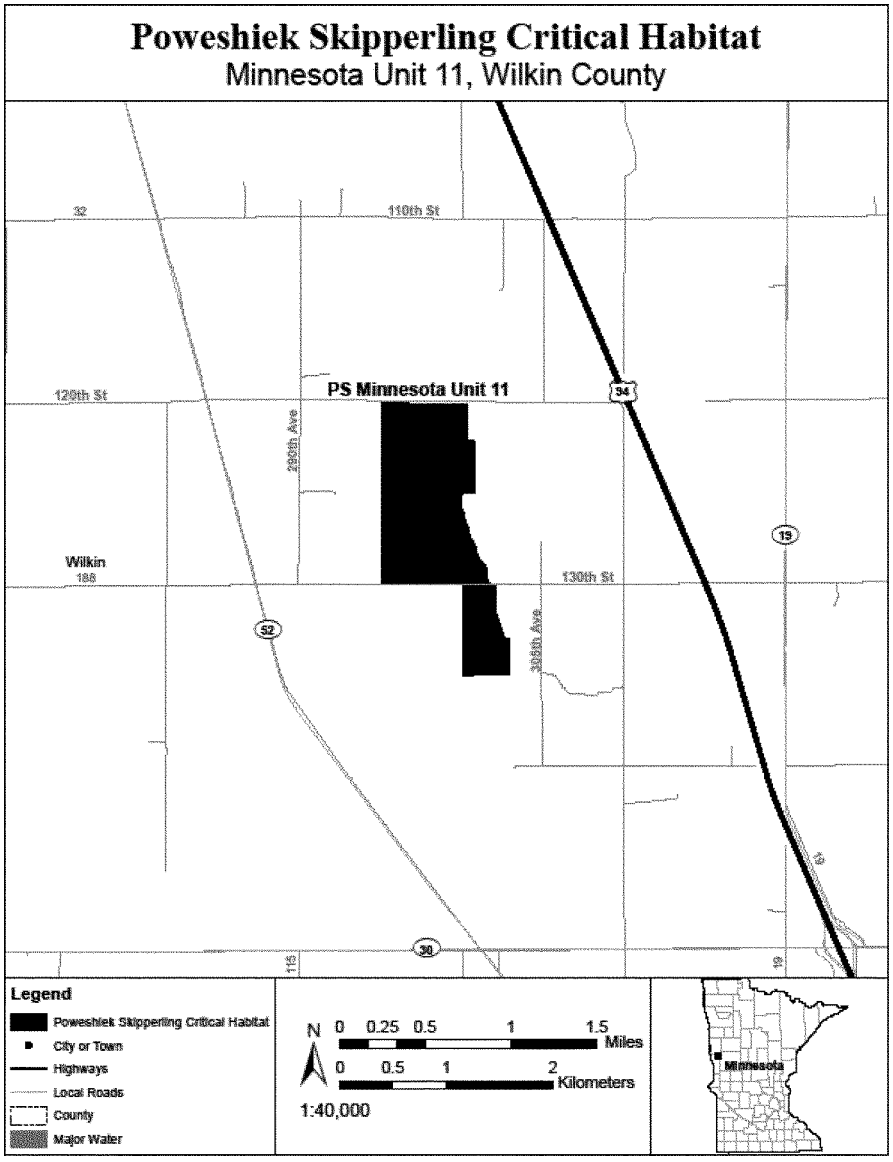
(32) PS Minnesota Units 8 and 9, Pipestone County, Minnesota. Map of PS Minnesota Units 8 and 9 follows:



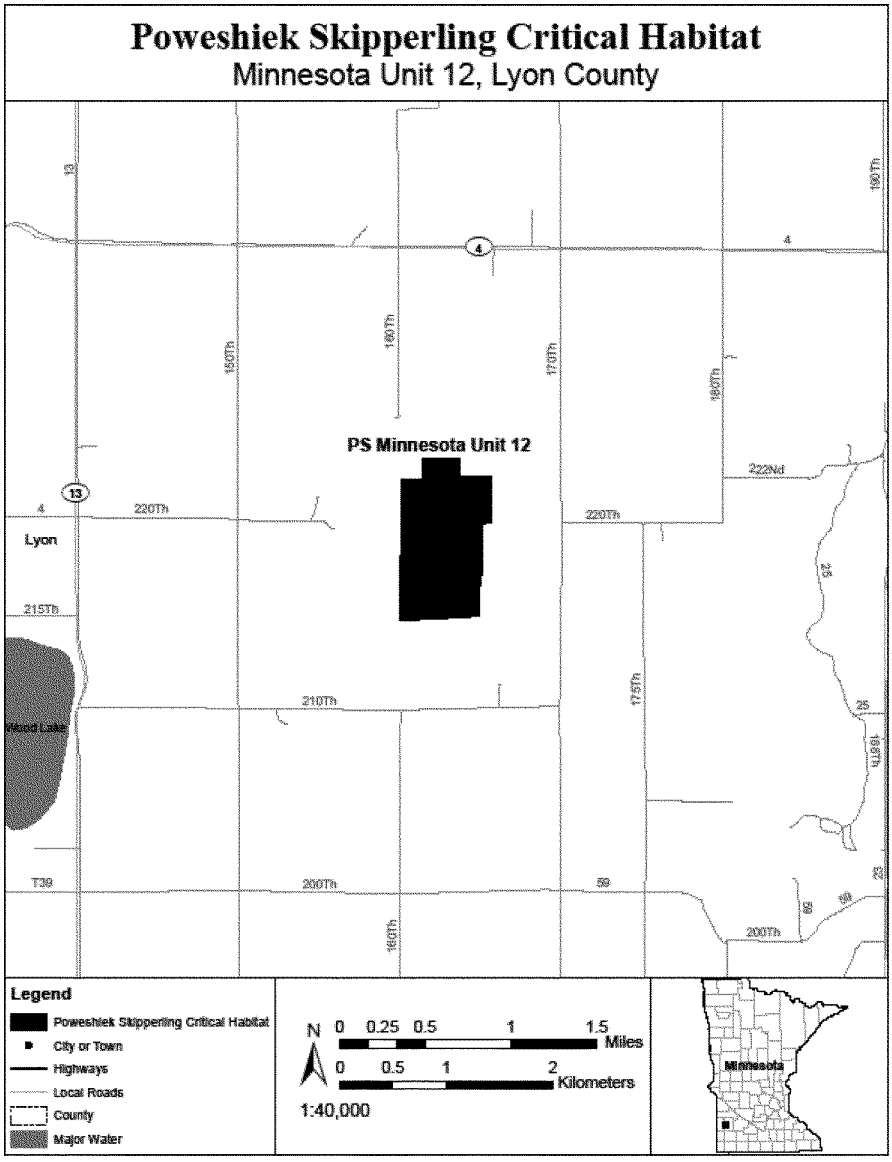
(33) PS Minnesota Unit 10, Chippewa County and Swift County, Minnesota. Map of PS Minnesota Unit 10 follows:



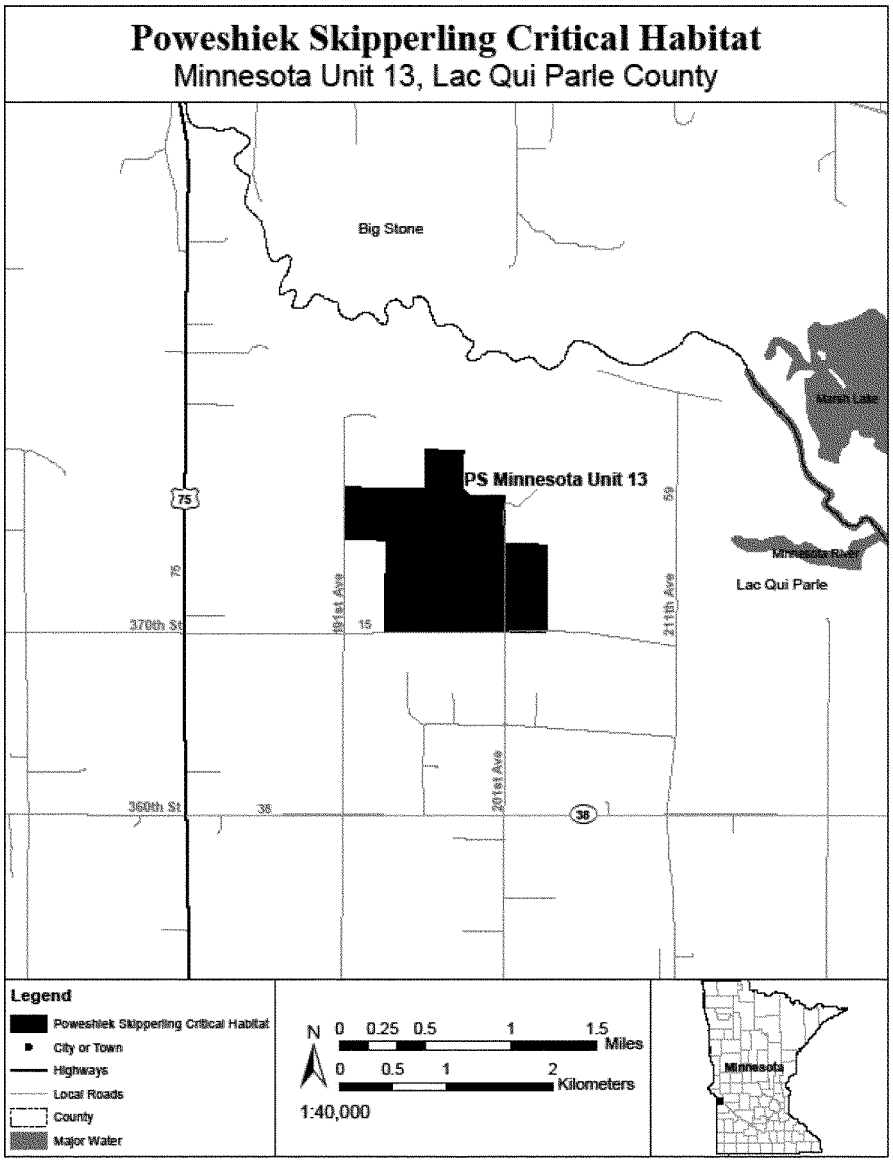
(34) PS Minnesota Unit 11, Wilkin County, Minnesota. Map of PS Minnesota Unit 11 follows:



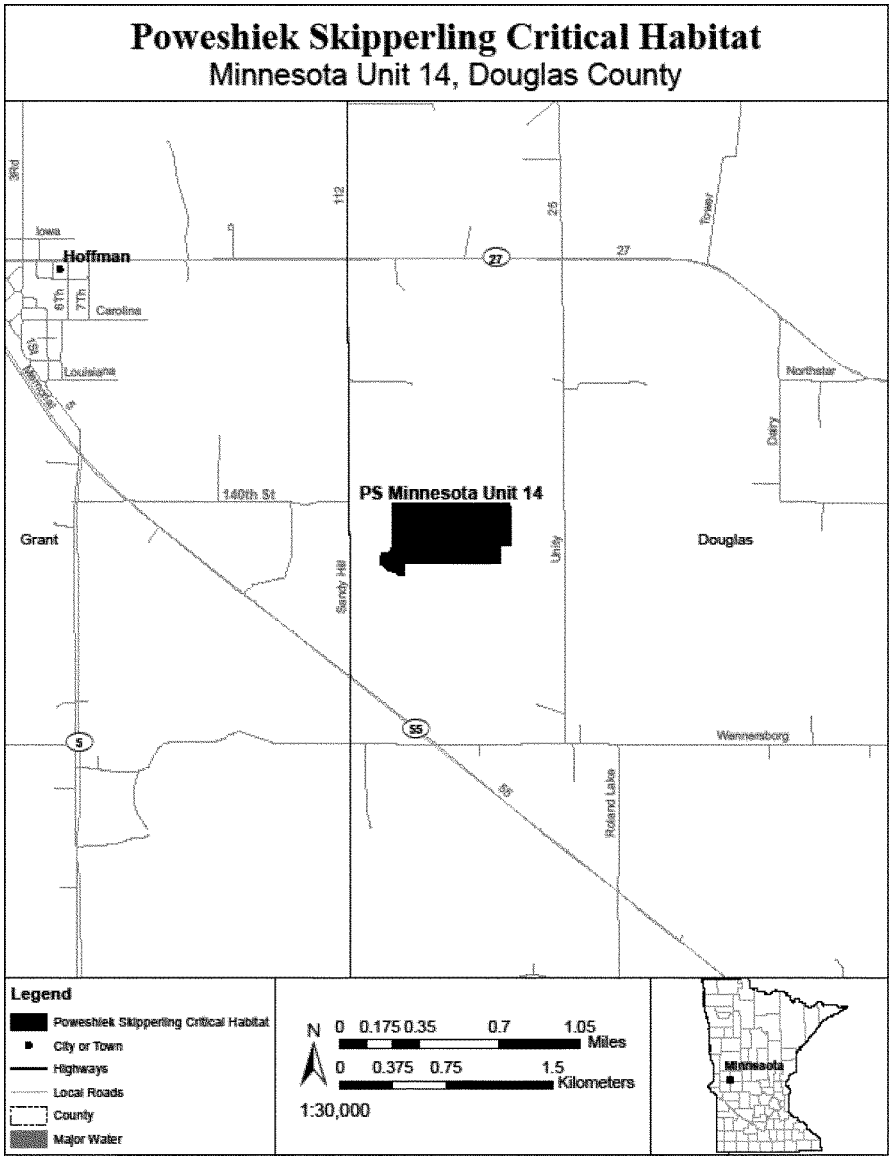
(35) PS Minnesota Unit 12, Lyon County, Minnesota. Map of PS Minnesota Unit 12 follows:



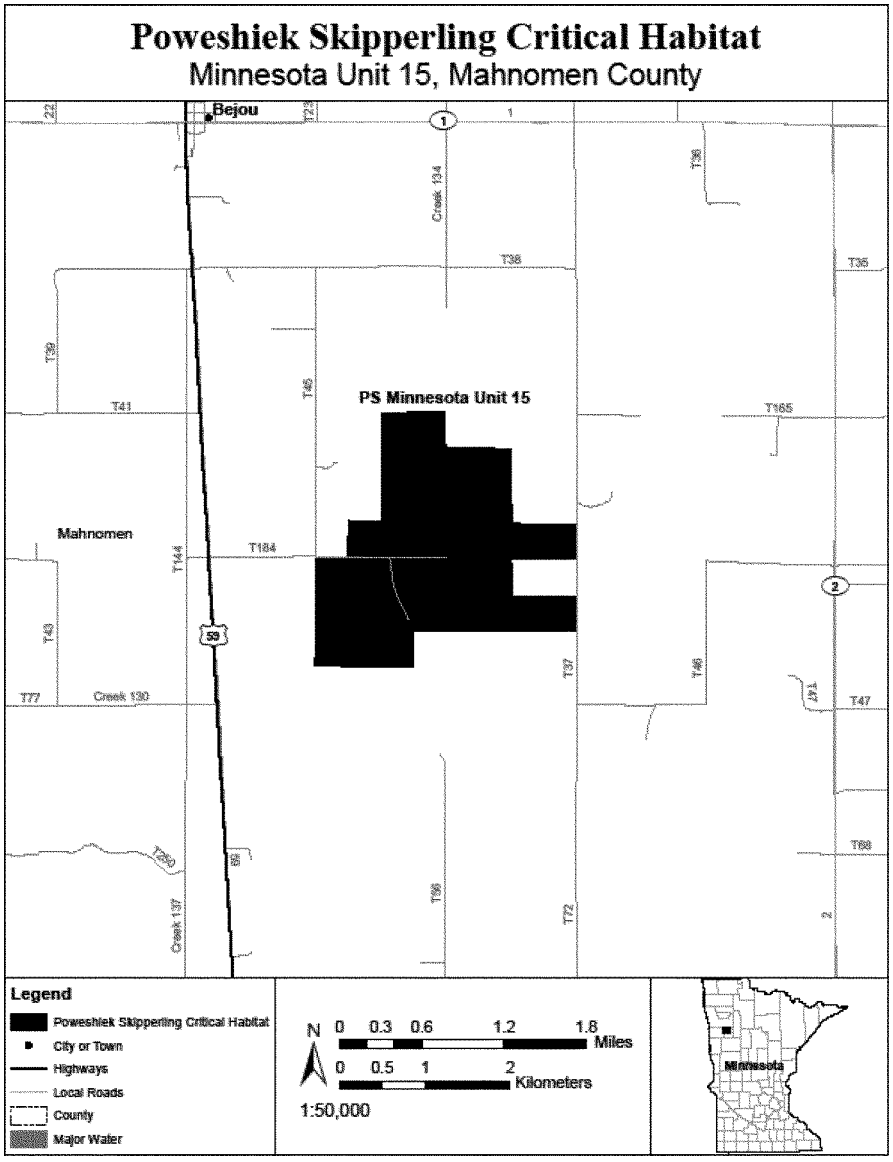
(36) PS Minnesota Unit 13, Lac Qui Parle County, Minnesota. Map of PS Minnesota Unit 13 follows:



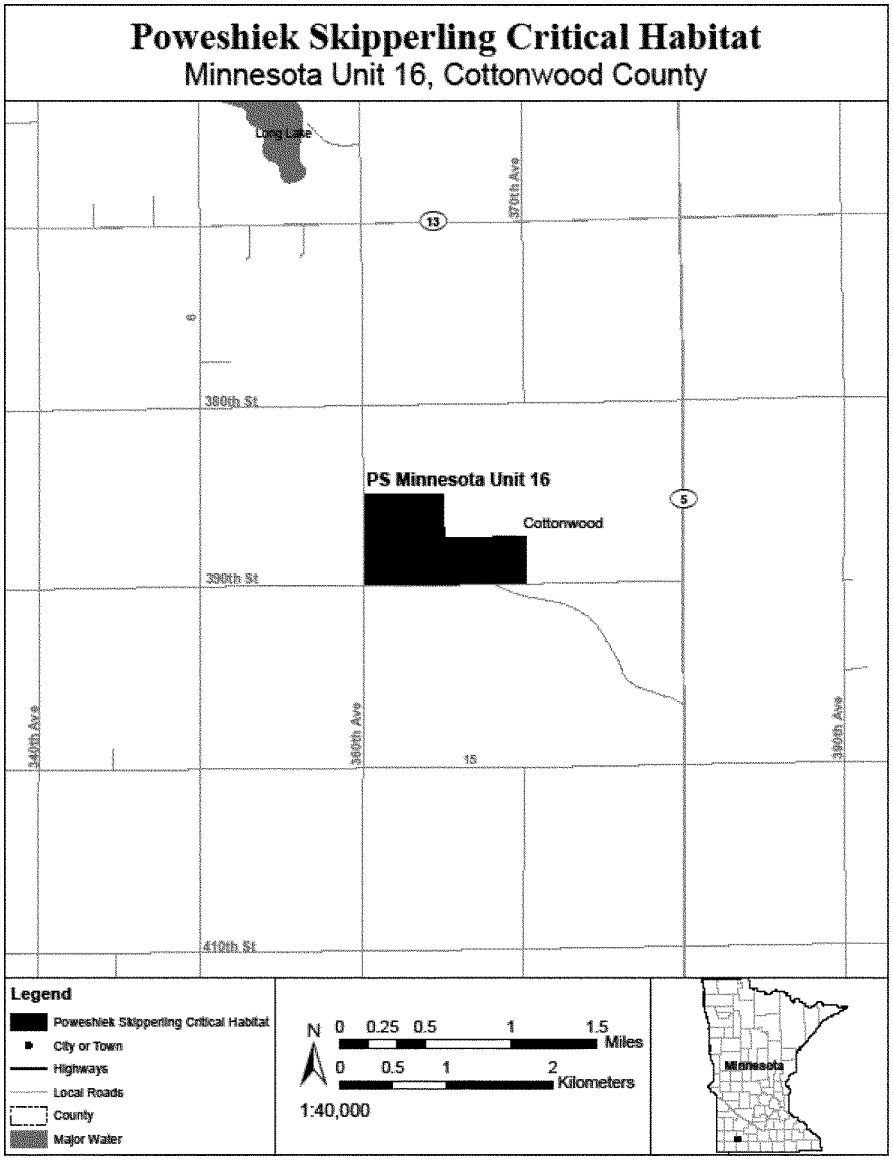
(37) PS Minnesota Unit 14, Douglas County, Minnesota. Map of PS Minnesota Unit 14 follows:



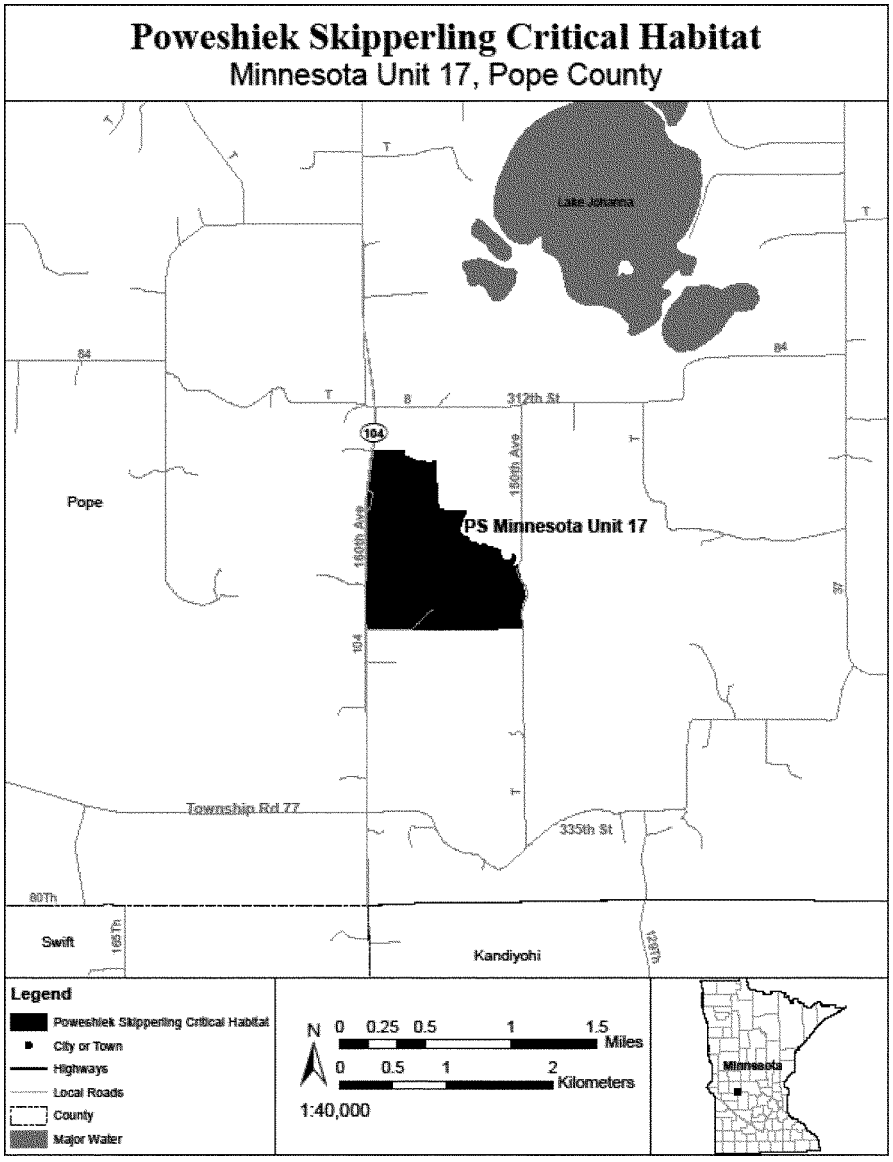
(38) PS Minnesota Unit 15, Mahnomen County, Minnesota. Map of PS Minnesota Unit 15 follows:



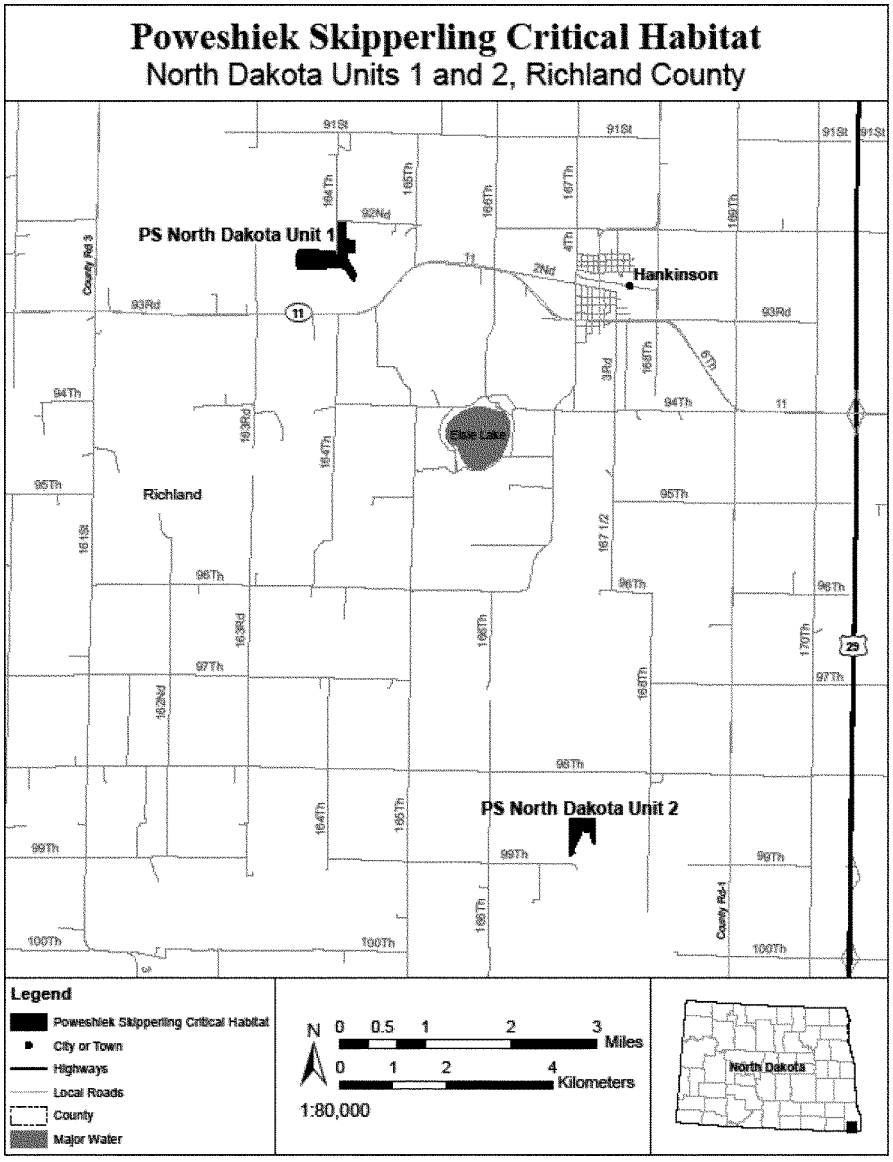
(39) PS Minnesota Unit 16, Cottonwood County, Minnesota. Map of PS Minnesota Unit 16 follows:



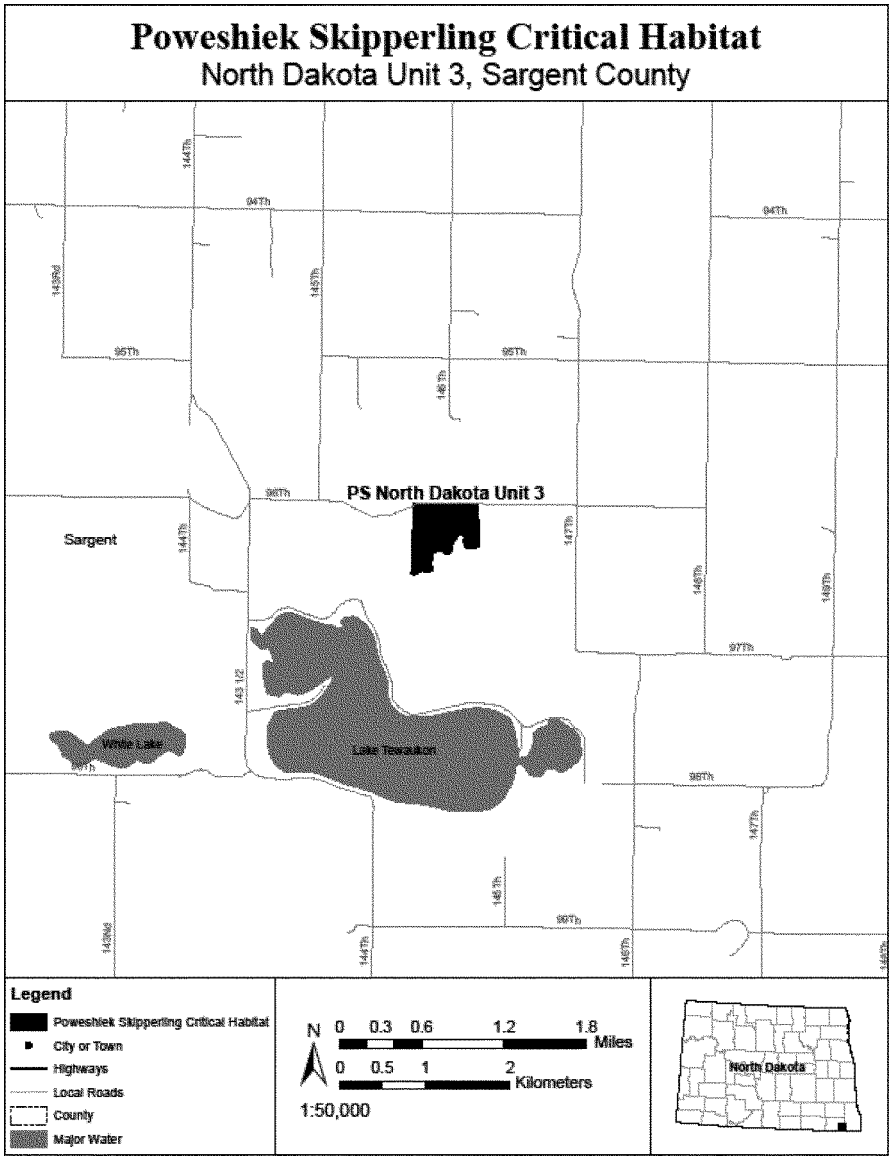
(40) PS Minnesota Unit 17, Pope County, Minnesota. Map of PS Minnesota Unit 17 follows:



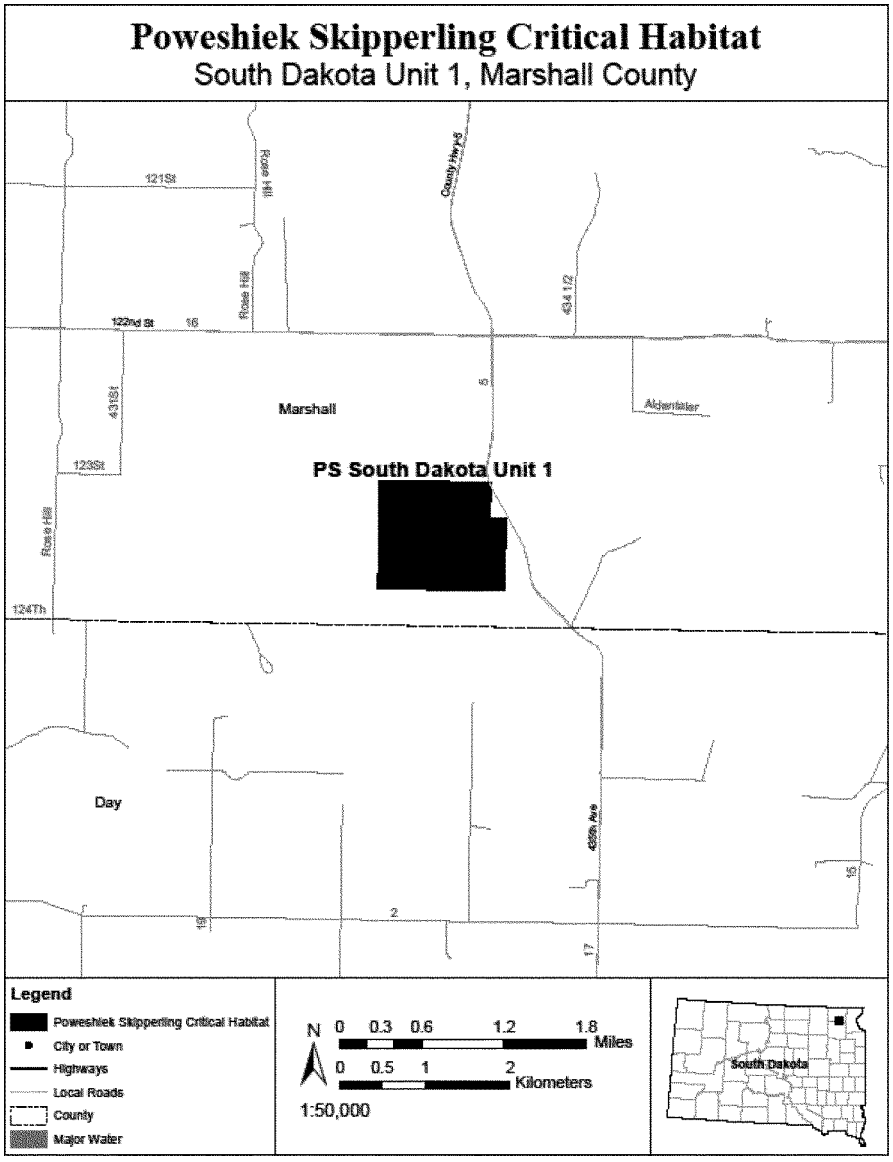
(41) PS North Dakota Units 1 and 2, Richland County, North Dakota. Map of PS North Dakota Units 1 and 2 follows:



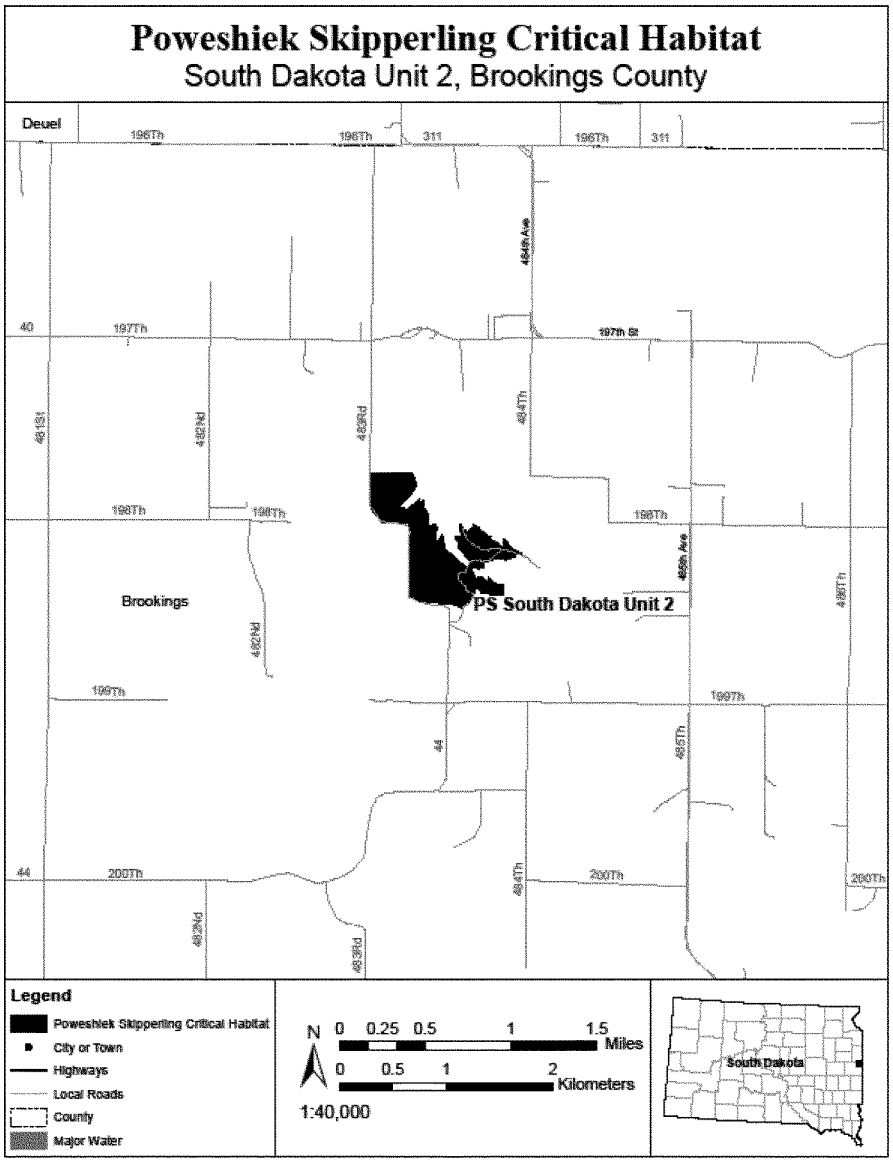
(42) PS North Dakota Unit 3, Sargent County, North Dakota. Map of PS North Dakota Unit 3 follows:



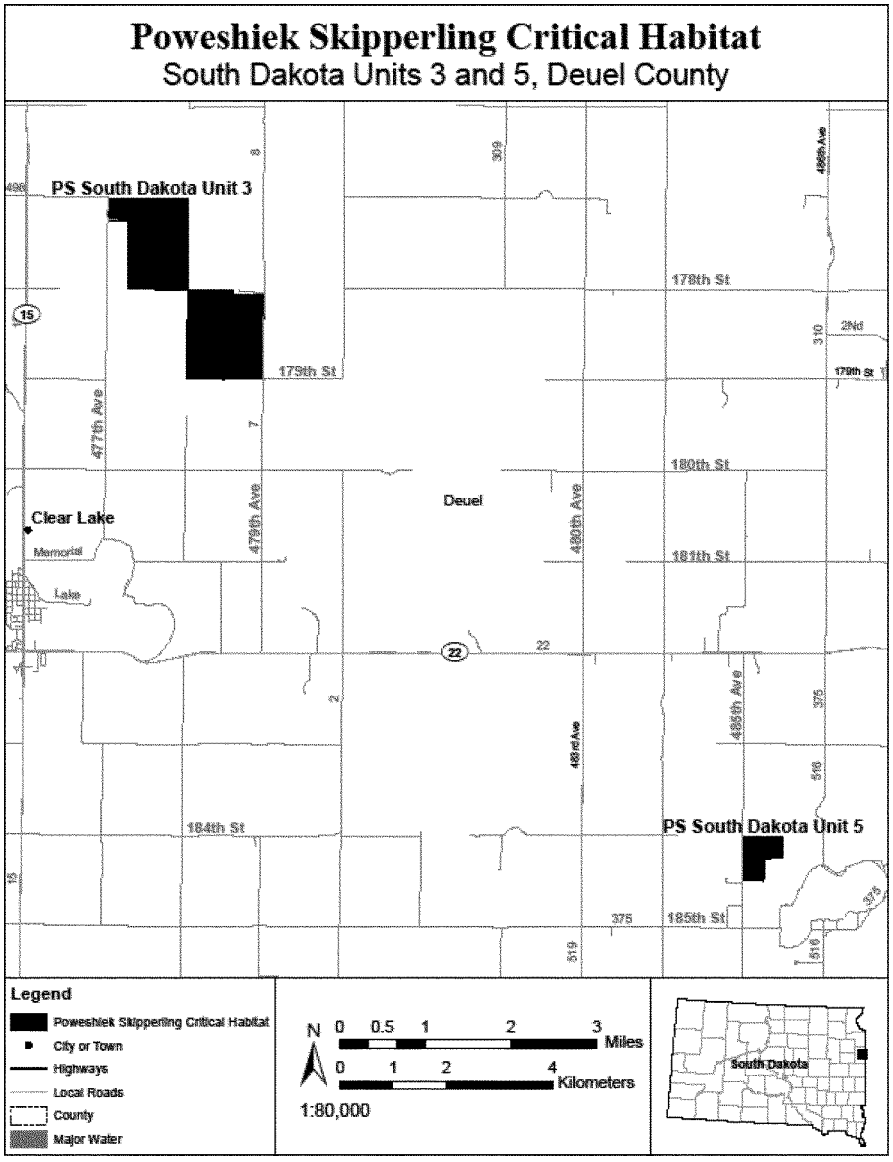
(43) PS South Dakota Unit 1, Marshall County, South Dakota. Map of PS South Dakota Unit 1 follows:



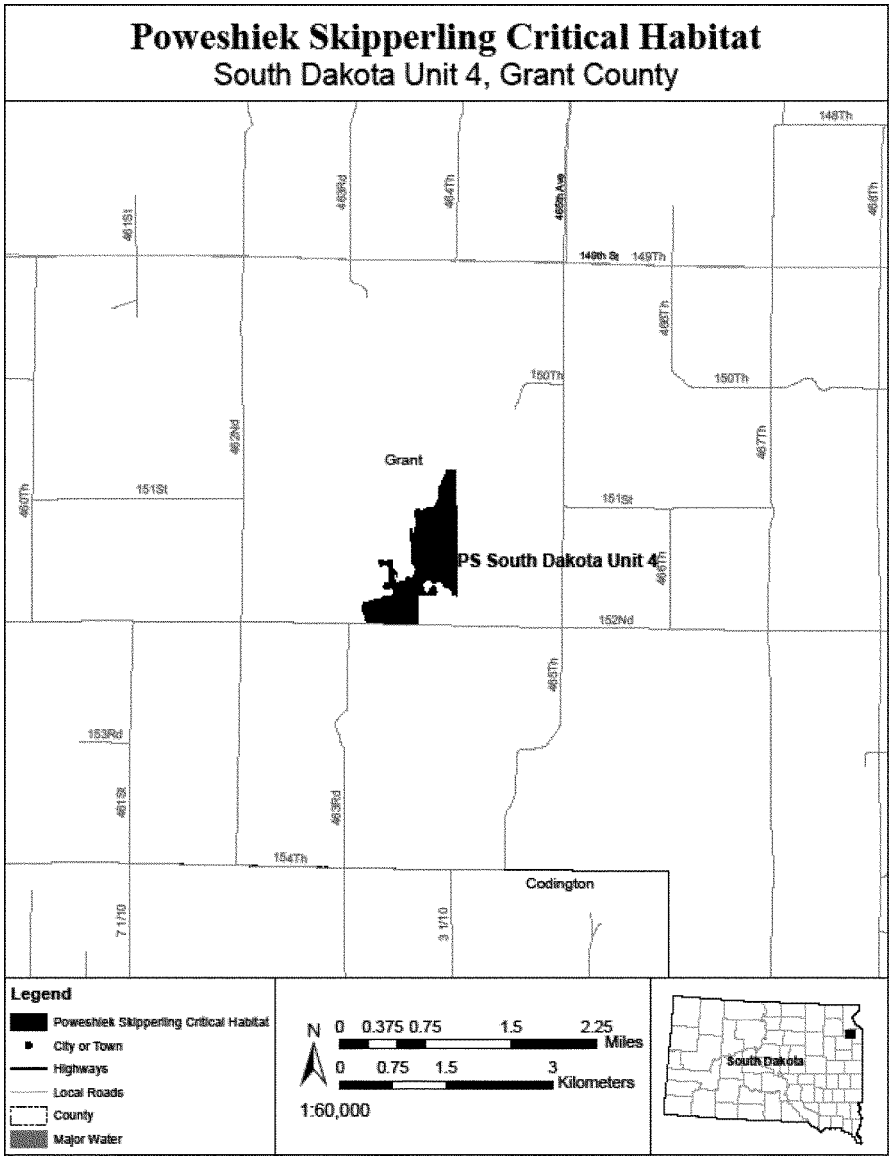
(44) PS South Dakota Unit 2, Brookings County, South Dakota. Map of PS South Dakota Unit 2 follows:



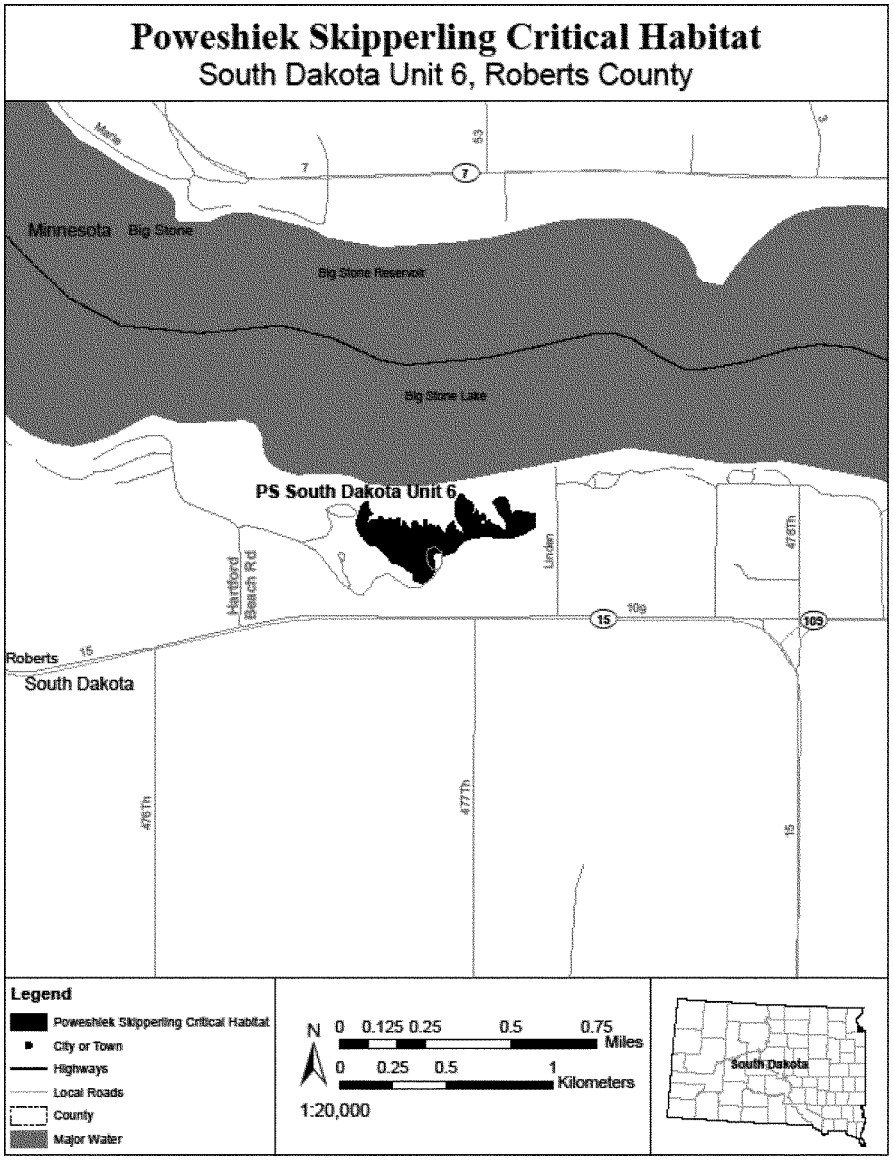
(45) PS South Dakota Units 3 and 5, Deuel County, South Dakota. Map of PS South Dakota Units 3 and 5 follows:



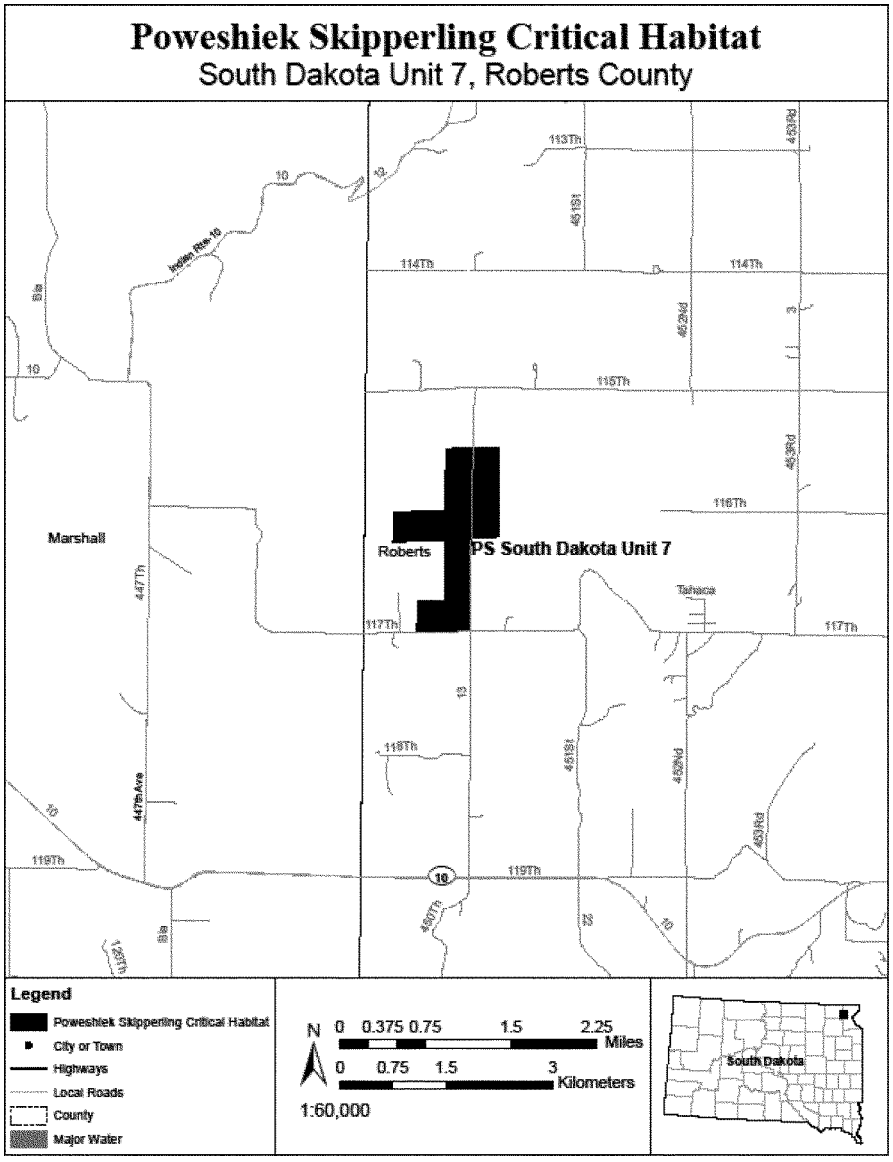
(46) PS South Dakota Unit 4, Grant County, South Dakota. Map of PS South Dakota Unit 4 follows:



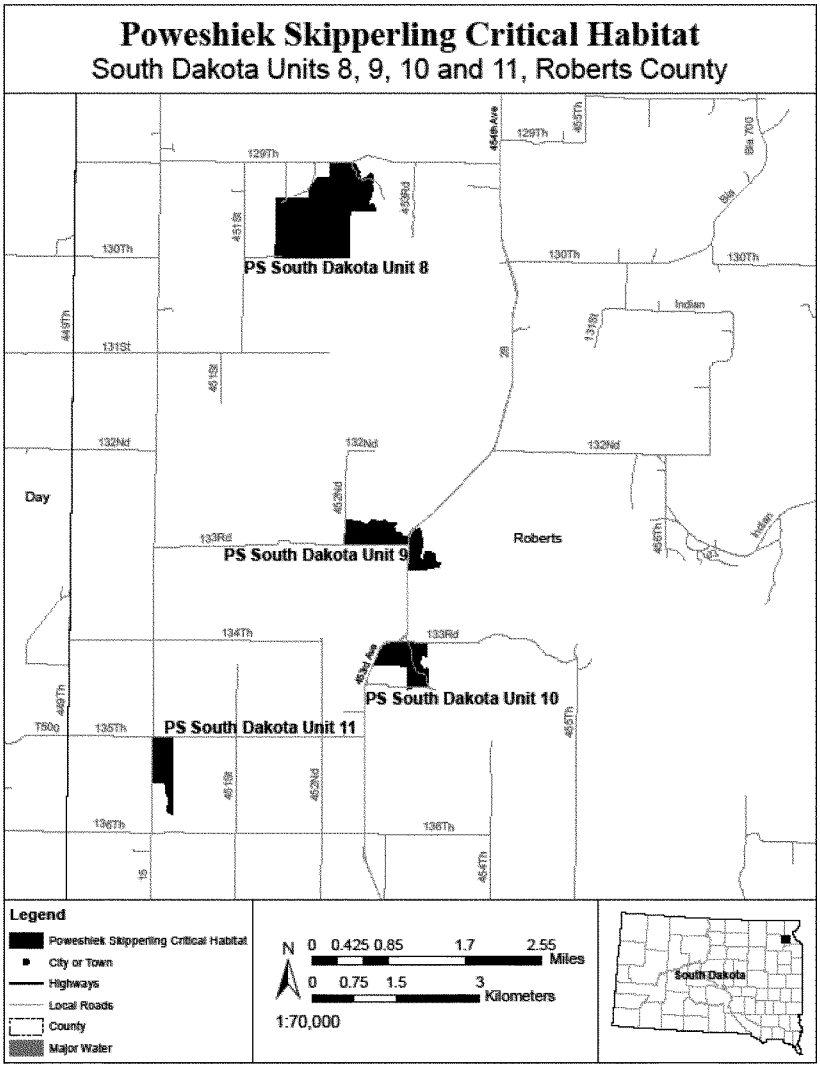
(47) PS South Dakota Unit 6, Roberts County, South Dakota. Map of PS South Dakota Unit 6 follows:



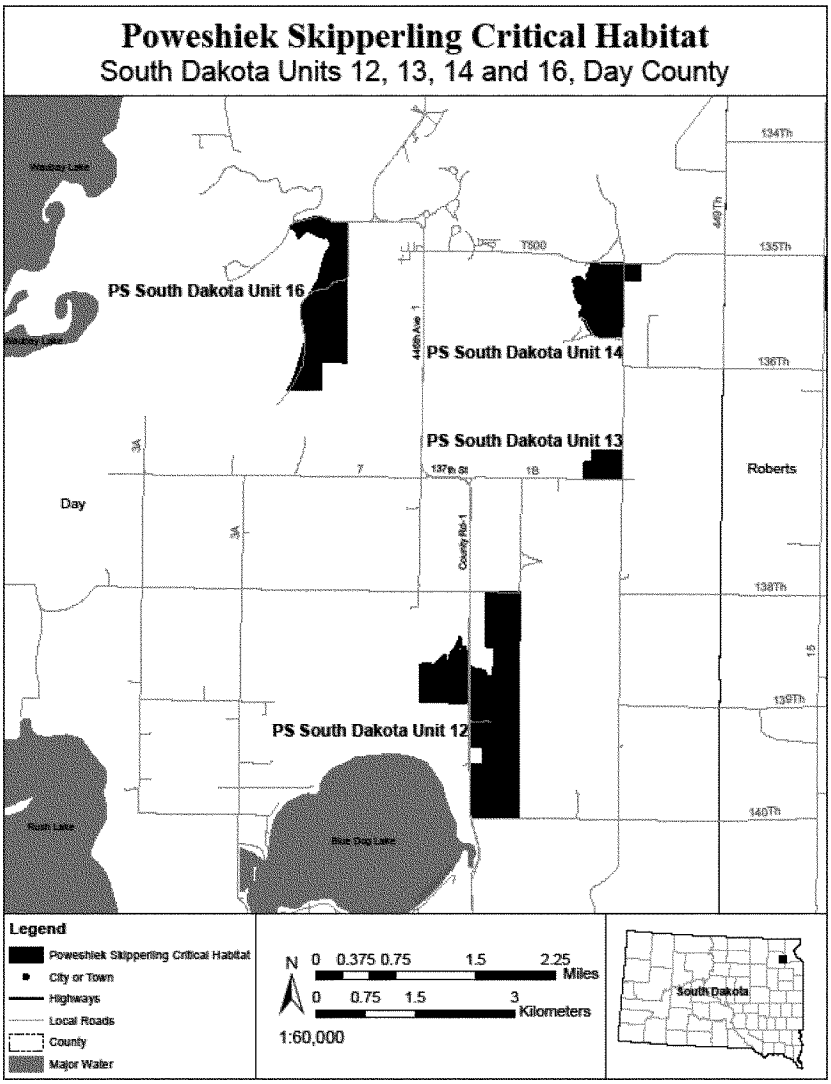
(48) Unit 48: PS South Dakota Unit 7, Roberts County, South Dakota. Map of PS South Dakota Unit 7 follows:



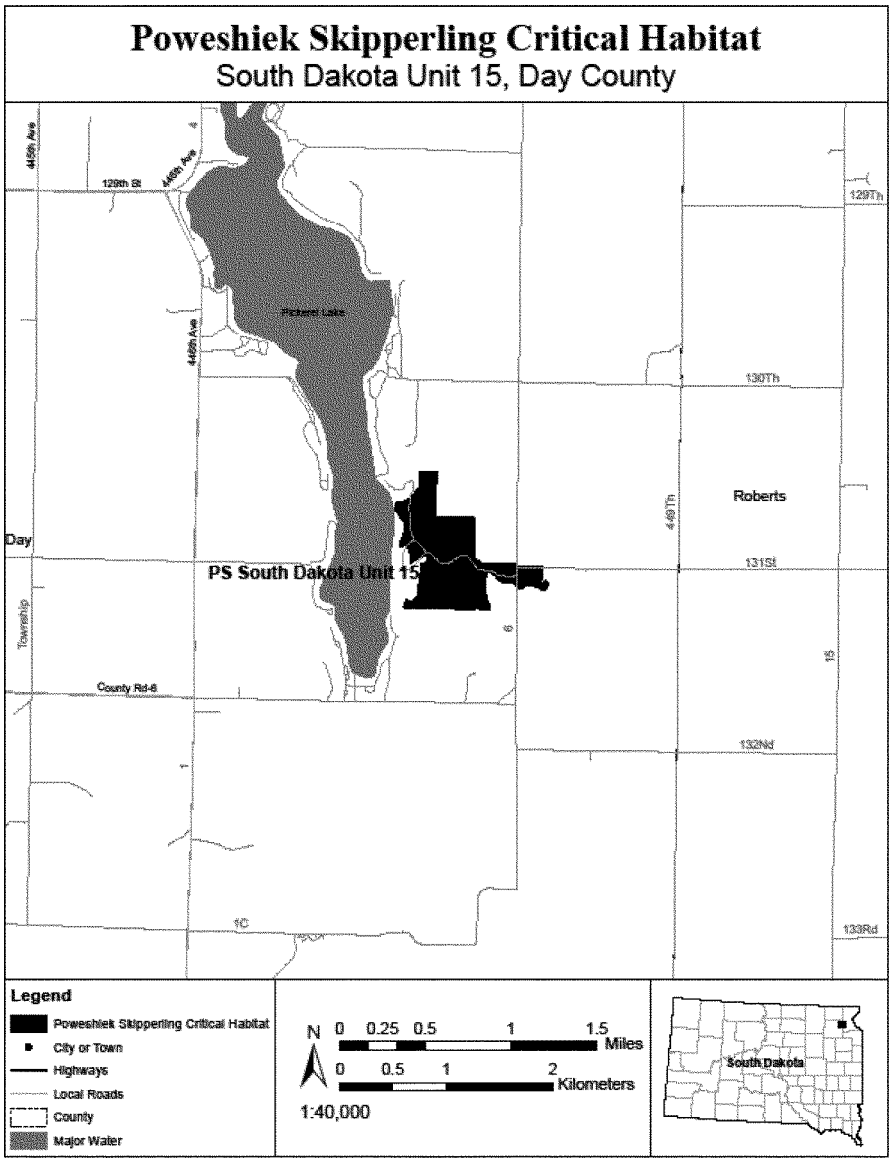
(49) PS South Dakota Units 8, 9, 10, and 11, Roberts County, South Dakota. Map of PS South Dakota Units 8, 9, 10, and 11 follows:



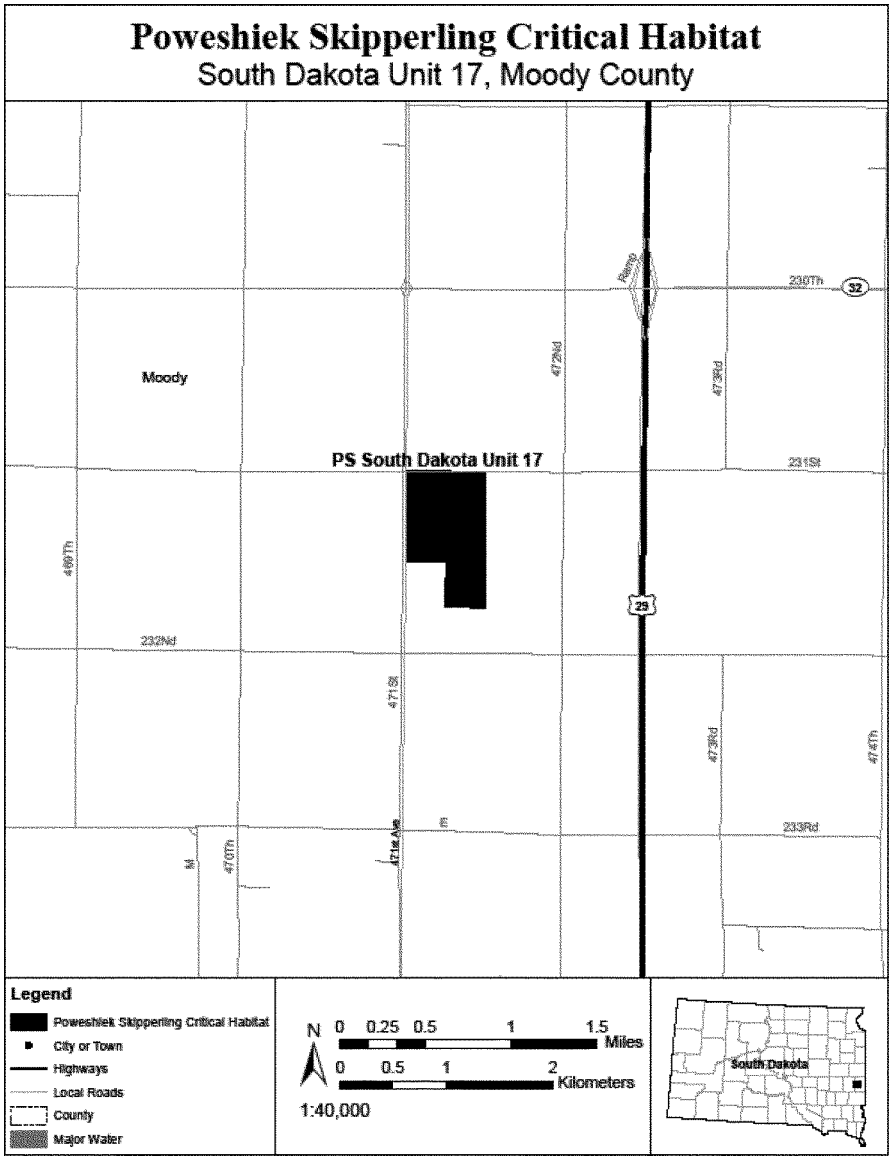
(50) PS South Dakota Unit 12, 13, 14, and 16, Day County, South Dakota. Map of PS South Dakota Units 12, 13, 14, and 16 follows:



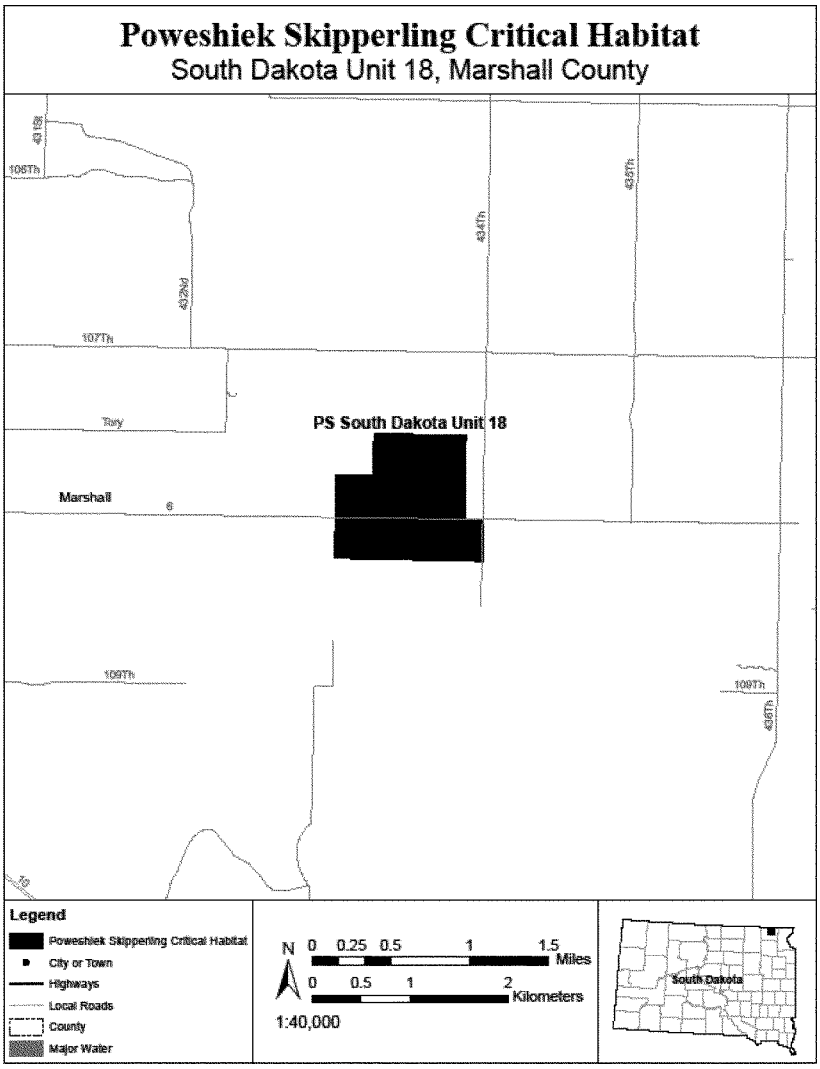
(51) PS South Dakota Unit 15, Day County, South Dakota. Map of PS South Dakota Unit 15 follows:



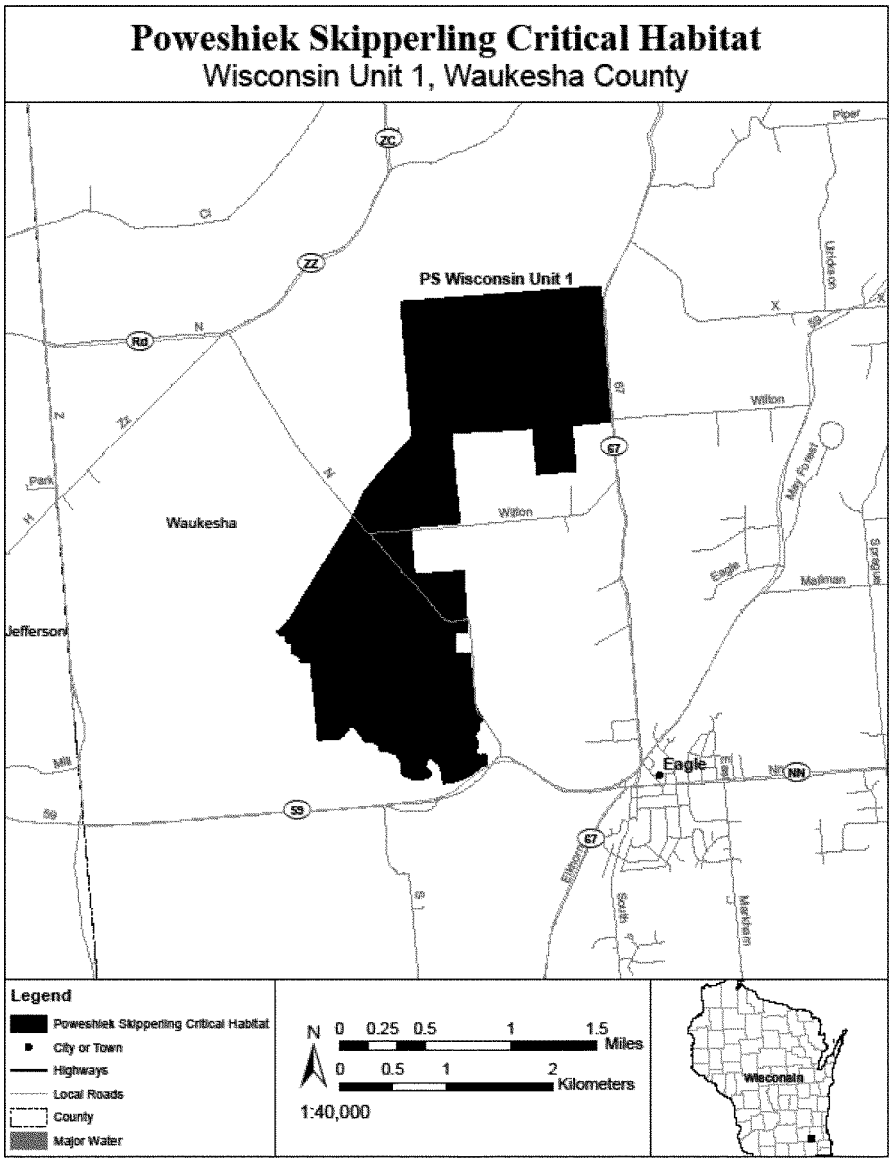
(52) PS South Dakota Unit 17, Moody County, South Dakota. Map of PS South Dakota Unit 17 follows:



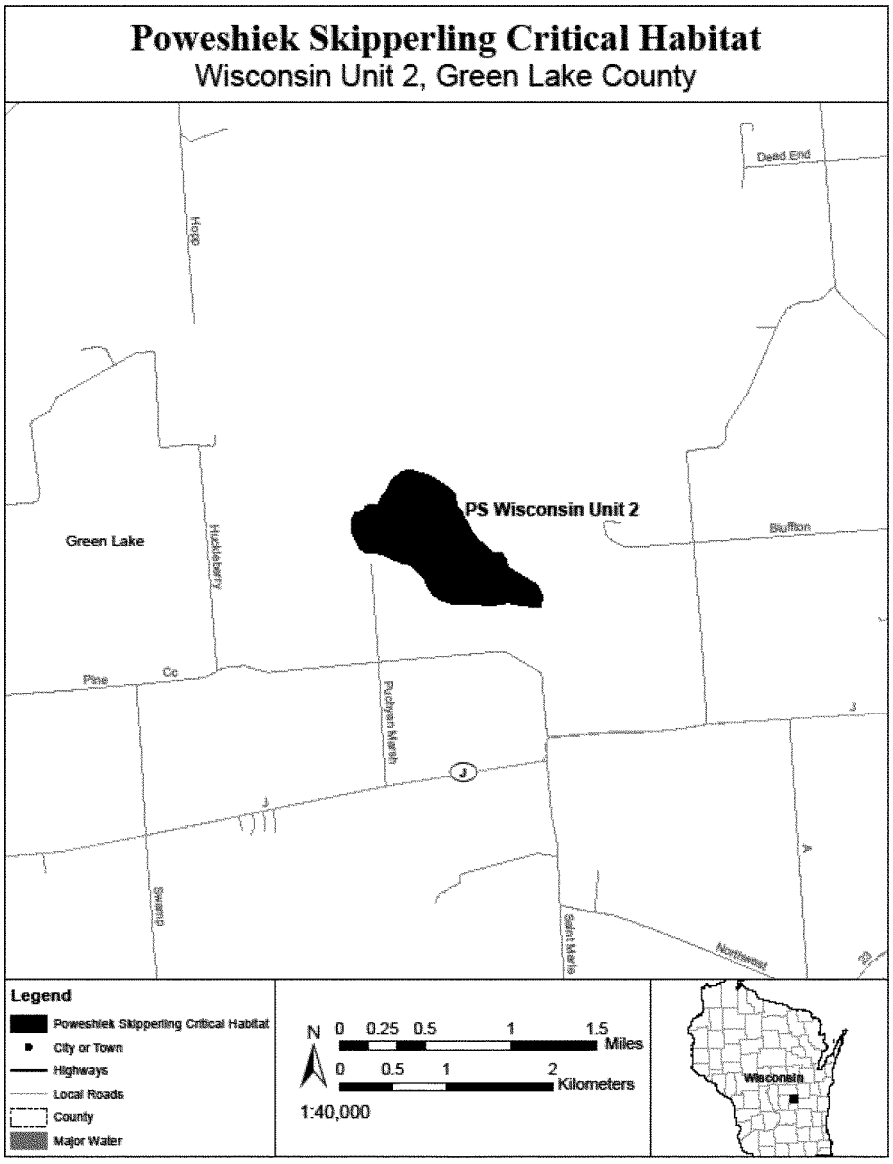
(53) PS South Dakota Unit 18, Marshall County and Roberts County, South Dakota. Map of PS South Dakota Unit 18 follows:



(54) PS Wisconsin Unit 1, Waukesha County, Wisconsin. Map of PS Wisconsin Unit 1 follows:



(55) PS Wisconsin Unit 2, Green Lake County, Wisconsin. Map of PS Wisconsin Unit 2 follows:



* * * * *

Dated: September 27, 2013.

Rachel Jacobsen,

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2013–24778 Filed 10–23–13; 8:45 am]

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No. 206 October 24, 2013

Part III

Department of Housing and Urban Development

24 CFR Parts 903, 905, 941, *et al.*
Public Housing Capital Fund Program; Final Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 903, 905, 941, 968, and 969

[Docket No. FR–5236–F–02]

RIN–2577–AC50

Public Housing Capital Fund Program

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Final rule.

SUMMARY: This final rule combines and streamlines the former legacy public housing modernization programs, including the Comprehensive Grant Program (CGP), the Comprehensive Improvement Assistance Program (CIAP), and the Public Housing Development Program (which encompasses mixed-finance development), into the Capital Fund Program (CFP). This rule defines qualified PHAs, which are not required to file annual plans. The rule expands HUD's current requirement that a Public Housing Authority (PHA) submit a physical needs assessment (PNA) to include small PHAs as well as large PHAs, but provides small PHAs additional time to plan for and implement this requirement. The rule allows PHAs to request a total development cost (TDC) exception for integrated utility management, capital planning, and other capital and management activities that promote energy conservation and efficiency, including green construction and retrofits, which include windows; heating system replacements; wall insulation; site-based generation; advanced energy savings technologies, including renewable energy generation; and other such retrofits. The rule also makes changes to replacement housing factor funds and the threshold for management improvements. Because this rule streamlines programs, several formerly separate regulations are eliminated with the implementation of this rule.

DATES: Effective date: November 25, 2013. The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of November 25, 2013.

FOR FURTHER INFORMATION CONTACT: Jeffrey Riddel, Director, Office of Capital Improvements, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410–8000; telephone number 202–708–1640 (this is not a toll-free number). Hearing- or speech-impaired individuals may access this number through TTY by calling the toll-free Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION: This final rule follows a February 7, 2011, proposed rule and makes changes in response to public comment on the proposed rule and further consideration of issues by HUD.

I. Executive Summary

A. Purpose of the Regulatory Action

This final rule implements section 9 of the United States Housing Act of 1937 (the 1937 Act), which created the CFP as part of the Quality Housing and Work Responsibility Act of 1998 (title V, Pub. L. 105–276, approved October 21, 1998). The Capital Fund consolidated the former public housing modernization programs, including the Comprehensive Grant Program (CGP), the Comprehensive Improvement Assistance Program (CIAP), and the Public Housing Development Program (which encompasses mixed-finance development). In 2008, the Housing and Economic Responsibility Act (HERA) (Pub. L. 110–289, approved July 30, 2008) made changes to the CFP, namely the removal of the former emergency set-aside for natural disasters and emergencies, and the creation of a category of ''qualified PHAs,'' smaller PHAs that are relieved from certain paperwork submission requirements. To date, there has been no comprehensive regulation implementing these statutory requirements and updates. Thus, rather than a comprehensive, user friendly regulation, PHAs have been required to use annual processing notices to supplement outdated regulations in various parts of title 24 of the Code of Federal Regulations (CFR), including parts 905, 941, and 965.

This regulation is necessary to consolidate the legacy modernization programs in one part of the CFR and to update the regulations in accordance with current law. An updated regulation with current program requirements is needed to provide new staff members with the knowledge necessary to manage the Capital Fund and Mixed Finance Development programs proficiently. In addition, the regulated community needs a single, clear, updated regulation in order to have complete and current information.

The Capital Fund formula itself, currently codified at 24 CFR 905.10, is reorganized at § 905.400. This formula includes a number of coefficients that are to be inserted into the equation. These coefficients are unchanged by this rule. The coefficients were defined as part of a negotiated rulemaking that occurred in 1999 and 2000. The proposed rule can be found at 64 FR 49924 (September 14, 1999) and the final rule can be found at 65 FR 14426 (March 16, 2000).

B. Summary of the Major Provisions of the Regulatory Action

This rulemaking: Establishes a new definition section and proposes several new definitions to be included in the section; clarifies Capital Fund eligible and ineligible activities, and incorporates energy efficiency standards; incorporates into part 905 of public housing modernization the regulations at 24 CFR part 968, which part is removed by this final rule; incorporates the development and mixed-finance development requirements of part 941, which also is removed; expands the requirement for a PNA to include small, as well as large, PHAs (specific requirements pertaining to the PNA will be addressed in a separate rulemaking), but delays the applicability of this provision for small PHAs until 30 days after the end of a federal fiscal year quarter following HUD's publication of a notice in the **Federal Register** announcing application of the provision.

The rulemaking also incorporates by reference the 2009 International Energy Conservation Code (IECC) and American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE) standard 90.1–2010, ''Energy Standard for Buildings Except Low-Rise Residential Buildings.'' The ASHRAE standard can be found at *http://www.ashrae.org/standards-research-technology/standards-guidelines*. The 2009 IECC can be purchased at *http://shop.iccsafe.org/*.

This rulemaking also: Clarifies the calculation of TDC limits and establishes the ability for PHAs to request a TDC exception for integrated utility management, capital planning, and other capital and management activities that promote energy conservation and efficiency; establishes 5 years of a Demolition or Disposition Transitional Funding (DDTF) grant that will be included in the regular Capital Fund formula grant, to replace the Replacement Housing Factor (RHF) grant of up to 10 years; provides for a DDTF transition period; clarifies at § 905.202(b) that because of their emergent nature, emergencies that are not identified in the 5-year action plan (statutorily required by section 5A of the 1937 Act) are eligible costs; revises the description of eligible amenities at § 905.202(c); phases in over 5 years a cap of 10 percent of a PHA's Capital

Fund that the PHA may expend on management improvements; and revises the identity of interest regulations in accordance with HUD's actual practice to provide PHAs with the flexibility to use an instrumentality as a general contractor in mixed-finance projects, as long as cost requirements are met, without having to request a waiver.

C. Costs and Benefits

This rule does not have any direct financial impact on the level of funding for the CFP, but has the potential to create some financial transfers among program participants of less than $100 million annually. The rule will cap management improvement expenditures from the Capital Fund at 10 percent, phasing in the cap over 5 years. On average, PHAs use approximately 8 percent of their Capital Fund grants on management improvements, with many PHAs using considerably less, and larger PHAs of more than 250 units using 9 percent. The 10 percent cap would not cause significant transfers outside of the CFP, though the 10 percent cap would require significant expenditure changes for some PHAs that spend a high percentage of their Capital Fund grants on management improvements.

This final rule will also have significant benefits. This rule updates and consolidates the CFP regulations and related regulations having to do with the use of Capital Funds for development and modernization, as well as regulations for continuing operation of low-income housing after completion of debt service. In addition, the rule codifies recent statutory requirements enacted in HERA. The benefits of the rule such as regulatory consolidation, program clarification, removal of obsolete references, and enhanced efficiencies justify the promulgation of this rule.

II. Background

Section 9 of the U.S. Housing Act of 1937 (1937 Act) (42 U.S.C. 1437g) is the statutory basis for the Public Housing Capital Fund (Capital Fund) and the Public Housing Operating Fund (Operating Fund). The Operating Fund is established by Section 9(e) of the 1937 Act, and the Capital Fund, which is the focus of this rule, is established by section 9(d) of the 1937 Act (42 U.S.C. 1437g(d)). Section 9(d) lists the various items for which the Capital Fund may be used, including development, modernization, maintenance, vacancy reduction, code compliance, demolition and replacement, homeownership activities, and energy efficiency, among others. Other important provisions found in section 9(d) of the 1937 Act are: The requirement for HUD to develop a formula to determine the amount of Capital Funds that are allocated to PHAs in each fiscal year (42 U.S.C. 1437g(d)(2)); flexibility for a small PHA to use up to 100 percent of its Capital Fund grant and for a large PHA to use up to 20 percent of its Capital Fund grant for purposes ordinarily pertaining to the Operating Fund (section 9(g) of the 1937 Act pertaining to limitation on use of funds; 42 U.S.C. 1437g(g)); and penalties for the slow obligation and expenditure of Capital Funds (section 9(j) of the 1937 Act, 42 U.S.C. 1437g(j). All of these requirements based in statute and others added by regulation constitute the CFP. Additionally, due to changes made to the annual plan statutorily required of PHAs (PHA Annual Plan) by section 5A of the 1937 Act, and the need to have grant reporting in compliance with the requirements of the CFP, and other federal reporting requirements, the CFP informational requirements will be decoupled from the PHA Annual Plan requirements. HUD will make necessary changes to the HUD forms involving the CFP budget and reporting requirements.

Section 2702 of the HERA amended section 5A of the 1937 Act (42 U.S.C. 1437c–1) to provide that certain PHAs, called ''qualified PHAs,'' are not required to file the PHA Annual Plan called for in section 5A(b)(1) of the 1937 Act (42 U.S.C. 1437c–1(b)(1)), although these PHAs, along with nonqualified PHAs, must file the 5-year plan and a civil rights certification required under section 5A(d)(16) of the 1937 Act, 42 U.S.C. 1437c–1(d)(16). Qualified PHAs under section 2702 are those that administer 550 or fewer units—considered as the sum of all the public housing units and vouchers under section 8(o) of the 1937 Act (42 U.S.C. 1437f(o)) (section 8) administered by a PHA—and which are not designated as a troubled PHA under section 6(j)(2), and which do not have a failing score under the Section 8 Management Assessment Program (SEMAP) during the prior 12 months. Please see the preamble to the proposed rule of February 7, 2011 (76 FR 6654–6682), for further discussion of the statutory background.

III. The Proposed Rule

Significant changes to the CFP regulations that were proposed by the February 7, 2011, rule included the following:

- Establishment of a new definition section and proposing several new definitions to be included in this section.
- Clarification of Capital Fund eligible and ineligible activities and incorporating energy efficiency standards.
- Incorporation into part 905 of public housing modernization the regulations at 24 CFR part 968, which part is removed by this final rule.
- Establishment of annual plan submission requirements for nonqualified PHAs as defined in section 2702 of HERA and Capital Fund submission requirements for qualified and nonqualified PHAs.
- Expansion of the requirement for a PNA to include small, as well as large, PHAs. The requirements pertaining to PNA may be addressed in a separate rulemaking.[1]
- Clarification that Energy Star appliances and systems, and cost-effective energy measures, are eligible costs.
- Incorporation of the IECC and American Society of Heating, Refrigerating, and ASHRAE standard 90.1–2010, ''Energy Standard for Buildings Except Low-Rise Residential Buildings.'' The ASHRAE standard can be found at *http://www.ashrae.org/standards-research-technology/standards—guidelines*. The 2009 IECC can be purchased at *http://shop.iccsafe.org/*
- Clarification of the calculation of TDC limits and establishment of the ability for PHAs to request a TDC exception for integrated utility management, capital planning, and other capital and management activities that promote energy conservation and efficiency.
- Limitations on the number of years that PHAs will receive RHF grants.
- Provision for RHF transition funding for PHAs that have already begun receiving RHF funding grants at the time the new 5-year program comes

[1] Part 968 promulgated December 21, 1989, instituted a requirement for large (Comprehensive Grant) PHAs to complete a PNA as a part of the Comprehensive Plan (see 968.315(e)(2). This rule does not add new PNA requirements for large PHAs but rather continues the current requirements with the only change being that small PHAs will also have to comply with those requirements. The current PNA requirements include completion of a brief summary of the physical improvements needed to bring each development to HUD standards for modernization, energy conservation life-cycle cost effective performance standards, and lead-based paint testing and abatement standards; the replacement needs of equipment and structural elements during the period covered; a preliminary estimate of cost; any physical disparities between buildings occupied predominantly by one racial or ethnic group and the physical improvements required to correct the disparity; and the number of units the PHA is proposing for substantial rehabilitation and subsequent sale, if any.

into effect. Those PHAs would receive 10 full years of replacement funding.

- Setting of costs limits for the CFP fee at 10 percent of the annual Capital Fund grant.
- Reduction of the amount of the grant that may be spent on management improvements from 20 percent to 10 percent over a 3-year period.
- Revisions to the requirements for timely obligation and expenditure of Capital Funds currently found at 24 CFR 905.120.
- Incorporation of the design and construction requirements currently found in 24 CFR 941.203 into part 905.
- Establishment of requirements for funding Resident Management Corporation (RMC) activities.
- Establishment of rules on contracting requirements and the use of force account labor.
- Incorporation of development requirements, including those pertaining to mixed-finance projects.
- Implementation of section 35(h) of the 1937 Act, 42 U.S.C. 1437z–7(h), allowing for deviations from Public Housing Requirements, under specified conditions, to ensure the long-term feasibility of mixed-finance projects, while still ensuring certain tenant protections.
- Prohibition on a PHA pledging its assets without written HUD approval.
- Establishment of sanctions for noncompliance with HUD contracts and regulations.

IV. Summary of Significant Changes in This Final Rule

The following changes were made to the proposed rule at this final rule stage:

- Revises the definitions of Capital Fund Annual Contributions Contract (CF ACC); Public Housing Requirements; Qualified PHA; and public housing funds. This final rule adds a definition of Declaration of Trust (DOT) and of Declaration of Restrictive Covenant.
- Clarifies that the provisions of direct social services and the costs for security guards or ongoing security services are not eligible management improvements.
- Provides, as one option to the guaranty of irrevocability of funding, that the required letter of credit is to be valued at 10 percent of the contract price (the proposed rule would have required a letter of credit to be valued at 25 percent of the contract price).
- Clarifies at § 905.202(b) that because of their emergent nature, emergencies that are not identified in the 5-year action plan (statutorily required by section 5A of the 1937 Act) are eligible costs.
- Revises the description of eligible amenities at § 905.202(c).
- Implements, over a 5-year time period, a 10 percent cap on the amount of Capital Funds that a PHA may spend on management improvements. (In contrast, the proposed rule would have implemented this cap over 3 years.)
- Establishes 5 years of a DDTF grant that will be included in the regular Capital Fund formula grant. Since DDTF will be included in the formula grant, the DDTF grant will not be subject to the same requirements as the RHF grants and will be usable for modernization as well as development. PHAs will be able to use the DDTF for any eligible activity under the CFP and this funding will not be subject to accumulation, although the DDTF grant will be subject to the same statutory requirements as any Capital Fund grant and the terms of the appropriation of Capital Funds from Congress.

In addition to the above listed changes, the following changes are also made via the final rule.

The final rule delays the applicability of § 905.300(a) for small PHAs. HUD is taking this action to provide small PHAs additional time to prepare for the implementation of the requirement to submit a PNA. Specifically, small PHAs will be subject to this provision 30 days following the end of a federal fiscal year quarter following HUD's publication of a notice in the **Federal Register** announcing application of the provision. Moreover, HUD plans to delineate a time frame for submission of a PNA such that the first submission by a small PHA would not be sooner than 6 months after the end of the federal fiscal quarter.

The final rule gives PHAs more time to prepare for the change to DDTF. Starting in Fiscal Year (FY) 2014, PHAs that would be newly eligible for RHF funding will receive instead 5 years of DDTF. In FY 2014, if a PHA has one or more years of first-increment RHF funding, the PHA will receive the remaining years of first-increment RHF and an additional 5 years of DDTF. If, in FY 2014, a PHA has already started receiving second increment RHF funding, the PHA will receive the remaining years of second increment RHF funding. An Excel spreadsheet that describes the impact of HUD's changes to DDTF is available at *http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/capfund.*

The final rule provides that PHAs that remove units because of homeownership are not eligible for replacement funding under an RHF.

This final rule corrects an error in proposed § 905.602(b), that addressed limitations on new construction. In the proposed rule, acquisition was improperly excluded from the limitations. HUD's interpretation of construction in this context, as including acquisition, was properly reflected in the regulatory preamble of the February 7, 2011, proposed rule at 76 FR 6654, third column, which stated as follows:

> Section 9(g)(3) of the 1937 Act (42 U.S.C. 1437g(g)(3)) imposes limitations on the use of the Capital Fund or Operating Fund for new construction. Generally, the CF formula shall not provide PHAs funding for the purpose of constructing public housing units (which includes acquisition), if the construction would result in a net increase from the number of housing units owned, operated, or assisted by the PHA on October 1, 1999. . . .''

However, the rule text at proposed § 905.602 did not correctly reflect this interpretation. This error is corrected in final rule § 905.602(b).

The final rule makes changes to proposed § 905.604(n), which addressed deviations from HUD requirements under 35(h) of the 1937 Act (see 42 U.S.C. 1437z–7(h)). The proposed rule would have required that to allow for deviations in a mixed-finance project because of a change in appropriations or other change in law preventing a PHA from providing Operating Funds, at least 20 percent of the units must be nonpublic housing rental units. In addition, the proposed rule would have predetermined specific allowable deviations. Some commenters objected to the 20 percent threshold and the limited allowable deviations. This final rule allows for more flexibility. As the statute provides, there must be a ''significant number'' of units that are not public housing. Rather than specific allowable deviations, the PHA, on behalf of the mixed-finance owner entity (Owner Entity) would submit an Alternative Management Plan to HUD, which would explain the reasons for the deviation and the proposed changes, among other details (see § 905.604(k) of this final rule).

This final rule revises the identity of interest regulations in accordance with HUD's actual practice. This revision provides PHAs with the flexibility to use an instrumentality as a general contractor in mixed-finance projects, as long as cost requirements are met, without having to request a waiver. The identity of interest general contractor must have submitted the lowest bid in response to a request for bids, or, in the alternative, the PHA must submit a written justification to HUD, including

an independent cost estimate, that demonstrates that the identity of interest general contractor's costs are less than or equal to the independent third party cost estimate. Identity of interest contractors will be considered by HUD as part of the development proposal approval. Since 2008, HUD has consistently granted waivers to allow this procedure to be followed; 45 waiver requests have been granted, and no waiver request was denied in that period. Additionally, HUD previously published this provision for comment (see HUD's proposed rule entitled ''Streamlining Public Housing Programs'' (FR–4990–P–01), published on August 8, 2008, at 73 FR 45373 and, generally, received supportive comments. The comments on the 2008 proposed rule can be found at *http://www.regulations.gov.*

V. The Public Comments

The public comment period on the proposed rule closed on April 8, 2011, and 45 public comments were received. Comments were received from a variety of stakeholders, including PHAs, trade associations, housing advocates, and individuals.

Definitions (§ 905.108)

Issue: The proposed definition of ''Capital Fund Annual Contributions Contract (CF ACC)'' appears to conflate the definition of the entire ACC (which is a contract addressing the operation of public housing) with that of a Capital Funds amendment (presumably limited to the special terms applicable to the provision of Capital Funds).

HUD Response: To avoid possible ambiguity, this final rule modifies the proposed definition of CF ACC to more clearly indicate that this is an amendment to the Consolidated Annual Contributions Contract (Consolidated ACC). It should also be noted that the ACC is a grant agreement that addresses not only the operation of public housing but also the development and modernization of public housing.

Issue: The definition of ''development'' in § 905.200(b)(2) appears to be limited to activities to add units to inventory; notwithstanding the reference to nondwelling facilities, it is unclear what else might be covered given the limiting phrase. Also, the definition of ''development'' should include a facility that is being modernized.

HUD Response: The reference to ''development'' in this paragraph is in the context of eligible housing, not a general definition of development, and is part of a larger list of eligible activities. The paragraph states that the eligible activities under the rubric of development include ''construction and acquisition with or without rehabilitation; any and all undertakings necessary for planning, design, financing, land acquisition, demolition, construction, or equipment, including development of public housing units, and buildings, facilities, and/or related appurtenances (i.e., nondwelling facilities/spaces). Development of mixed-finance projects includes the provision of public housing through a regulatory and operating agreement, master contract, individual lease, condominium or cooperative agreement, or equity interest.''

Issue: The definition of ''Community Renewal Costs'' in § 905.108 states that Capital Funds may be used for community renewal costs, but not what those costs are, which makes it difficult to apply the TDC formula at § 905.314(e). The commenter states that this term should be defined.

HUD Response: Community Renewal costs consist of the sum of the following HUD-approved costs related to the development of a public housing project: planning (including proposal preparation), administration, site acquisition, relocation, demolition, and site remediation of environmental hazards associated with public housing units that will be replaced on the project site, interest and carrying charges, off-site facilities, community buildings and nondwelling facilities, contingency allowance, insurance premiums, any initial operating deficit, on-site streets, on-site utilities, and other costs necessary to develop the project that are not covered under the ACC. This final rule adds this information to the definition.

Issue: The definition of ''Public Housing Requirements'' should be revised to specifically reference the Consolidated ACC and all amendments, rather than referring to the CF ACC Amendment without the underlying document. If there is intended to be a split between the CF ACC Amendment and the Mixed-Finance ACC Amendment, references to the CF ACC should be corrected accordingly. The definition should read:

> *Public Housing Requirements.* All requirements applicable to public housing including, but not limited to, the 1937 Act; HUD regulations; the Consolidated Annual Contributions Contract, including amendments; HUD notices; and all applicable federal statutes, executive orders, and regulatory requirements, as these requirements may be amended from time to time.

HUD Response: HUD accepts this recommendation and the change is incorporated into the definition at § 905.108.

Issue: HUD's regulation at § 903.3 does not directly define the term ''qualified'' PHA. The commenter recommends that to make the final rule transparent and conducive to public understanding, it should list the 3 factors necessary for a small PHA to be ''qualified'' in order to avoid having a PHA Annual Plan. The commenter additionally notes that while the proposed rule's summary and overview declare that the proposed PHA Annual Plan change would merely incorporate the definition of ''qualified PHA'' in the PHA Annual Plan regulation at § 903.3, the actual proposed rule text removes the current subsection explaining the purpose of the PHA Annual Plan.

HUD Response: For ease of use and transparency, this final rule incorporates the definition of ''qualified PHA'' that is provided in § 903.3, which, in turn, adopts the statutory definition for this term in section 2702 of HERA (codified at 42 U.S.C. 1437c–1(b)(3)(C)), rather than relying on a cross-reference:

> The term ''qualified PHA'' means a public housing agency that meets the following requirements:
>
> (1) The sum of the number of public housing dwelling units administered by the agency, and the number of vouchers under section 8(o) of the United States Housing Act of 1937 (42 U.S.C. 1437f(o)) administered by the agency, is 550 or fewer; and
>
> (2) The agency is not designated under section 42 U.S.C. 1437d(j)(2) as a troubled public housing agency and does not have a failing score under SEMAP during the prior 12 months.

Issue: The definition of ''Owner Entity'' requires that the rule make clear, either in the definition or elsewhere, that a mixed-finance development can be owned by an Owner Entity, a PHA, or, alternatively, an instrumentality.

HUD Response: HUD has clarified the definition of Owner Entity as it relates to mixed-finance in §§ 905.108 and 905.604(a)(1).

Issue: In proposed § 906.604(b)(4), the definition of ''participating party'' is overbroad.

HUD Response: This term is no longer used this final rule.

Issue: The rule should include a definition of ''partners,'' used in § 905.108; a definition of ''declaration of trust''; a definition of ''modernization''; and a definition of ''mixed-finance modernization.''

HUD Response: ''Partner'' was proposed to be defined in § 905.604(b); however, because the term applies

elsewhere, this final rule moves the definition to § 905.108. ''Mixed-finance modernization'' is defined at § 905.108, 905.200 and 905.604. Definitions of ''Declaration of Trust'' and ''modernization'' are added to this final rule at § 905.108.

Issue: The definition of ''public housing'' excludes HOPE VI and other non-Capital Fund assistance that HUD regulates.

HUD Response: To capture the Public Housing Funding that HUD regulates, this final rule defines ''public housing funds'' in a more inclusive manner at § 905.108 to include HOPE VI and other funds appropriated for public housing uses, including development, rehabilitation, and operations.

Total Development Cost (TDC)

Issue: Several commenters expressed support for limiting modernization costs to 90 percent of TDC as well as for the TDC exception in § 905.314(c) for integrated utility management, capital planning, and other capital and management activities that promote energy conservation and efficiency, including green construction and retrofits.

One commenter, however, stated that there is a lack of clarity in the language of § 905.314(c) because the terminology varies between ''exception'' and ''waiver,'' where a waiver is normally a more formalized process than a simple regulatory exception.

HUD Response: This final rule retains the 90 percent of TDC threshold for modernization. On the issue of exception or waiver, the commenter is correct, ''exception'' is the correct term and is used in § 905.314(c) of this final rule.

Issue: One commenter states that while the rule deals with Capital Funds, it should also include other sources of funding for public housing such as HOPE VI, Choice Neighborhoods, ''Development funds,'' and any other sources that may become available in the future. The commenter states, for example, § 905.314(c), on TDC, currently covers only development with Capital Funds and that this section should be revised to include all public housing funding sources.

HUD Response: HUD agrees that, because of the federal interest in maximizing the use of funds, TDC applies to all public housing funds and revises § 905.314(c)(1) of this final rule accordingly.

Issue: Heating-and-cooling-degree-days should continue to be an essential factor when considering exceptions to TDC. The unique expenses associated with implementing energy-saving and green features that represent high front-end costs, which may or may not be ''cost saving sensitive'' but are highly sensitive to depleting energy sources, should be treated similarly. The commenter states that the rule should directly and specifically address the eligible high front-end expenses when green features emphasize renewable energy sources that far exceed TDC, in exchange for preserving the other energy sources that are depleting.

HUD Response: This final rule provides for a TDC exception for integrated utility management, capital planning, and other capital and management activities that promote energy conservation and efficiency. HUD believes that, rather than trying to address each possible special case in the rule, this exception preserves PHA discretion to address the commenter's concern as well as other similar concerns that may arise in individual cases.

Contracts and Contracting

Issue: This commenter states that the proposed rule should subordinate its terms for a covenant to the terms of the financing deal for development. As for the covenant for modernization, it should subordinate such terms only when Capital Fund financing is involved in the modernization of the property. The commenter states that for all other cases it would appear that the 20-year covenant for modernization could then be a reasonable provision for inclusion in a final rule.

HUD Response: Section 9(d)(3)(B) of the 1937 Act (42 U.S.C. 1437g(d)(3)(B)) requires use restrictions to remain on the property for 20 years from the date that modernization is completed with Capital Funds on any public housing or portion thereof. HUD retaining a priority position as to HUD's financing ensures that the low-income use requirements will continue to be met. HUD has interpreted the 1937 Act to allow appurtenances to be excepted from the definition of public housing (e.g., nondwelling properties such as administrative buildings) which, if included in public housing, would have had to remain under the Declaration of Trust for 20 years from the latest date on which modernization is completed, but may have liens prior to the Declaration of Trust.

Issue: The proposed regulation at § 905.316(a), which provides that PHA procurement must comply with 24 CFR part 85, should be limited to activities funded with Capital Funds.

HUD Response: Section 905.31(a) explicitly refers to public housing capital activities; no further clarification is necessary.

Issue: A commenter stated that § 905.316(d)(2)(iv), which refers to irrevocable letters of credit as an assurance of completion, is insufficient because the specific terms are not stated. The rule should require that, before accepting a letter of credit, the PHA have its counsel review the proposal form and opine that the PHA and HUD are fully protected under its terms. Another commenter stated that the 25 percent requirement is inconsistent with modern private sector practice and imposes extra costs that do not materially increase the PHA's security, and, in the context of mixed finance, is unnecessary because the tax credit investors have a strong monetary interest in completion.

HUD Response: The main condition that HUD is concerned about, as stated in the rule, is irrevocability. The letter of credit is only one option for the assurance, and the PHA may select one of the other options. Therefore, HUD does not believe a change is necessary regarding further specificity of the terms. However, HUD agrees to lower the percentage requirement to reflect modern practice, and this final rule now requires a 10 percent irrevocable letter of credit at § 905.316(d)(iv).

Issue: Proposed § 905.308(b)(4) appears to be an incredible expansion of prevailing wage rate requirements, since it appears to apply to third party contracts and to professionals. The commenter requests clarification as to whether, under this section, architects, engineers and technicians must be paid the prevailing wage rates and questioned how to find those rates.

HUD Response: The commenter is incorrect; HUD is not expanding the Davis-Bacon wage rate requirements in this rule. These are standard Davis-Bacon provisions and are required by statute; specifically, as Davis-Bacon requirements related to HUD-funded projects under the 1937 Act (42 U.S.C. 1437j(a)). Guidance can be found at the Department of Labor's wage rate site, *http://www.wdol.gov/.* HUD also has a Web page with Davis-Bacon information at *http://portal.hud.gov/hudportal/HUD?src=/program_offices/labor_relations.*

Issue: One commenter asked whether § 905.326, which imposes a 5-year time frame for record retention, intends to add an additional 2 years to the record retention required under 24 CFR 85.36(i)(11) and 85.42(b).

HUD Response: Yes, based on the life cycle of Capital Funds, this rule adds 2 years to the 3 years required under 24 CFR part 85, for a total of 5 years.

Issue: As to § 905.318, a commenter states that a title insurance policy is not available before a PHA takes title.

HUD Response: Title insurance is required at the time the property is acquired by the PHA. This final rule makes this clarification.

Forms

Issue: The definition of ''Cooperation Agreement'' references a form prescribed by HUD, form HUD–52481, which is available in HUDClips (*http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips/forms/),* but one commenter stated that the form states that it is a drafting guide.

HUD Response: This form has always been a guide because State and local law must be considered as well. Many PHAs have used this form ''as is'' and that is acceptable as long as it conforms to State and local law.

Issue: One commenter stated that there should be an exception for the use of American Institute of Architects forms, such as AIA–B108–2009 under § 905.316(b)(use of HUD-prescribed contract forms).

A commenter stated that one of HUD's proposed changes to part 905 would require that PHAs nationwide use standard mandated contract forms. The commenter states that while PHAs should be required to incorporate certain terms and conditions in their contract, they must also have flexibility to address local legal requirements, which may vary from state to state.

HUD Response: HUD-prescribed contract forms include necessary federal and Public Housing Requirements. HUD intends to limit the use of contract forms to HUD forms, because nonstandard and local forms do not reflect the appropriate federal limitations. Therefore, HUD has not changed the form requirements.

Issue: The rule is inconsistent with respect to references to ACC forms. The rule refers variously to a mixed-finance ACC Amendment (§ 905.604(k)(2)), ACC Amendment (throughout § 905.604(k)), and CF Amendment (§ 905.612(b)) in closely related provisions. The rule seems to suggest that it intends to replace 3 ACC forms currently in use with a single CF ACC amendment, but is inconsistent in this respect.

HUD Response: It is not the intention of this rule to replace the 3 ACC forms with a single ACC Amendment. There is one consolidated ACC, and separate ACC Amendments for different sections of the program. A definition of ACC Amendment has been added to § 905.108. There are separate ACC Amendments for the various areas of the Capital Fund Program (CFP), including but not limited to the CFP annual formula grant, CFP annual RHF grants, the Capital Fund Education and Training Community Facility Program grants that were awarded, and mixed-finance grants.

Replacement Housing Factor (RHF)

Issue: Reduction in RHF grant. PHAs that have a reduction in units due to demolition and disposition have been eligible for an additional grant, the RHF grant. PHAs have been entitled to an initial 5 years of RHF funding and an additional 5 years of RHF funding if certain conditions are met. The rule proposed, for units demolished or disposed of on or after the effective date of this rule, to reduce the RHF to 5 years of funding, in total.

One commenter observed that this change would have a positive impact on the availability of Capital Funds. Several other commenters, however, objected to this change and stated that RHF funding should be standardized to 10 years because RHF funding is the best approach for developing replacement housing, and many PHAs have compelling reasons for demolishing or disposing of public housing property and need this resource, which is one of the few resources remaining to assist with new public housing. There are still thousands of distressed housing units, and until these can be improved, RHF funding should continue at 10 years. PHAs have a capital backlog of an estimated $32 billion and an average of 10,000 units are lost each year. RHF funding adds up to a vital resource over the course of 10 years, especially given the uncertainty of funding from year to year. PHAs cannot count on an award of HOPE VI or Choice Neighborhood grants, because they are scarce and directed to certain types of projects. The RHF constitutes the only resource available that is dedicated to replacement public housing, and is an important resource for PHAs that do not have HOPE VI funds.

One commenter stated that because the funding is only paid to PHAs that have removed units, without HUD development funds it can take years to develop a viable, fundable plan to for replacement housing. One commenter stated that a PHA cannot count on other resources, and that RHF ''constitutes the only resource available that is dedicated to replacement public housing. HUD has not done a study of RHF, including its leveraging effectiveness, and has not established a sound basis for dramatically cutting this much-needed resource.'' Even with 10 years' worth of funding, agencies must look for other resources, and thus it is not sensible to reduce the amount provided by the RHF even more.

HUD Response: While the RHF is an important tool for development of replacement housing, in the current limited funding environment, the need for replacement housing for a few PHAs has to be balanced with the needs of the majority of PHAs whose Capital Funds modernize existing public housing. These needs are quantified in a study released in June 2011 on modernization needs, ''Capital Needs in the Public Housing Program,'' prepared by Abt Associates, available at *http://portal.hud.gov/hudportal/documents/huddoc?id=PH_Capital_Needs.pdf.* The study found that the Nation's 1.2 million public housing units have an estimated total of $25.6 billion in existing capital needs. Regarding demolition and disposition needs, the Capital Fund and other sources of funding, such as section 8 funding for replacement housing, can be used to meet these needs. The change in the RHF will result in an increase in Capital Funds, which is a more flexible resource.

However, given the significance of the change, this final rule allows for a longer transition period than proposed. PHAs that would be newly eligible for RHF funding in Federal Fiscal Year (FFY) 2014 will instead receive 5 years of DDTF from the Capital Fund. The Federal Fiscal Year is defined in § 905.108 of this rule as the fiscal year that begins each year on October 1 and ends on September 30 of the following year (PHA fiscal years can have different beginning and ending dates). PHAs that have already begun receiving first-increment RHF funding by FFY 2014 will receive the remainder of their first increment and 5 years of DDTF. If a PHA is already receiving second-increment RHF funding by FFY 2014, it will receive the remainder of its second-increment RHF funding. DDTF funding would have fewer limitations than RHF funding, in that it could be used for modernization needs (of which there is a substantial backlog) as well as development; at the same time, statutory requirements applicable to the Capital Fund, such as the requirements for expenditure and obligation in section 9(j) of the 1937 Act (42 U.S.C. 1437g(j)), will apply. This is a generous transition and should ameliorate the issues discussed by the commenters.

Issue: Scattered site replacement housing. One commenter stated that eliminating 5 years of RHF funds would tie the hands of PHAs that replace older public housing units with new

scattered-site units. Such units may take years to come online and that the local housing opportunities commission is inclined to pass over units in areas with a high affordable housing concentration in favor of units in wealthier areas. The commenter also stated that reducing the time frame for RHF funding may restrict efforts to develop mixed-finance developments that include some public housing because such deals and regulatory regimes are complex.

HUD Response: Firstly, if the PHA in question has already received at least one year of RHF funding as of the effective date of this final rule, the PHA will be eligible under § 905.400(k) for an additional 5 years of RHF funding. Secondly, the change in RHF grant funding will increase the amount of Capital Funds, which is a more flexible resource that, unlike RHF funds, can be used for any Capital Fund purpose, be it development or modernization. This flexibility is particularly important in the case of smaller PHAs whose RHF funds typically are not enough at any one time to engage in development activities. In many cases, by the time these unused funds are recaptured by HUD, they are lost to their intended use for assisted housing because the life cycle of the funding has expired and the funds must be returned to the Department of the Treasury as general revenues. Under DDTF, PHAs in this situation will be able to use the funds for modernization needs, thus assuring that funds intended for housing needs actually go to that purpose. Also, because these funds are, in fact, Capital Funds and not part of a separate appropriation, the phased-in decrease to 5 years means that there will be more Capital Funds available to all PHAs receiving Capital Fund grants.

Issue: Grandfathering. Commenters stated that PHAs currently receiving RHF grants should retain their full 10 years of eligibility.

HUD Response: Under this final rule, PHAs that have received at least one year of RHF funding as of the effective date of this rule will be eligible for 10 years of RHF grants if they meet the regulatory requirements of this rule, including leveraging (see § 905.400(i)).

Issue: Accumulation of RHF funds. Commenters stated that 10 years of RHF grants should be ''banked'' or accumulated on a PHA's behalf, and paid out if the PHA meets obligations to develop one or more HUD-approved mixed-finance projects.

HUD Response: Appropriations statutes, not regulations, control the period of availability of federal funds, including Capital Funds; in the case of FY 2010, FY 2011, and FY 2012 Capital Funds, the funds are available only until September 30, 2013; September 30, 2014; and September 30, 2015, respectively (see, respectively, div. A, tit. II, Pub. L. 111–117 (approved December 16, 2009); div. B, tit. I, section 1103, Public Law 112–10 (approved April 15, 2011); and div. C, tit. II, Public Law 112–55 (approved November 18, 2011). This limitation prevents lengthy multiyear accumulations as suggested. Even were the funds involved to be appropriated as no-year funds, as a general matter, HUD finds that it is not appropriate for public funds to remain unobligated and unexpended for long periods of time, a policy also expressed in section 9(j) of the 1937 Act (42 U.S.C. 1437g(j)), which penalizes PHAs for delayed obligation and expenditure of funds.

Issue: Reduce administrative costs rather than eliminating RHF grants. Commenters stated that while administering the RHF grants can be cumbersome for HUD, the administration of the program should be simplified rather than HUD reducing the amount made available to the program. The commenters suggested that if the number of units receiving RHF grants is relatively stable from year to year, then after an initial cost, 5 years of RHF funding may not reduce the remaining money in the Capital Fund, while alleviating some of HUD's administrative burden.

HUD Response: Administrative costs are not the major contributor to the need to reduce the total number of years of RHF funding. RHF funds and traditional Capital Fund grants are both funded from the same appropriation, which was $2.044 billion in FFY 2011. While RHF is an important tool for development of replacement housing, the need for replacement housing for a few PHAs has to be balanced with the needs of the majority of PHAs whose Capital Funds modernize existing public housing. Reducing RHF grants from 10 years to 5 years will make more funds available for modernization. It is also common for PHAs to accumulate 5 years of funding and then realize there are insufficient funds to develop units and, subsequently, reject the funding, or allow the funding to be recaptured. When this occurs, most of the funding that is returned to HUD must be transferred to the Treasury, and cannot be redistributed because, during the accumulation, the life cycle of the funds from the first and seconds years of second-increment funding will have expired.

Regarding administrative costs, the replacement housing policy that is presented in this final rule has been revised from the policy presented in the proposed rule, based on public comment. The revised policy simplifies the administration of the program for both HUD staff and PHAs. While the revised policy will still only provide 5 years of additional funding for units removed from inventory due to demolition or disposition, the limitations on the current RHF funding will be eliminated, allowing PHAs to use the funding for any eligible costs under the Capital Fund program, including development.

Issue: Plans for future disposition activities rely upon RHF grants to fund the development of new rental and homeownership units. With the elimination of the one-for-one replacement statutory requirement the need for RHF grants has become greater over time because it provides critical financing to demolish outdated properties. Additionally, the proposed change would make it more difficult to maintain significant numbers of highly subsidized units in mixed-finance properties.

HUD Response: Capital Funds and section 8 funds are available for these purposes. Furthermore, this final rule provides for a lengthier transition period and, beginning in FY 2014, DDTF funds that can be used on the same basis as Capital Funds.

Issue: RHF grants should not be available for units lost to homeownership, but only for units lost because of demolition or disposition, and should be limited to highly leveraged replacement rental transactions using only HUD's mixed-finance methodology.

HUD Response: In this final rule, RHF grants eligibility is based on units lost as a result of demolition and disposition, but not homeownership. In addition, there is a leveraging requirement for PHAs that have already received some RHF funding as of the effective date of this rule and wish to receive an additional 5 years. HUD does not agree that RHF grants should be restricted to mixed-finance as that is overly inflexible.

Issue: Second-increment RHF funds continue to be needed to replace housing losses resulting from ongoing, necessary demolition and disposition. PHAs state that they made demolition and disposition plans based on RHF funding being available.

HUD Response: As originally designed, the RHF grants were never intended to fund the cost of replacement of every unit demolished or disposed of from the PHA's inventory. However, in order to ease the transition for PHAs that have already demolished or

disposed of units that are relying in part on RHF grants, the proposed RHF regulation has been modified in this final rule at § 905.400(j) and § 905.400(k). PHAs that have received at least one year of first increment RHF funding prior to FFY 2014, the proposed effective date of the DDTF, will be eligible to receive up to 10 years of funding for units removed from inventory as a result of demolition or disposition. The additional 5 years of DDTF funding will not be subject to the same restrictions as RHF grants because it will be included in the Capital Fund grant (although it will be subject to the same legal requirements as any Capital Fund grant, including the obligation and expenditure requirements of section 9(j) of the 1937 Act (42 U.S.C. 1437g(j)), and any time limit placed on the appropriation by the applicable appropriations act). It should be noted that the PHA always has the option to use additional Capital Fund formula grant funds as a resource in a mixed-finance transaction.

Issue: The change to RHF grants will severely impact bond funding, where the 10 years of RHF grants were a major determinant to the amount of bonds issued. The commenter cites an example in which a ''vast majority'' of units slated for demolition were demolished well before FY 2010, but, because a few units were not demolished until 2010, the units remained in the Public Housing Information Center (PIC) database in FFY 2010 and would apparently be subject to the proposed rule limiting RHF grants to a single 5-year increment even though 10 years of RHF grants from the demolition of these units had been pledged to an outstanding bond issue. HUD should use the date of the demolition or disposition application, not the date of removal from the PIC system, to determine the applicability of new RHF grant rules.

HUD Response: Under this final rule, the postponement of the RHF transition to FY 2014, along with the future provision of DDTF funding, should allow for bond funding to continue. As to the issue of using the date of the application to determine the applicability of new RHF grant rules, the mere existence of an application is far too preliminary a step. First of all, a given application may or may not be approved. Secondly, even if approved, there are cases when demolition does not occur for a considerable period of time, even years. Despite the single example cited by the commenter, the approach that will generally help ensure the best use of public housing funds, and which is the most verifiable, is to base the payment of RHF or DDTF funds on removal of the units from the PIC system.

Issue: Due to the federal budget crisis, RHF funding should be eliminated altogether. Since PHAs also receive tenant protection vouchers, the government is ''paying double'' for each unit removed.

HUD Response: Removing RHF funding altogether would have negative consequences for PHAs that have planned demolitions and dispositions based on future availability of RHF grant increments for replacement housing. On the other hand, to the extent possible, in today's funding environment, PHAs must use federal funds to leverage other sources of funding. HUD believes that the RHF transition provisions in this final rule for PHAs already receiving, and relying on, RHF grants offer the best balance between the need to maximize sources of funding and the need to fund adequate replacement housing. PHAs newly coming into the RHF program as of FY 2014 will receive 5 years of more flexible DDTF funds. It should be noted that in order to prevent duplicative funding, RHF and DDTF funding is prohibited for a PHA that will replace units using another source of federal funding (see § 905.400(i)(5)(iii) of this final rule).

Issue: HUD has not undertaken a study of the RHF grant program, including its leveraging effectiveness, and has not established a sound basis for dramatically cutting this much-needed resource.

HUD Response: HUD has many years of experience with RHF grants and leveraging, which has shown that without leverage it is quite difficult to achieve unit replacement. HUD is not dramatically cutting a much needed resource. Not only will all activities that are currently eligible under the RHF grant program still be eligible under DDTF, but the DDTF will also allow PHAs to use this funding on any eligible activity under the Capital Fund Program. Further, HUD is providing a lengthier transition to DDTF to accommodate PHAs' concerns. It should be noted that the funding for the RHF and DDTF grants is taken out of the general Capital Fund Appropriation. In limiting the DDTF funding to 5 years, the funding that would have gone to only specific PHAs receiving 10 years of RHF funding, will now be distributed among all of the PHAs receiving a Capital Fund formula grant.

Issue: Several commenters objected to the apparent retroactive date of the change to RHF.

HUD Response: The changes to the RHF grant program will not be retroactive, but will be implemented starting in FFY 2014, which should ameliorate the impact.

Issue: In order to compensate for RHF grants that will be ''lost'' under this provision, PHAs should have the freedom to select higher-income applicants.

HUD Response: Under this final rule, PHAs that have demolished or disposed of units, and have begun to receive first-increment RHF funding as of FFY 2014, will be eligible for an additional 5 years of DDTF. Other PHAs will have significant advance notice that they will be eligible for only 5 years of DDTF and can do their financial planning accordingly. Finally, there is no direct nexus between funding for replacement housing and admission of higher-income residents.

Issue: The change to RHF funding is contrary to the statutory requirement that the Capital Fund formula be developed by negotiated rulemaking.

HUD Response: The statutory requirement of section 9(f) of the 1937 Act (42 U.S.C. 1437g(f)), is that ''the formulas . . . shall be developed according to procedures for issuance of regulations under the negotiated rulemaking procedure. . . .'' HUD interprets this to mean that the formulas are initially developed by negotiated rulemaking, not that each subsequent revision requires negotiated rulemaking. HUD previously fulfilled this statutory obligation to this regulation (see HUD's final rule published on September 14, 1999 at 64 FR 49924).

Issue: Funding for small numbers of units. Some PHAs disposed of or demolished small numbers of units at various times, which resulted in RHF allocations too small to acquire or develop any replacement units. PHAs should be allowed to use funds that fall below certain thresholds for other public housing uses, such as modernization. One commenter stated that HUD should consider setting a minimum threshold for RHF funding, below which a PHA may elect to use it for general Capital Fund purposes and not replacement housing.

HUD Response: The final rule addresses these issues by providing that the 5-year DDTF be given to PHAs in their Capital Fund formula grant. The formula grant, along with the increment that has been added, can be used for any Capital Fund eligible purpose, including development of replacement housing or modernization.

Issue: The rule should include an exception where PHAs that demonstrate hardship will be eligible for a second increment of RHF funding. Hardship could include, but not be limited to, in-

process development projects that anticipated second-increment RHF funding and localities with critical shortages of affordable housing.

HUD Response: The final rule addresses the issue of in-process development by extending the transition and providing for DDTF. As for other forms of ''hardship,'' such as shortages of affordable housing, HUD already provides funds for housing development and for vouchers, among other forms of funding.

Eligible Activities and Costs

Issue: Is the phrase ''public housing capital assistance'' in § 905.314(b) intended to be broader than ''Capital Funds?'' If so, other included funding sources should be specified.

HUD Response: HUD has added a definition of ''public housing funds'' in § 905.108 that encompasses a broader source of funds.

Issue: A commenter stated that the language in proposed § 905.202 designating those items that are ''not modest in design and cost,'' or not ''customary for the locality'' as ineligible is overly broad and could disqualify many green and energy conservation measures and complicate the use of Capital Funds for all but the simplest of projects.

HUD Response: Green and energy conservation measures that do not otherwise qualify as eligible activities will be covered by the TDC exception found in § 905.314(c) of this final rule. Further, it has been long-standing regulatory description and PHA practice to design, construct, and equip public housing units to improve substandard conditions and to harmonize with the neighborhoods they occupy, meet building standards, and achieve modest levels of comfort and liveability for the low-income public housing residents to be served, and all at a reasonable costs as defined under TDC. See e.g., former 24 CFR 941.203 and 968.112(b) and (o).

Issue: Add ''except for emergencies'' to proposed § 905.202(b), which identifies activities and costs not identified in the 5-year action plan as ineligible costs.

HUD Response: This final rule clarifies that emergencies that are not identified in the 5-year action plan are eligible costs.

Issue: The proposed regulation at § 905.202(g) uses a test for ineligible costs (''in excess of the amount directly attributable to the public housing units'') that may be read more literally than is appropriate. In a mixed-finance project, for instance, are the common areas ''directly attributable'' to the public housing units? Costs should be deemed ineligible when they are disproportionate to the benefit received by the public housing program in relation to other programs, or similar standard. The commenter also states that in § 905.314(a), the concept of ''costs directly attributable to the public housing program'' should be replaced with a reasonability or proportionality concept. The commenter also states that it is inappropriate for HUD to reserve the right in § 905.202(i) to retroactively find costs ineligible, when such costs otherwise came within the definition of eligibility and did not violate some standard set forth in the rulemaking provisions of the Administrative Procedure Act (APA) (5 U.S.C. 501 *et seq.*).

Another commenter stated that the ''directly attributable'' standard does not provide a standard by which a PHA can justify a cost's eligibility. This commenter states that the principles for cost allocation in OMB Circular A–87 (Cost Principles for State, Local, and Indian Tribal Governments) should be the basis for the eligibility determination.

HUD Response: HUD disagrees. While concepts such as proportionality and reasonability are subjective, direct attribution to the intended purpose of the funds is objective. In general practice, the objective measures would not exclude eligible costs along the lines of what the commenter claimed. By requiring direct attribution to public housing, HUD is ensuring responsible use of government funds, and acting in accordance with 2 CFR Part 225. As to the APA issue, the APA requires public notice and an opportunity to comment on the rule itself, which the public has received regarding this rule. Each individual decision that may be made under this rule is not subject to additional notice and comment. On the contrary, it is entirely lawful for federal agencies to reserve discretion over managing their own programs.

As to OMB Circular A–87, Cost Principles for State, Local, Indian, and Tribal Governments, now codified at 2 CFR part 225 (part 225), the final rule cites part 225 in relation to reasonable costs, and as one test for ineligible costs under § 905.202(d). However, by suggesting that 2 CFR part 225 be the sole test for the connection between the costs and the public housing program, the comment misunderstands the nature of the circular. Part 225 is designed to identify basic principles, not to take the place of specific program regulations. Part 225 states, inter alia, ''The principles are for the purpose of cost determination and are not intended to identify the circumstances or dictate the extent of Federal or governmental unit participation in the financing of a particular program or project.'' (See 2 CFR part 225, Appendix A, General Principles for Determining Allowable Costs, at § A.1). Also, part 225 states that allowable costs must conform to ''governing regulations as to the types or amounts of cost items.'' (See *Id.* at § C.1.d). By requiring direct attribution to public housing, HUD is acting well within the scope of 2 CFR part 225, its statutory authority, and APA principles.

Issue: While § 905.200(b)(12) makes approved homeownership activities eligible, some activities—such as relocation assistance, mobility counseling, and homeownership counseling—may appropriately occur prior to the approval of a specific homeownership plan. After the introductory phrase ''activities associated with approved homeownership,'' the rule should add ''provided, however, that activities under sections C and D may occur prior to approval of the homeownership plan.''

HUD Response: Resident relocation and mobility counseling, which includes those items mentioned in the comment, are separately eligible under § 905.200(b)(10) of this final rule. While the physical relocation has to be after the approval of the homeownership plan, the mobility counseling and surveying of the tenants can be done at any time. However, as the section in question does not specify the need for a homeownership plan or timing in relation to it, no rule revision is required.

Issue: Under § 905.312(a), are amenities such as air conditioners, dishwashers, washing machines and dryers eligible costs, or prohibited luxuries?

HUD Response: HUD agrees that some further clarification may be helpful with respect to amenities. This final rule clarifies that air conditioning is an eligible modest amenity. Further clarification on luxury items and modest amenities will be provided in future guidance.

Issue: Are Capital Funds eligible to be used to construct office, resident service, or maintenance facilities?

HUD Response: Yes.

Issue: How does § 905.202(f), on direct provision of social services, relate to management improvements, and could HUD provide some examples?

HUD Response: Section 905.202(f) provides that direct provision of social services is not an eligible Capital Fund expense. Examples of such ineligible expenses, provided in the rule, are salaries for social workers or General

Educational Developmental (GED) teachers, and this prohibition would apply to other benefits for such workers as well. Statutorily, under 42 U.S.C. 1437g(d), services simply are not Capital Fund eligible costs; rather, the costs of the provision of services may be an operating cost under the Operating Fund as provided in 42 U.S.C. 1437g(e)(1)(D). While it is not entirely clear what the commenter means by ''relate to management improvements,'' the commenter appears to be asking whether these types of costs may nonetheless be permitted under the Capital Fund as management improvements. Eligible management improvements under § 905.200(b)(7) of this rule include activities that have a linkage between the management improvement and the correction of an identified management deficiency. Generally, the ineligible social services expenses about which the commenter asks would not be tied to management in such a way as to make them eligible as management improvements. HUD may issue further guidance on this subject in the future.

Issue: One commenter states that, in § 905.200(b)(8), the discussion of eligible resident self-sufficiency activities refers to funding from the Operating Fund for $25 per-unit, per-month, for resident participation. The commenter states that Operating Fund rule at 24 CFR 990.190(e) references only $25 per annum.

HUD Response: This statement is corrected in this final rule.

Issue: The examples of Capital Fund-related legal costs at § 905.200(b)(13) are too limited and should be expanded. Costs that specifically should be mentioned include: negotiating and drafting mixed-finance arrangements; negotiating and reviewing property descriptions; title policies, regulatory interpretation, opinions, drafting, reviewing, and negotiating evidentiary documents for mixed-finance development, the Capital Fund financing program, conventional development, and acquisition transactions.

HUD Response: Unfortunately, existing funding does not allow every potential legal cost that one can envision to be expressly included. All of the legal costs mentioned in the comment would be eligible if they were reasonable in cost and related to the Capital Fund development activities. However, this rule is not intended to be an exclusive list of eligible and Capital Fund-related legal costs.

Issue: Section 905.200(b)(7)(iii) (''Activities that include or foster equal opportunity'') should be revised to include Limited English Proficiency(LEP), Reasonable Accommodation, and Violence against Women Act (VAWA) policies and their implementation as part of equal opportunity requirements.

HUD Response: Housing counseling for residents and prospective residents, as well as the design and construction of accessibility improvements, are eligible under the Capital Fund. (See §§ 905.200(b), 905.200(b)(7)(i) and (iv) and 905.200 (b)(10) of the rule.). Generally, a PHA would use operating subsidy or other noncapital resources for staffing and program materials for LEP or VAWA, rather than management improvements under the Capital Fund.

Issue: Proposed § 905.200(b)(4) states that vacancy reduction may be an eligible activity. It would be helpful for the rule to be more explicit about what is expected, either in the rule itself or in guidance. Also, compliance with accessibility requirements should be explicitly mentioned under proposed § 905.200(b)(6) and should be more specific.

HUD Response: HUD is making no change to the final rule text, but may issue future guidance on this and other issues. As to accessibility specifically, § 905.312 addresses accessibility requirements.

Issue: The rule should allow set-asides of capital replacement reserves for future modernization as an eligible activity. The inclusion of ''modernization'' as an eligible activity in section 9(d)(1)(A) of the 1937 Act (42 U.S.C. 1437g(d)(1)(A))— coupled with the authorization to accumulate funds to undertake modernization, substantial rehabilitation, or new construction of units in section 9(j)(1)(B) of the 1937 Act (42 U.S.C. 1437g(j)(1)(B))— should be sufficient legal basis to allow for such capital replacement reserves.

HUD Response: Replacement reserves as such are not an authorized use of Capital Funds under section 9 of the 1937 Act (42 U.S.C. 1437g). Under section 9(j)(1)(B) of the 1937 Act (42 U.S.C. 1437g(j)(1)(B)), accumulated funds for modernization are required to be expended within 24 months once sufficient funds are accumulated to undertake an activity.

Issue: Subpart B, starting at § 905.200, should have more precise language describing what is covered by the subpart.

HUD Response: HUD agrees and has made the suggested revision at § 905.200(a) of this final rule.

Issue: The term ''significant'' in the phrase ''. . . PHA must have determine that there is no debt service payments, significant Capital Fund needs, or emergency needs that must be met prior to transferring 100 percent of its funds to operating expenses'' in 24 CFR 905.314(1)(2) should be clarified.

HUD Response: HUD is considering issuing guidance to assist HUD field offices and PHAs with what information should be evaluated prior to allowing a small PHA to transfer all of its Capital Funds to Operations.

Federalization and Federalism

Issue: The rule should clarify the meaning of § 905.602(c) of the proposed rule, prohibiting federalization of certain projects. One commenter stated that the rule should provide that federalization is prohibited except as otherwise approved by HUD. Another commenter stated that there is no authority for prohibiting nonfederal public housing owned by a PHA from being federalized as provided in that section and that such policy is not in the interest of preserving affordable housing. Another commenter noted that the only authority for allowing federalization is found in section 9(n) of the 1937 Act (42 U.S.C. 1437g(n)), and that any such language should be carefully limited to apply only to ''covered locally developed public housing units'' as defined in section 9(n). This commenter stated that there is no other statutory authority to limit a PHA's decision to bring PHA-owned properties into the public housing program, subject to the HUD approvals generally required for public housing development. In some instances, such units may provide the most economical and best opportunities for the production of replacement public housing.

HUD Response: This final rule revises proposed § 905.602(c) titled ''Federalization,'' to make a more general statement that nonpublic housing properties may be used in the development of public housing units provided all requirements of the 1937 Act and the development requirements of this part are met. For historical reference, former section 9(n) of the 1937 Act was never used by HUD to federalize projects. Former section 9(n) was repealed by the Consolidated Appropriations Resolution, 2003 (Pub. L. 108–7, 117 Stat. 1, approved February 20, 2003; see 117 Stat. 502) with additional directions applicable to ''covered locally developed public housing units'' in the states of New York and Massachusetts. HUD's regulation at § 905.602(c) is neither a development exception nor a new development method relying on any form of prior authority relating to Federalization. Instead, HUD may consider any

property presented for development of public housing units under all of the existing requirements of the 1937 Act and 24 CFR part 905.

Issue: HUD's proposed regulation at § 905.602(c) should be revised to provide that a PHA may acquire and modernize a building that it already owns outside the public housing system, if that same modernization would be permitted for new construction under § 905.602(b).

HUD Response: Section 905.602(c), both as proposed and in this final rule, allows this activity to occur.

Issue: This rule triggers Executive Order 13132 on Federalism. This rule opens the public housing market to private partnerships with restrictions on the public on obtaining information and attending meetings, and without the accountability required for use of public funds. The commenter states that planning issues are under the jurisdiction of local municipalities under state requirements.

HUD Response: Executive Order 13132 on Federalism concerns regulations and proposed legislation that have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. This regulation does not have these direct effects on states or on the relationship between the Federal Government and the states. This rule, which is authorized by statute, establishes substantive regulations and procedures for the use of federal funds by PHAs, as directed by statute, and does not preempt state law. Therefore, this rule does not trigger the Executive Order.

Conversion of Units

Issue: A commenter states that § 905.10(f)(3) as codified prior to the effective date of this final rule indicates that the total estimated need of the development is unchanged by conversion of units. The commenter states, however, that the preamble to the final rule adopting the existing regulation explains that ''reduction of units is not based only on demolition or disposition.'' If the intention of the new Capital Fund rule is not to change the formula, the language of the current rule regarding conversions should remain. The commenter expressed concern about the impact of this rule, considering the unit conversion it must undertake at one of its developments. HUD's policy, as stated in the proposed rule, would result in a permanent loss that is difficult for a housing agency of a small size to absorb. If a small PHA has an outstanding Capital Fund Financing Program loan, the terms of which require maintaining its public housing stock to generate sufficient Capital Fund grants to sustain three-to-one debt service coverage, HUD's proposed rule also may mean that it cannot undertake the necessary reconfiguration without partial prepayment of the loan.

The commenter further states that HUD's funding policy should encourage rather than discourage PHA action to convert efficiencies to one-bedroom units. Because PHAs have the same square footage to manage and renovate, it would be reasonable for the Capital Fund to build in the proper incentive by not taking away funds when conversions occur.

HUD Response: The Capital Fund formula is based on a complex calculation with a variety of characteristics including, but not limited to, the number of units in the development, the average number of bedrooms, and the location and age of the development. Based on the way the formula is calculated, if one PHA has a larger formula share it reduces the formula share for other PHAs. It was never the intent of the Capital Fund formula to result in HUD continuing to pay the modernization needs or the administrative costs of units that no longer exist at one housing authority while making other housing authorities with modernization needs pay for them, which would be the result if the Capital Fund were used to pay for units lost to conversion. The incentive for reconfiguration or conversion for the PHA is to better serve the needs of the low-income families in the community. Furthermore, funding for reconfiguration or preparing units for conversion, and any necessary relocation, are eligible Capital Fund expenses.

Issue: A commenter states that while the new rule specifically states that reconfiguration of units will alter Capital Fund formula funding allocations, this policy was not articulated in the Capital Fund rule prior to the proposed rule and may have unintended consequences, such as a decrease of subsidy to the agency.

A commenter states that § 905.400(f)(3) differs from the current regulation, which is that conversion of public housing units does not change the Capital Fund formula shares. This proposed policy will discourage, for example, combining of unmarketable efficiency units into one-bedroom units.

HUD Response: HUD is aware that some PHAs have been confused about the intent of the proposed provision, § 905.400(f)(3), as well as the current provision, 24 CFR 905.10. The purpose of this provision is to clarify HUD's policy as it has consistently been implemented.

Issue: How does the limit on new units found at § 905.602(b)(1) apply to merged units? May a PHA replace merged units, and will the new units be eligible for Capital Fund and operating subsidy?

HUD Response: This limit based on the number of units in management as of October 1, 1999, would remain the same. Thus, for example, if a PHA had a unit count of 100 as of 1999 and in FY 2005 the PHA decided to merge 6 efficiency units into 3 one-bedroom units, the PHA's unit count would be reduced to 97, and the PHA would be allowed to build 3 additional units.

Separating CFP Informational Requirements From PHA Annual Plan Requirements

Issue: Small PHAs should not have the same reporting requirements as large authorities and should operate as stated in HERA. Removing some reporting requirements from the annual plan and making their submission separate would result in small housing authorities being obligated to submit forms from which they are currently exempt. Even with the passage of HERA, small housing authorities continue to suffer from an excessive regulatory structure. HUD should not reestablish a regulatory burden that has been lifted by HERA. HUD should find a less burdensome method of receiving any necessary information, such as through an annual audit.

HUD Response: These commenters appear to be referring to qualified PHAs, a category established under HERA as ''a public housing agency meeting the following requirements: (1) the sum of public housing dwelling units administered by the public housing agency and the number of vouchers under section 8(o) of the 1937 Act is 550 or fewer, and (2) the public housing agency is not designated as a troubled PHA under section 6(j)(2) and does not have a failing score under SEMAP during the prior 12 months.'' While qualified PHAs are exempt from submitting a PHA Annual Plan, they are not exempt from the requirement to hold an annual public hearing or to submit a 5-Year Plan. Further, HUD has authority under section 9 of the 1937 Act (42 U.S.C. 1437g) to obtain information needed to calculate the Capital Fund formula and monitor the implementation of the CFP.

Issue: Large PHAs (over 550 units) that are required to submit both a PHA

Annual Plan and a Capital Fund program submission should be able to submit those documents at the same time as permitted under current rules. A key goal of the PHA planning process under section 5A of the 1937 Act (42 U.S.C. 1437c-1) is to unify and consolidate PHA planning and reporting requirements from the various programs that PHAs administer in order to create efficiencies for PHAs and HUD, and also to provide residents and the community with an opportunity to review the PHA's plans holistically. The changes included in this proposed rule may have the impact of requiring a second public process, reducing efficiency, and creating confusion in the community about the opportunities for input. If a PHA submits their annual plan, and then subsequently submits a Capital Fund budget that alters the annual plan, the PHA will be required to hold a second public hearing process, unnecessarily burdening PHAs.

A commenter states that a separate public process from developing the agency plan should not be required. Combining these processes has worked well. The commenter also stated that it is difficult to get resident participation and that all parts of a PHA are tied together and should be discussed in total, rather than the context of individual meetings. The commenter concluded that combining this public consultation has worked well for over 10 years. Decoupling the capital planning from the overall agency planning will make it more difficult to see the big picture of the PHA, require more administrative time and expense for the PHA with separate resident advisory board actions, and make it more challenging for the PHA Board to pass an agency budget that contains both operating and capital expenditures. Furthermore, it may not be feasible to schedule a resident meeting and a Board of Directors meeting in time to comply with HUD deadlines for submission of the ACC Amendment. This commenter suggests HUD extend the deadlines.

HUD Response: HUD's regulations at § 905.300(b)(3)-(4) are revised in this final rule to clarify that the PHA is to present the Capital Fund submission to the public and its residents and Resident Association Board (RAB) concurrent with the public hearing being held on the PHA Annual Plan. By making these submissions concurrent, the PHA will be able to present an integrated plan for public housing to the community and to the RAB. The PHA must consider the recommendations of the RAB concerning both the PHA Annual Plan (under current 24 CFR part 903) and the Capital Fund submission, and these submissions must be consistent with any applicable Consolidated Plan. This final rule further clarifies that the required forms and information on the Capital Fund submission will be submitted along with the Annual Contributions Contract Amendment submitted to HUD when the annual Capital Fund awards are made.

Issue: How does HUD have the discretion to require separate reporting requirements for the Capital Fund activities, considering that certain items, such as capital improvements and asset management, are required to be in the PHA Plan?

HUD Response: The PHA Annual Plan requirements are satisfied with general information, as opposed to the more specific information required for Capital Fund formula purposes. They are not the same requirements.

Issue: The language regarding budget submission requires clarification. According to a commenter, the proposed rule states that: ''The PHA's budget must be approved by the PHA's Board of Commissioners, but does not require HUD approval (see § 905.300(b)(1)).'' If that in fact is the case, why require the budget to be submitted to HUD when the CFP ACC is submitted to HUD? The proposed rule should state that the budget must be approved and therefore gets submitted to HUD for review and approval, or that the PHA's budget must be approved by the PHA's Board of Commissioners, and does not need to be submitted to HUD for its review and approval. One commenter states that PHA Board approval only should be required.

HUD Response: This final rule revises § 905.300(b)(1)(iv) to state that the PHA's 5-Year Action Plan and budget must have been approved by the PHA's Board of Commissioners before it is submitted to HUD for review and approval. Under the current process for Qualified PHAs HUD reviews the PHA's budget for eligible activities and compliance with cost limits and other requirements. The HUD review is tantamount to HUD approval. Therefore, the language has been changed to signify that HUD approval is required.

Issue: HUD should provide additional funding to defray the cost of the PNA inspection. Another commenter questioned whether PNA inspections would be conducted by PHA staff or outside firms, thus resulting in additional costs. Another commenter stated that the rule should provide more details about the PNA. Another commenter stated that the PNA should be a flexible planning tool and not impose requirements.

HUD Response: The PNA is currently addressed in a separate rulemaking (see HUD's proposed rule published on July 20, 2011, at 76 FR 43219), which provides details on the PNA. Unfortunately, due to constraints on funding, HUD cannot provide extra funds for this purpose.[2]

Issue: A commenter stated that in § 905.300(b)(3) the reference relating to the PHA Annual Plan is confusing as the CFP is being decoupled from the PHA Annual Plan process. The commenter questioned whether HUD is requiring a separate consultation via the processing of the PHA Annual Plan or it can be a stand-alone process. Another commenter states that decoupling CFP requirements from the PHA annual plan is ''essential to guaranteeing resident input''; however, it may also be beneficial to maintain explicit requirements for resident meetings and input.

HUD Response: In this final rule, most cross references in § 905.300(b) to 24 CFR part 903 are removed and § 905.300 is expanded to include sections on resident and RAB participation, public hearings, definition of significant amendment, criteria for plan revision, and procedures for HUD review and approval. These changes should ensure that the decoupling is complete.

Development, Redevelopment, and Modernization

Issue: Since this regulation replaces part 941 in full, whenever the rule regulates the development process, it should refer not only to Capital Funds, but also HOPE VI, Choice Neighborhoods, development funds, and other sources appropriated by Congress for the development of public housing.

HUD Response: This final rule includes a definition of ''public housing funds'' at § 905.108 to provide this broader definition.

Issue: Proposed § 905.314(g) provides that the modernization cost limit is 90 percent of TDC. One commenter suggests that the rule allow determination for redevelopment to be made when modernization costs reach a lower threshold such as 70 or 80 percent. In such cases, when the community believes such modernization expenditures would not be prudent use of federal financial assistance, such a community or PHA should be able to decide instead to demolish and develop new affordable housing.

HUD Response: Demolition of public housing is governed by section 18 of the

[2] Please see footnote #1 for more information.

1937 Act (42 U.S.C. 1437p) and is beyond the scope of this rulemaking.

Issue: The reference to Capital Fund financing in proposed § 905.600(c) is unclear.

HUD Response: Proposed § 905.600(c) on Capital Fund financing is revised in this final rule. HUD's final rule on Capital Fund financing (see final rule published on October 21, 2010, at 75 FR 65208) is incorporated in subpart E of this final rule.

Issue: Proposed § 905.600(d) suggests that a PHA or a PHA's partner would solicit construction bids after approval of a development proposal. At least in the mixed-finance environment, a final development proposal cannot be submitted without a firm construction price.

HUD Response: In this final rule, HUD's regulation at § 905.600(c) on the development process is revised. HUD does not dictate when a PHA or a PHA's partner solicits construction bids. However, the PHA must submit, as part of its Development Proposal (§ 905.606), an independent construction cost estimate or actual executed construction contract that supports the permanent and construction budgets for the project.

Issue: Proposed § 905.600(e)(7) should refer to ''proceeds'' of an Operating Fund Financing Program (OFFP).

HUD Response: This final rule makes this revision at § 905.600(d)(8).

Issue: Proposed § 905.202(h) is overbroad and could be read to prohibit temporary or bridge funding.

HUD Response: This section, at § 905.202(i) of this final rule, refers to costs that are actually funded by a duplicate source and temporary or bridge financing does not result in duplicate funding.

Issue: Section 9(l) of the 1937 Act (42 U.S.C. 1437g(l)) allows for capital- and operating-fund-only transactions, and permits HUD to reduce the period during which the property must be operated according to Public Housing Requirements. However, the proposed rule does not reflect this flexibility. Also, following the statute, the rule should allow PHAs to make section 8 assistance available in cases where there is operating assistance but not Capital Fund assistance.

HUD Response: Generally, the reference in § 905.304(a)(3) to ''such shorter period as permitted by HUD by an exception'' implements the flexibility under 42 U.S.C. 1437g(l).

In the case of mixed-finance specifically, § 905.604(j)(3)(ii) states that the term of the ACC Amendment will be determined based on the assistance provided under § 905.304, ''unless reduced by the Secretary.'' Also, if the PHA is no longer able to provide operating subsidy, final rule § 905.604(j)(3)(iii) permits early termination of the DOT or Declaration of Restrictive Covenants and provides public housing residents with a relocation option, which may be a unit in another project or a Housing Choice Voucher.

Issue: A commenter stated that the proposed regulation at § 905.312(c)(1) should not refer to outdated Handbook 7485.2 REV.

HUD Response: This handbook is not referenced in the rule.

Mixed Finance

Issue: All provisions of this rule should be premised on the belief that the interests of all participants are advanced if the regulations permit a predictable and efficient restructuring such that a project can be operated on a stable basis with whatever level of federal subsidy is reliably available.

HUD Response: Along with statutory compliance, this rule also provides for sufficient flexibility to meet project goals.

Issue: The rule should provide more extensive standards. The articulated standards in the proposed rule bridge the gap about halfway—they include some substantive standards, yet do not include some of the fundamental ''rules'' that have developed over the years regarding, for example, funding and replenishing of reserves and required segregation of public housing funds (both direct subsidy and tenant rents) from attachment in the case of foreclosure or loan acceleration.

HUD Response: The types of issues to which the commenter refers are matters of policy and procedure that are best stated in guidance, such as PIH Notices and policy statements.

Issue: HUD's regulation at § 905.600(d) should be revised to take into account that, in mixed-finance, the construction contract is virtually always signed before proposal approval. Accordingly, the second sentence of § 905.600(d)(3) should be revised to remove the phrase, ''After HUD approval of the development proposal. . . .''

HUD Response: This final rule adopts, at § 905.600(c)(3), this revision to accord with general industry practice.

Issue: Commenters questioned language suggesting why the mixed-finance category includes projects funded entirely with Capital Funds.

HUD Response: If there is an Owner Entity other than the PHA, the project is considered mixed-finance even if 100 percent of the funding is public housing Capital Funding. However, if the PHA holds a 100 percent interest in the project, it is not a mixed-finance project.

Issue: The rule is overbroad in requiring the formation of an ''Owner Entity'' in situations where nonpublic housing sources are being utilized, but no third-party participation in the ownership is required. There are instances, where state or local resources may be used, where the rule would seem to require another entity, but the transaction should not require the PHA to go to the expense of establishing and maintaining a separate Owner Entity.

HUD Response: This final rule revises § 905.604 to clarify this role of the Owner Entity. The partnership arrangement to which the commenter refers applies in mixed-finance situations; where the PHA owns 100 percent of the units, mixed-finance development would not apply.

Issue: Proposed § 905.604(a) should be revised to reflect that in some cases, such as meeting Davis-Bacon requirements, only the mixed-finance owner can comply; the PHA can require compliance, but cannot directly comply itself.

HUD Response: HUD agrees, and this final rule incorporates the suggested change at § 905.600(a).

Issue: HUD's regulation at § 905.604(h), ''Irrevocability of financial commitment,'' should allow alternatives to the opinion of counsel. The opinion of counsel will not always be feasible to obtain.

HUD Response: The opinion of counsel as to irrevocability is an option, not a requirement. Please note that this final rule places this material at §§ 905.606(a)(6)(iii)(A) through (D).

Issue: HUD's regulation at § 905.604(h)(1) states that, to ensure the irrevocability of funds, that the PHA or the Owner Entity be ''ready willing, and able'' to attain milestones. Also, the conditions in the legal documents must be ''commercially reasonable.'' These terms are vague and could lead to a finding of noncompliance if an auditor applies a different definition of commercial reasonableness.

HUD Response: This final rule, in § 905.606(a)(6)(iii)(A), revises this terminology to avoid ambiguity. The contractual conditions must be ''generally consistent with similar affordable housing transactions,'' and the PHA or Owner Entity must know of no ''impediments that would prevent the project from moving forward consistent with'' the project milestones.

Issue: The requirement in proposed § 905.604(h)(3), that counsel has examined the availability of financing, seems to mean that counsel will examine the funding for the funding

source, which may be feasible in some cases, such as funds received from a city, but not in the case of bank or Assisted Housing Program (AHP) funds, because those entities will not reveal their funding sources.

HUD Response: This proposed section (now at § 905.606(a)(6)(iii)(D)) is revised in this final rule to clarify that it is the participating parties' financing that is examined.

Issue: In the case of operating-fund-only assistance under proposed § 905.604(k), one commenter stated that the provisions that require use restrictions to continue for a substantial and virtually indefinite period, whether or not there is operating subsidy to support them, are highly problematic for mixed-finance deals. The full flexibility permitted by 42 U.S.C. 1437g(l) should be utilized in order to give lenders and investors assurance that if sufficient subsidy ceases to be available, they will be promptly released from the obligation to house people who require such subsidy. In operating-fund-only projects, in such cases, section 8 assistance should be used to allow residents to remain if they wish.

HUD Response: This final rule implements the ability for HUD to reduce the use restriction period found in 42 U.S.C. 1437g(l) (see § 905.604(j)(2)(ii) and (iii)). If the use restrictions are terminated, the PHA must provide residents with a decent, safe, sanitary, and affordable unit to which they can relocate, which may include a public housing unit in another development or a Housing Choice voucher.

Issue: Proposed § 905.608, which covers the site acquisition proposal, only applies to acquisition with Capital Funds and should include acquisition with all available sources, including HOPE VI and other funds.

HUD Response: This final rule adds a definition of ''public housing funds'' to include not only Capital Funds, but also HOPE VI, Choice Neighborhoods, development funds, or any other funds appropriated by Congress for public housing development.

Issue: There is no justification in § 905.608(f) for stating that, absent HUD approval, the purchase price may not exceed the appraised value, because the federal interest in cost reasonableness is generally accomplished by TDC rules.

HUD Response: TDC is applicable to new development and acquisition of existing housing. The TDC operates as a constraint on excessive payments of public funds in the context of § 905.608 along with HUD's requirement for a PHA to provide an appraisal of the property.

Issue: Proposed § 905.612(b)(2) on mixed-finance drawdown ratios is unclear as to whether the requirement applies only to the final drawdown ratio or to interim ratios as well.

HUD Response: This final rule clarifies this paragraph to refer to the overall drawdown ratio.

Issue: While the rule requires that HUD funds be drawn down in the same ratio as other funding sources, projects are more economically feasible when interest-free HUD funds can be drawn first.

HUD Response: HUD's regulation at § 905.612(b)(2) clarifies that upon completion of the project, the ratio of public housing funds to non-public housing funds for the overall project must remain as reflected in the executed documents. The ratio does not apply to the construction period.

Issue: HUD's proposed regulation at § 905.604(b)(6) should be revised to acknowledge that Public Housing Requirements do not apply to non-mixed-finance development.

HUD Response: This section is clarified in the final rule. Public Housing Requirements apply to public housing-related work or mixed-finance development as meant in this subpart.

Issue: Proposed §§ 905.316, 905.318, and 905.320(b) and (c) appear to apply to both mixed-finance and conventional development, yet this is not clear from their language.

HUD Response: This final rule clarifies these sections.

Issue: HUD's proposed regulation at § 905.604(a) is unclear as to whether it applies only to the PHA, mixed-finance owner, or both.

HUD Response: This final rule revises this section. Final § 905.604(a)(1) explains the possible ownership structures under mixed-finance.

Issue: Rather than stating that mixed-finance contracts should ''specify that they comply'' with listed requirements, mixed-finance contracts should be required simply to contain no provisions inconsistent with the applicable regulations.

HUD Response: An affirmative statement of compliance provides a basis for HUD to take enforcement action if the statement is untrue, which is an assurance that HUD requires when committing public funds.

Issue: The rule should codify the authority to retain the original DOFA that existed prior to a mixed-finance transaction.

HUD Response: The rule codifies the current practice. In § 905.604(a)(4) of this final rule, the Department will retain the date of full availability (DOFA) if a PHA is doing mixed-finance modernization.

Issue: The rule should be more specific as to the minimum information required by a PHA for the release funds for predevelopment assistance under proposed § 905.612(a)(3).

Response: HUD reviews each mixed-finance project separately, as the structure and financing of each project is unique. HUD has issued ''Cost Control and Safe Harbor Standards for Rental Mixed-Finance Development,'' which contains provisions related to predevelopment expenses. Further, HUD has internal mechanisms for evaluating each mixed-finance project and issues that arise within the context of mixed-finance development. These mechanisms are the best way to manage mixed-finance projects, including the use of public housing funds for predevelopment purposes. Therefore, to date, there has been no need to issue generally applicable guidance on the use of public housing funds for predevelopment expenses related to mixed-finance development.

Issue: A commenter asked under what circumstance HUD would approve a PHA to exceed the 5 percent limit for predevelopment costs under § 905.612(a)(2).

HUD Response: As the rule states, this will be determined on a case by case basis. HUD declines to speculate about the circumstances under which this may occur.

Deviations Under Section 35(h) of the 1937 Act, 42 U.S.C. 1437z–7(h)

Issue: A commenter stated that additional flexibility for mixed-finance projects is considered helpful, for instance flexibility with rent and income eligibility requirements for projects with 20 percent or more nonpublic housing units. Another commenter stated that the threshold should be the lesser of 10 percent or 10 units. Another commenter stated that such flexibility should be granted for all public housing stock.

HUD Response: HUD's regulation at § 905.604(k) of this final rule provides flexibility where a PHA has a project in which a ''significant number'' of units are other than public housing units, following the statutory language under section 35(h) of the 1937 Act (42 U.S.C. 1437z–7(h)), which addresses mixed-finance development. The statute allows deviations under the specific statutory conditions stated, which do not apply to all public housing stock.

Issue: The standard for allowing ''restructuring'' is too limiting and ''HUD should expand it to the extent interpretation permits, and should

generally recognize the ability of parties to make restructuring decision outside this standard where the standard need not be applied.'' This commenter states that the phrase ''reduction in appropriations'' is meaningless without a recognized starting point, and suggests that the per-unit appropriations in 1998 would be a reasonable starting point for interpretation. In addition, any definition should recognize the likelihood of continuing inflation; a flat appropriation over 10 years would be the equivalent of a 50 percent effective reduction in funding at an inflation rate of 7 percent. This commenter states that HUD may interpret ''reduction in appropriations'' to be a reduction in the present value of the per-unit appropriation available. This commenter also states that HUD should recognize that many Regulatory and Operating (R&O) Agreements, for good reason, limit the operating-subsidy pass-through obligation of the PHA with reference to what the PHA is receiving from HUD. For instance, an R&O Agreement might provide for the PHA to pass through 90 percent of what it actually receives for that project. In literal terms, such a PHA is never prevented by a funding reduction from meeting its obligations, because its obligations automatically decrease, yet clearly a project receiving 50 percent of its intended subsidy would be in deep trouble and require deviation under section 35(h) of the 1937 Act. The commenter states that skilled drafters could provide alternate 35(h) triggers, such as a PHA failure to provide alternate non-operating subsidy funding in specified circumstances. This commenter states that ''HUD needs to take care that it does not carelessly eliminate these triggers.'' This commenter states that the rule eliminates these triggers by replacing the statutory phrase ''from meeting its contractual obligations'' with ''from providing Operating Funds as provided in its contractual agreement.''

HUD Response: This final rule implements the statutory authority correctly, and the statute is unambiguous in referring to ''a reduction in appropriations under section 1437g,'' meaning an actual reduction in appropriations from Congress, not a change as a by-product of inflation. HUD recognizes that projects are structured differently. For this reason, this final rule removes the proposed section on ''Allowable Deviations.'' HUD encourages PHAs to draft R&O agreements that clearly address the issue of reduction in appropriation and clearly identify a ''starting point,'' or baseline amount, from which a reduction in operating subsidy caused by a reduction in appropriation can be calculated. In addition, as requested by the commenter, to avoid unintended impacts, HUD has revised the language in the final rule concerning a public housing agency's inability to meet its contractual obligations to mirror the phrasing in the statue.

Issue: HUD should propose to Congress legislation allowing deviations from Public Housing Requirements that do not rely on section 35 of the 1937 Act (42 U.S.C. 1437z–7).

HUD Response: HUD, through rulemaking, interprets and implements enacted legislation. The subject of proposing additional legislation is beyond the scope of this rulemaking process.

Issue: A commenter stated that the allowable deviations in the proposed rule are too limiting and unclear. For example, it is not clear if the ''increased public housing rents'' contemplated by proposed § 905.604(n)(2)(i) are different from those contemplated by proposed § 905.604(n)(2)(iii). More generally, HUD should not require a complicated sequencing of remedies; each situation will be different, and the paramount requirement for this rule is that it gives the PHA and owner the ability to design a restructuring plan appropriate to their circumstances.

Commenters objected to specific allowable deviations in the proposed rule. A commenter stated that limiting a rent increase under proposed § 905.604(n)(2)(iii) to the ''amount strictly needed'' is too inflexible. One commenter stated that the rule should not allow PHAs to eliminate eligibility restrictions altogether as contemplated in § 905.604(n)(2)(ii).

HUD Response: The allowable deviations are removed in this final rule in favor of a case-by-case approach, under which the Owner Entity will submit an Alternative Management Plan, which HUD will review.

Issue: HUD's annual reevaluation and approval of the transformation plan under proposed § 905.604(n)(5) should provide that, once the annual update is properly submitted, the existing plan remains in effect pending HUD action.

HUD Response: The intent is for the existing plan to remain in effect until HUD disapproves it or approves a change. This final rule revises § 905.604(k)(4) accordingly.

Issue: One commenter stated that the tenant protections in § 905.604(n)(2)(iv) should be limited to 2 years; otherwise, if a PHA has limited resources to relocate tenants, it may be unwilling to act and leave the mixed-finance owner without a remedy.

HUD Response: The proposed regulation at § 905.604(n)(2) is removed in this final rule. The regulation at § 905.604(k)(2)(ii)(C) addresses tenant protections and states that the responsibility for relocation is with the PHA or as included in the agreement between a PHA and the Owner Entity. The PHA should address this issue when negotiating its Regulatory and Operating Agreement with an Owner Entity.

Issue: The requirement in proposed § 905.604(n)(3)(iii)(D) that Public Housing Requirements be reinstated once the PHA restores operating subsidies to their normal level could be subject to misinterpretation, and deviations switch on and off from year to year.

HUD Response: HUD will consider providing additional guidance on the timing of reinstatement in the future, based on experience with this issue.

Issue: Proposed § 905.604(n)(3)(iv)(A) does not specify whether the reference to ''reduced allocation of operating subsidy'' refers to the subsidy provided by HUD or the subsidy passed through by the PHA.

HUD Response: The statute on which this section is based refers to reduced appropriations; what is meant is a reduction in appropriations resulting in a reduction of subsidy allocation. This final rule clarifies this point at § 905.604(k)(2)(iv)(B).

Issue: To ensure that project owners have pursued available alternative remedies prior to undertaking an Alternative Management Plan, the rule should require that project owners demonstrate that available development resources are being utilized to offset deficits with the public housing units.

HUD Response: Along with eliminating the allowed deviations and requiring the PHA to submit an Alternative Management Plan, this final rule includes such a provision as part of the supporting documentation that a PHA will submit with its an Alternative Management Plan (§ 905.604(k)(2)(iv)(D)).

Issue: One commenter states that proposed § 905.604(n)(3)(iv)(E), which requires prior expenditure of 50 percent of a named reserve, seems to contradict § 905.604(n)(2)(ii), which states that deviations from Public Housing Requirements are permitted only if the owner has expended all operating subsidy reserve funds put aside for this eventuality. A commenter states that this section should be eliminated, as requirements for operating reserves vary

greatly in mixed-finance projects, and may not be appropriate for this use.

HUD Response: This final rule, at § 905.604(k)(2)(iv)(D), removes an expenditure of reserve requirement and states more generally that the owner entity must use ''all available means'' to offset the reduction in appropriation or change in applicable law, including the use of other public and private development resources, the use of cash flow from any nonpublic housing units, funds from other operating deficit reserves, and so forth.

Issue: A commenter states that to ensure that project owners have pursued available alternative remedies prior to undertaking an Alternative Management Plan, the rule should require that project owners demonstrate that available development resources are being utilized to offset deficits with the public housing units.

HUD Response: This final rule at § 905.604(k)(2)(iv)(D) requires the PHA to provide documentation that the Owner Entity has used all available means to offset the impact of reduced operating subsidy.

Issue: Commenter states that HUD's regulations implementing 35(h) of the 1937 Act (42 U.S.C. 1437z–7(h)) should take care to state that they do not affect, one way or the other, the ability of PHAs and their partners to restructure a project consistent with standard Public Housing Requirements.

HUD Response: That section only applies to deviations from statutory requirements under the conditions specified. It does not affect mixed-finance arrangements consistent with statute and regulation.

Issue: The word ''solely'' in proposed § 905.604(n)(3)(iv)(B)(''The deficit in operating revenues is attributable solely to the reduction in operating subsidy''), as such situations are likely to have multiple causes.

HUD Response: This final rule uses the term ''primarily'' instead of ''solely'' (§ 904.604(k)(2)(iv)(B)).

Issue: Deviations should be allowed for changes in law other than appropriations.

HUD Response: The statute allows for deviations in the case of a reduction in appropriations or other change in law that makes a PHA unable to fulfill its contractual obligations with respect to a specific number of public housing units. This final rule implements this statutory authority at § 905.604(k).

Issue: The reference to ''contractual agreement'' in § 905.604(n)(1) should be changed to ''Regulatory and Operating Agreement (R&O),'' which is more specific.

HUD Response: There may be instances where an agreement is not through an R&O.

Issue: A commenter states that implementation of ''transformation remedies'' (42 U.S.C. 1437z-7(h)) should be postponed until HUD has had broad discussions with stakeholders to ensure that appropriate protections remain in place for PHAs and residents. This commenter is particularly concerned about the potentially serious consequences of implementing a regulation that facilitates the loss of public housing units in the current political and economic environment.

HUD Response: HUD, at this time, cannot predict how many or which projects will require such deviations, and views that the greater risk is that, without an Alternative Management Plan under the statute and regulations, units will be permanently lost, where under transformation the deviation may be temporary. By removing in this final rule the proposed paragraph allowing deviations automatically under certain conditions, HUD will review each request and apply oversight to the process. HUD submits that this is the best choice under current conditions.

Issue: The proposed regulation at § 905.604(n) places the risk on PHAs regardless of the contractually agreed upon structure of a mixed-finance deal or the underlying business arrangement between a public housing authority and, for example, its private developer partner. The commenter states that one example is making the PHA responsible for tenant relocation, including moving costs (§ 905.604(n)(2)(iv)). This commenter states that in many mixed-finance transactions, investors require reserves to be sized, in part, to pay for relocation costs. Shifting responsibility to PHAs for such costs may not be part of existing deal structures and would result in a substantial realignment of risk in a mixed-finance transaction.

HUD Response: This final rule provides for required relocation according to the contractual agreement between the PHA and the Owner Entity (see § 905.604(k)(2)(ii)(C)).

Issue: The phrase ''in HUD's sole discretion'' should be removed from proposed § 905.604(n)(4). The commenter states that this phrase removes the issue from judicial review.

HUD Response: While HUD does not agree with the commenter regarding judicial review, this final rule clarifies the review of an Alternative Management Plan, in § 905.604(k)(3), by providing examples of some, but not all, of the reasons why HUD might disapprove an Alternative Management Plan.

Energy Conservation Requirements

Issue: Many PHA commenters stated that HUD should not mandate energy conservation measures without giving PHAs the flexibility to determine their own priorities. The rule should make it clear that PHAs are not required to implement everything recommended in an energy audit, but that energy needs must be balanced against other PHA needs. Many of these PHAs supported energy conservation, generally.

One commenter stated that if energy audits and their corresponding recommended energy conservation measures are to be relied upon clearly, established and standardized measurement systems should be established so that uniformity of results is achieved. If measurement standards and recommendations vary from audit to audit, Capital Funds could be continuously wasted from year to year based on the new and/or conflicting recommendations.

One commenter stated that HUD and industry would benefit from more research and discussion on this topic.

Other commenters stated that not all energy audits produce savings or are reliable and there could be burdens on PHAs. Some commenters stated that they are skeptical of a cost-effectiveness approach to spend Capital Funds.

Other commenters suggested use of a 20-year, voluntary rolling base freeze on public housing utility consumption levels.

One commenter questioned the cost effectiveness of energy conservation measures (ECMs), and also stated that there could be situations where an audit may find an ECM not to be cost effective, when in fact it is an improvement that the PHA should implement as part of a modernization. This commenter stated that return on investment (ROI) should always be a factor in determining whether or not it makes sense to implement a recommendation. Another commenter stated that in addition to ROI, health and safety, conflicting modernization schedules, and the validity of energy audit results need to be considered.

One commenter stated that it should be determined whether using the funds for the energy conservation measures now would take away from future development needs or be premature.

One commenter stated that energy trade-offs need to be easy to plan and implement, not burdensome and complicated.

One commenter stated that in determining which energy conservation measures should be implemented, it is important whether the item is

something that would have been replaced anyway.

HUD Response: HUD is handling the energy audit process, ECMs, and ROI issues under a separate rulemaking (see the proposed rule of 76 FR 71287 *et seq.*). The 20-year rolling base freeze relates to the current Operating Fund rule at 24 CFR part 990 and is outside the scope of this rulemaking.

Issue: One commenter endorsed incorporating the International Energy Conservation Code (IECC) in various subsections of the proposed rule related to what types of projects are eligible for Capital Funds. The commenter suggested that HUD reference the 2009 IECC to promote energy efficiency over the life of those projects. One commenter stated that because the section specifies the required design and construction requirements for affected building projects, the International Building Code (IBC) and the IECC will also provide compliance with several other requirements listed in this section, including compliance with ASHRAE standard 90.1–2010, ''Energy Standard for Buildings Except Low-Rise Residential Buildings,'' an accepted alternative means of compliance with chapter 5 of the IECC.

HUD Response: This final rule references the 2009 edition of the IECC, in §§ 905.200 and 905.312, rather than the 2006 IECC, and references the ASHRAE standard.

Reductions in the Amount of Capital Funds for Management Improvements

Issue: Commenters expressed concern about limiting the amount of Capital Fund budget that can be used for management improvements to 10 percent. Although PHA's on average only use 8 percent, the flexibility to go up to 20 percent is important and has a significant upside without a corresponding downside; for instance where PHAs need multiple infusions of capital for management improvement purposes at the same time, which may occur when a PHA becomes near-troubled or troubled. Also, such flexibility might be needed in an emergency. PHAs rarely use too much of their Capital Fund for management improvement, and HUD provides a solution to a problem that does not exist. Often there are statutory restrictions that prevent overly high usage, such as using 50 percent. HUD has not provided evidence that PHAs are mismanaging their Capital Fund for nonconstruction activities. It is counterintuitive that in a period of underfunding of PHAs, HUD would introduce a proposal that limits flexibility, authorized under statute, for PHAs to administer their CFP to meet local needs.

PHAs need the flexibility to use limited funds to address the ever-growing capital improvements necessary to ensure continued assisted housing for low-income residents; therefore, the current rule should be kept as is.

A PHA may need additional assistance for training, consulting, information technology upgrades, or security services and, with the prospect of being forced to use reserves for operational expenses during the next fiscal year, the use of CFP for management improvements will be crucial. One PHA commenter cited the need to pay a resident coordinator.

Another commenter cited a possible need to upgrade computer systems and train users. Another commenter referenced ''investments in technology,'' community policing, and security measures. Another commenter cited the Americans with Disabilities Act (42 U.S.C. 12101 *et seq.*) compliance, the Violence Against Women Act (VAWA) (Pub. L. 109–162, approved January 5, 2006), and the Limited English Proficiency programs.

Another commenter cited the funding environment and projections of flat or declining funding. Another commenter cited resident training and service goals, and suggested a 15 percent limit as more reasonable.

HUD Response: In a limited funding environment, HUD has the obligation to ensure that PHAs expend their funds to maintain their properties in good physical condition. HUD agrees that resident training and service are important goals. Capital Funds may be used for capital expenditures (hard costs) to facilitate programs to improve the empowerment and economic self-sufficiency of public housing residents, as well as for resident-related management improvements. It is important to mention this not only with respect to capital and management improvement funding, but also that, generally, Section 3 of the Housing and Community Development Act of 1968 (12 U.S.C. 1701u) requires, to the greatest extent feasible, that PHAs make their best efforts to ensure that employment and other economic opportunities generated by certain of HUD's Capital Fund- assisted activities are directed to low- and very-low-income persons, in accordance with 12 U.S.C. 1701u and HUD's Section 3 regulations at 24 CFR part 135.[3] Examples of such resident training and economic opportunities would be job training (e.g., painting and carpentry or computer skills and data entry) for residents and resident business development (e.g., painting contracting business or jobs in the PHA's offices, related to management assistance) for the purposes of carrying out activities related to the Capital Fund management or physical improvements. In addition, HUD has taken the public comments into consideration and revises the Management Improvements Policy in this final rule in order to allow PHAs more time for making any necessary adjustments. This final rule reduces the standard allowable percentage for management improvements from up to 20 percent to up to 10 percent for all PHAs over a 5-year period, rather than the 3 years proposed.

It should be noted that while some items mentioned by commenters are eligible expenses under the Capital Fund Program (CFP)—such as compliance with section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 701 *et seq.*), housing counseling for residents and prospective residents, and the design and construction of accessibility improvements—others such as staffing for security services, VAWA, and Limited English Proficiency, are not. Based on the responses to the proposed changes to the Management Improvements Policy, it has become evident that there is confusion over what items are eligible management improvement activities; therefore, eligible and ineligible activities under management improvements have been clarified at §§ 905.200(b)(7) and 905.202(h), respectively.

It should also be noted that the commenter misunderstands HUD's policy to conserve scarce resources as a statement that PHAs are mismanaging their Capital Funds, which HUD has never contended. However, as a recent modernization study entitled ''Capital Needs in the Public Housing Program (available at *http://portal.hud.gov/hudportal/documents/huddoc?id=PH_Capital_Needs.pdf*) has shown, there are huge outstanding modernization needs (over $25 billion in 2010 dollars), and there has been insufficient regulation of the allocation of management funds.

[3] While 12 U.S.C. 1701u uses ''best efforts'' with respect to the efforts required of PHAs, their contractors and subcontractors and uses ''to the greatest extent feasible'' with respect to the efforts required of program assistance programs (e.g., housing and community development programs), HUD has determined that there is very little difference between these terms, and that the same level of effort is to be undertaken by HUD and all recipients and contractors regardless of the source of HUD financial assistance. That level of effort is ''to the greatest extent feasible.'' (See, 59 FR 33866, 33877, June 30, 1994).

One result has been that large amounts of management funds have been used to, for example, fund and operate security staff, which should be an operating expense. HUD's regulation in this area intends to ensure that in this difficult fiscal environment sufficient modernization funds are allocated for modernization needs.

Issue: The reduction of the amount for management improvements will cause an ''undue financial burden to PHAs.'' Resident Opportunities and Self Sufficiency (ROSS), Community Supportive Services, and HOPE VI are not formula grants, and there is no guarantee a PHA would be successful in its grant application to receive such funding. Without the full 20 percent management improvement funding, PHAs that do not receive Public Housing Drug Elimination Program (PHDEP) funds might have to cancel security and drug elimination programs. While the current Capital Fund formula does allow for the potential use an additional 20 percent of appropriated Capital Funds to be used for operations, not all PHA's elect to or are eligible to utilize this funding mechanism. Reducing the management improvement amount by 50 percent would be penalizing those PHAs that are not utilizing this option.

Another commenter stated that the ROSS program has become politically disfavored, and that HOPE VI funding will be eliminated. The commenter was skeptical of HUD equating the 20-percent use of Capital Funds for operations with the 20 percent use of Capital Funds for management improvements, while housing authorities cannot use 20 percent of Capital Funds for management improvements as they can for operations. The commenter also stated that the proposed rule ignores that public housing programs are underfunded and housing authorities will not benefit from further restrictions on funding that limits how they operate.

HUD Response: The purpose of limiting the management improvement percentage is to help ensure that the PHAs spend appropriate amounts on the basic task of providing decent, safe, and sanitary housing. HUD is aware that this change may require a period of time of adjustment for PHAs. Therefore, HUD is phasing in the 10 percent cap over 5 years rather than the 3 years proposed.

HUD agrees that funding for operations does not necessarily equate to funding for management improvements, although there may be some overlap and all large PHAs (250 units or greater) are eligible under the statute to use up to 20 percent of their annual Capital Fund grant for operations, as long as it is in the PHA Plan and the PHA does not have emergency conditions that need to be corrected immediately. However, generally, all PHAs are working under a limited funding environment under which they have a legal obligation to provide decent, safe, and sanitary housing. HUD believes that the course it has chosen—to limit the amount that can be taken from the Capital Fund and to provide flexibility for those PHAs that are clearly spending enough Capital Fund to maintain the physical condition of their property—is the best use of limited funding.

Issue: There should be a direct correlation of management improvements to improved program performance.

HUD Response: HUD believes as a general matter that the issue is not performance, but the proper allocation of limited Capital Funds. HUD believes that the bulk of those funds should go to capital needs, and that the vast majority of PHAs are not using and do not need to use, more than 10 percent for eligible management improvements.

Issue: Larger PHAs, in particular, may have higher management costs that require flexibility in their use of their grant, and so those PHAs with 250 or more units should be allowed to continue using 20 percent of the Capital Fund grant for management improvements.

HUD Response: The actual usage of management improvements indicates that most PHAs use 10 percent or less of their Capital Funds for eligible management improvements. However, because some PHAs do use more, HUD is allowing more time than proposed to phase in the cap. The 10 percent overall cap will be phased in over 5 years.

Issue: One commenter stated that the proposed rule should be modified to include specific accounting instructions for the way in which to properly assign the 10 percent to the Central Office Cost Center.

HUD Response: As an administrative rather than regulatory matter, HUD may address this issue in guidance, but not in this rulemaking.

Other Issues

Issue: Resident participation. While it is commendable for the rule to include resident participation costs as eligible costs under § 905.200(b)(8)(ii), it would be helpful for HUD to take some additional action on resident participation.

HUD Response: This final rule incorporates, at § 905.300(b)(3), the resident participation and resident advisory board requirements formerly in 24 CFR part 903.

Issue: Tenants should be able to access technical assistance to help them understand either the budget or structural issues. The commenter states that there should be support for technical assistance through a capital operating account and that technical assistance should be offered on the regional and national level.

HUD Response: Funding for additional technical assistance (there is currently limited technical assistance for RAB training) is outside the scope of this rulemaking. This is an issue of appropriations.

Issue: Commenters are concerned about the dates of implementation in the proposed rule.

HUD Response: The implementation dates for the DDTF and the RHF transition can be found in § 905.400(j)–(k) and the implementation date for management improvements will be in accordance with the effective date of the rule. The rule only applies prospectively.

Issue: Adding the Public Housing Development Program to the list of programs eligible for the Capital Fund program may have a negative effect by spreading already scarce funds to more places as this program includes mixed-finance development. The commenter stated that mixed-income finance development may not have as high a degree of need as the low-income housing and that possible renovations could be more expensive in those buildings because they are for people of higher economic standing.

HUD Response: As to the fact that development is an eligible expense under the Capital Fund, this is statutorily required under section 9(d)(1) of the 1937 Act (42 U.S.C. 1437g(d)(1)). As to the potential for higher costs of renovations in mixed-finance housing, HUD is not aware of any evidence of these higher costs, and development of public housing via mixed-finance development is subject to the same limitations on TDC and Housing Construction Costs as non-mixed-finance development of public housing.

Issue: A commenter disagreed with language under proposed § 905.400(d)(3)(ii), which stated that units with a DOFA date of October 1, 1991, or after, shall be considered to have zero existing modernization need. The commenter stated that it is more cost effective to maintain a unit than it is to renovate it to address deferred maintenance and delayed capital improvements or to replace it. The commenter stated that buildings will

have capital needs in less than 20 years and need to accrue Capital Funds. Another commenter stated that the time frame for having existing modernization needs should be changed to 10 years.

HUD Response: This calculation was determined by the original negotiated rulemaking, and will not be revised in this rulemaking. However, HUD agrees that this is one of several components of the formula that should be reevaluated. Consequently, HUD is considering initiating another proposed rule to solely address the Capital Fund formula.

Issue: A commenter stated that there is a fundamental illogic in allocating 50 percent of Capital Funds to ''existing modernization needs,'' as defined, and 50 percent to ''accrual needs,'' as defined. Under the rule, a building constructed after 1991 would be deemed to have no modernization needs. The proportion of buildings in the public housing inventory that are more than 20 years old will decrease over time. Therefore, the inventory will be divided among an ever-smaller group of buildings, even as the post-1991 buildings age and become needier.

HUD Response: Similar to HUD's response to the preceding comment, these allocations are part of the original negotiated rulemaking and will not be revised in this rulemaking, but, as already noted, HUD is considering initiating another proposed rule on the Capital Fund formula.

Issue: A commenter stated that the proposed guidelines for site and neighborhood standards are overly rigid and unnecessarily restrictive. HUD should revise these standards to allow for PHAs to provide on-site replacement housing sufficient to meet community needs, regardless of the number of units previously existing on the site. The commenter also stated that the proposed requirement that sites used for replacement housing be accessible to necessary services through public transportation would not work in rural areas and small communities, where public transportation is limited or nonexistent.

HUD Response: It is HUD's responsibility to help ensure that some of the public housing that is demolished or disposed of is replaced, and to help ensure that there is sufficient public housing to serve the low-income community. As a result, PHAs, when submitting site acquisition or development proposals, are required to select sites that support this responsibility. HUD recognizes that each site selected for the construction or rehabilitation of public housing presents unique circumstances that reflect the neighborhood or community slated for the construction or rehabilitation. Consequently, HUD will balance the need for housing and the overall impact of the rehabilitation of public housing on residents when reviewing these development proposals against the site and neighborhood criteria identified in § 905.602(d). This final rule revises § 905.602(d)(9) to reflect the commenter's concern about lack of public transportation in rural areas.

Issue: A commenter stated that the standard in § 905.602(d)(5)(ii) should be revised to insert the phrase ''public housing'' to read:

> . . . the number of public housing units being constructed is the minimum number needed to house current residents that want to remain at the site, so long as the number of [public housing] units is significantly fewer than the number being demolished . . .

HUD Response: HUD agrees with this clarification and this final rule makes the suggested revision.

Issue: It is unclear what is meant by § 905.306(b), ''Items and costs.''

HUD Response: This term refers to items and costs listed in the PHA's budget and Capital Fund 5-Year Action Plan. To be obligated, these items and costs must meet the definition of ''obligation'' found in § 905.108.

Issue: HUD should include in §§ 905.306 and 905.310 the authorization found in section 35(b)(1) of the 1937 Act, 42 U.S.C. 1437z–7(b)(1) for a PHA to deposit funds in an escrow account in order to collateralize construction financing, whether through a bond issue or otherwise. The commenter states that escrow is a crucial technique for obtaining 4 percent Low Income Housing Tax Credits (LIHTC), in particular. In addition, the regulation should state explicitly that deposit into the escrow account constitutes expenditure for all deadline purposes.

HUD Response: To put this authority into effect, the statutory language requires HUD to issue regulations. HUD will consider doing so in the future.

Issue: The § 905.304(a) requirement to record a Declaration of Trust on ''all public housing property'' is vague. The commenter suggests reference to a Declaration of Trust recorded against real property on which a public housing project is located.

HUD Response: The phrase ''all public housing property'' is an appropriate phrase that accurately covers both the PHA's land and improvements, each of which must be subject to the Declaration of Trust.

Issue: HUD's proposed regulation at § 905.304(a)(3) requires projects receiving operating fund assistance to operate as public housing for the following 10 years, ''except as permitted by HUD by an exception.'' This rule should provide operating-fund-only projects with the maximum flexibility permitted by the 1937 Act to cease public housing operations if subsidies are reduced or suspended.

HUD Response: Each situation should be evaluated and determined by its own merits. A broad exception for an entire class of projects does not sufficiently protect the public interest.

Issue: The rule should remove references to Public Housing Development and Major Reconstruction of Obsolete Projects (MROP) funding, which program no longer exists.

HUD Response: PHAs still have unobligated balances in Public Housing Development and MROP grants, and so MROP cannot yet be removed from the rule.

Issue: The rule should be revised to provide that Moving to Work (MTW) agencies shall submit plans for expenditures of their Capital Funds pursuant to the terms of their MTW agreements, and any contrary requirements in the regulations will not apply to MTW PHAs.

HUD Response: HUD's proposed regulation at § 905.300(b)(10) has been revised at this final rule to incorporate guidance on MTW agencies providing the Capital Fund submission information through the MTW plan.

Issue: PHA performance should be rewarded with respect to timely obligation and expenditure of funds.

HUD Response: Timely obligating and expending funds simply means that a PHA is meeting the statutory legal requirements of 42 U.S.C. 1437g(j). HUD does not agree that PHAs should be rewarded for meeting basic legal requirements.

Issue: Terminology should be updated to reflect changes in asset management and project-level accounting.

HUD Response: HUD believes this final rule uses the appropriate terminology.

Issue: One commenter asked for clarification of whether § 905.312(b), on inspections of work in progress and goods delivered, applies only to mixed-income developments.

HUD Response: The section applies to both mixed-finance and public housing development.

Issue: One commenter objected to the fact that § 905.700, ''Other security interests,'' may be read to require HUD approval of transactions that provide recourse to nonpublic housing property of a PHA.

HUD Response: HUD's regulation at § 905.700 implements the statutory

language at section 30 of the 1937 Act, 42 U.S.C. 1437z–2, which states that HUD, upon such terms and conditions as it may prescribe, may authorize a PHA to ''mortgage or otherwise grant a security interest in any public housing project or other property of the PHA.''

VI. Incorporation by Reference

42 U.S.C. 12709 requires HUD to adopt energy efficiency standards that meet or exceed the requirements of the 2006 International Energy Conservation Code (hereafter in this section referred to as ''the 2006 IECC''), or, in the case of multifamily high-rises, the requirements of the American Society of Heating, Refrigerating, and Air-Conditioning Engineers Standard 90.1–2004. This statute also provides for the updating of those standards by adopting amended standards. Accordingly, the following updated standards are incorporated by reference in § 905.110 of this final rule with the approval of the Director of the Office of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51:

- ASHRAE 90.1–2010, ''Energy Standard for Buildings Except Low-Rise Residential Buildings.''
- The 2009 International Energy Conservation Code (IECC).

All approved material may be obtained from the organization that developed the standard. These standards also are available for inspection at HUD's Office of Policy Development and Research, Affordable Housing Research and Technology Division, Department of Housing and Urban Development, telephone number 202–708–4370 (this is not a toll-free number). In addition, the standards are available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030 or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Other resources are:

- ASHRAE 90.1–2010, ''Energy Standard for Buildings Except Low-Rise Residential Buildings,'' by the American Society of Heating, Refrigerating, and Air-Conditioning Engineers, Inc., 1791 Tulle Circle NE., Atlanta, GA 30329 (*http://www.ashrae.org/standards-research-technology/standards-guidelines*), and
- The 2009 International Energy Conservation Code (IECC) by the International Code Council, 500 New Jersey Avenue NW., 6th Floor, Washington, DC 20001 (1–888–422–7233) (*http://www.iccsafe.org/Store*).

The incorporated standards are found in this final rule at §§ 905.200(b)(6)(ii) and 905.312(b)(1).

VII. Findings and Certifications

Regulatory Review—Executive Orders 12866 and 13563

Under Executive Order 12866 (Regulatory Planning and Review), a determination must be made whether a regulatory action is significant and, therefore, subject to review by the Office of Management and Budget (OMB) in accordance with the requirements of the order. Executive Order 13563 (Improving Regulations and Regulatory Review) directs executive agencies to analyze regulations that are ''outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. Executive Order 13563 also directs that, where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, agencies are to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. This rule was determined to be a ''significant regulatory action'' as defined in section 3(f) of Executive Order 12866 (although not an economically significant regulatory action, as provided under section 3(f)(1) of the Executive Order).

With respect to Executive Order 12866, it is determined that this final rule would not have any impact on the level of funding for the CFP—which level is determined by annual congressional appropriations—but would potentially create some financial transfers among program participants. The total amount of transfers is estimated to be less than $100 million annually, with most of the transfers being interagency transfers attributable to the Demolition or Disposition Transitional Funding (DDTF). However, the benefits of the rule such as regulatory consolidation, program clarification, removal of obsolete references, and enhanced efficiencies, justify the rule regardless of the transfers of funding involved.

A summary of the changes made to the proposed rule at the final rule stage can be found in the preamble of the final rule. These changes can be aggregated in two groups:

1. Revision of Definitions and Other Clarifications

The final rule accommodates changes to definitions and provides other clarifications in response to public comments on the proposed rule, and further consideration of the issues by HUD. These actions bring much needed clarity to the Capital Fund Program.

For example, the proposed definition of ''Capital Fund Annual Contributions Contract (CF ACC)'' appeared to conflate the definition of the entire ACC (which is a contract addressing the operation of public housing) with that of a Capital Funds amendment (presumably limited to the special terms applicable to the provision of Capital Funds). To avoid possible ambiguity, this final rule modifies the proposed definition of CF ACC to more clearly indicate that this is an amendment to the Consolidated Annual Contributions Contract.

2. Program Requirements

A. Management Improvement

The proposed rule called for the gradual phase down of the management improvements funding limit from up to 20 percent to up to 10 percent over a period of 3 fiscal years. This final rule extends the phase-in over a 5-year time period. Following the phase down all PHAs would be limited to using up to 10 percent for management improvements. The 20 percent standard was implemented by regulation; it is not a statutory limitation.

HUD has determined, using 2008 data, that approximately 440 of the 3129 PHAs expended in excess of 10 percent of their Capital Funds for management improvements, corresponding to a total of $28.4 million. That sum represents an approximation of the amount of funding currently allocated to management improvements that effectively would be transferred to other eligible Capital Funds activities.

HUD notes, however, that collectively and on average, PHAs expend well below the 10 percent threshold. Still using the 2008 data, $2.14 billion was distributed by formula to PHAs under the Capital Fund Program. Of that amount, only $99,693,783, or about 4.65 percent, was expended by PHAs for management improvements. Overall, the average amount expended by PHAs for management improvements was 8.1 percent.

These results suggest that the potential transfer of $28.4 million would be observed at the level of each individual PHA. Collectively, and for the program as a whole, there would not be any transfers since PHAs, on an average, budget less than 10 percent for management improvements.

In reviewing the impact of HUD's 10 percent cap on management improvements, it is important to note that the cap does not imply a cost to the PHAs or a reduction in funding. With

the limit, PHAs with a management improvements budget over 10 percent of their annual Capital Fund allocation will simply have to realign their budget over a 5 year period and transfer the excess to other eligible capital fund activities within the PHA.

There is also no cost to be borne by PHAs and there is no reduction of the annual Capital Fund allocation to the PHA when the limit becomes effective. Further, there should be no disruption of activities already planned and included in the PHA plan. In this regard, it should be noted that Capital Fund expenditures are guided by the PHA's 5-year plan and annual statement, which describe the work to be carried out in the budget year. The fact that this final rule calls for a phase-down over 5 years mitigates any adverse programmatic impact to the PHA and allows work items already budgeted to be funded using management improvements funds to be completed, if the PHA so desires.

The restriction established by this rule is that no new work items in excess of 10 percent of the PHA's annual Capital Fund allocation would be approved using management improvements funds. The limitation and the priority change will leave a larger percentage of the PHA's annual Capital Fund grant available to be used for physical improvements, and will cause a transfer from and to an economic agent outside of the PHAs. Traditionally, PHAs spend management improvement funds on management information systems equipment, resident initiatives, etc. Stakeholders in these lines of business may see a reduction of activities from PHAs that routinely budget more than 10 percent to management improvements, as a result of the 10 percent limit.

Nevertheless, the potential benefit for capping the management improvements budget to 10 percent, down from 20 percent is to target the bulk of the capital funds to other capital fund—eligible activities, such as physical improvements. Recent studies, such as the Capital Needs Assessment, have stressed an urgent need for additional funding for physical improvements.

B. Capital Fund Formula

This proposed rule proposes the phase-down of the Replacement Housing Factor (RHF) from a 10-year long RHF program to a 5-year RHF program for PHAs that remove units from the inventory based on demolition or disposition.

The final rule establishes 5 years of a DDTF grant that will be included in the regular Capital Fund formula grant. The modification would alter the distribution of funds amongst program participants and thus create some inter-agency transfers. It should be noted that the main difference at this stage is on the way funds are distributed to eligible PHAs and the eligible use of funds. The DDTF grant will not be subject to the same requirements as the RHF grant, and it will allow PHAs to fund modernization as well as development, and fund any eligible activity under the Capital Fund Program. The need for more modernization is quantified in a study released in June 2011 on modernization needs, ''Capital Needs in the Public Housing Program,'' prepared by Abt Associates, available at *http://portal.hud.gov/hudportal/documents/huddoc?id=PH_Capital_Needs.pdf.* The study found that the Nation's 1.2 million public housing units have an estimated total of $25.6 billion in existing capital needs.

This final rule will also have significant benefits. This rule updates and consolidates the Capital Fund Program regulations and related regulations having to do with the use of Capital Funds for development and modernization, as well as regulations for continuing operation of low-income housing after completion of debt service. In addition, the rule codifies recent statutory requirements enacted in HERA. The benefits of the rule, such as regulatory consolidation, program clarification, removal of obsolete references, and enhanced efficiencies, make the rule necessary. Although HUD established the Capital Fund formula in 2000, HUD has continued to rely on Capital Fund Program requirements to the extent that these requirements were not superseded by statutory requirements.

The update in energy standards is made on the basis of a review of analysis prepared pursuant to the Energy Independence and Security Act (Pub. L. 110–140, approved December 19, 2007) showing that the average simple payback is 3.45 years for the energy savings resulting from implementing IECC 2009 to equal the incremental cost of the improvements.[4] This payback period is significantly less than the useful life of affected components and as a result the benefits of compliance with IECC 2009 outweigh the costs. It is noted that regardless of HUD's determination, 37 states have adopted IECC 2009 or IECC 2012, making the current HUD IECC 2006 standard moot in those states in addition to others, such as California, that enforce a stricter state standard than IECC. Generally, the IECC establishes baseline expectations for energy efficiency that consumers can rely upon as a matter of public policy. Without the requirement of the IECC to implement baseline energy conservation measures, real estate owners in both the public and private sectors generally would not implement energy conservation solely on the basis of energy savings. This is because the incentive for such measures in the form of cost savings often does not accrue to the entity implementing the energy conservation measure, creating a misplaced incentive. If there are market failures or barriers that are not reflected in the return of the investment, then the market penetration of energy-efficient investment will be less than optimal. Consistent with the search cost approach to imperfect information, landlords have a reduced incentive to provide energy-efficient appliances to their tenants.[5]

It is determined that this final rule is not economically significant. This final rule accommodates changes made to the proposed rule in response to public comments and other consideration of issues by HUD. Like the proposed rule, this final has the potential to generate some transfers caused by the modification of the formula grant to accommodate the introduction of the DDTF. Notwithstanding, the rule will yield some substantial benefits such as regulatory consolidation, program clarification, and removal of obsolete references.

With respect to Executive Order 13563, the preamble has demonstrated that, in response to public comment, and following further consideration of the issues by HUD, components of the Capital Fund regulations have been made more flexible and less burdensome.

The docket file is available for public inspection in the Regulations Division, Office of the General Counsel, Room 10276, 451 7th Street SW., Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the docket file by calling the Regulations Division at 202–708–3055 (this is not a toll-free

[4] Zachary Pachette, John Miller, Mike DeWein, *Incremental Construction Cost Analysis for New Homes,* Building Code Assistance Project, Updated June 2011. (Retrieved from: *http://bcap-ocean.org/incremental-cost-analysis*).

[5] Allcott, Hunt and Michael Greenstone, 2012, ''Is there an Energy-Efficiency Gap?'' National Bureau of Economic Research, Working Paper 17766; Gillingham, Kenneth, Matthew Harding, and David Rapson. 2012. ''Split Incentives and Household Energy Consumption.'' *Energy Journal* 33 (2): 37–62.

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number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service, toll-free at 800–877–8339.

Paperwork Reduction Act

The information collection requirements contained in this final rule have been submitted for review and approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). The information collection requirements for the Capital Fund program are assigned OMB control numbers 2577–0157, 2577–0226, 2577–0265, and 2577–0275. The information collection requirements in this final rule include largely pre-existing information collection requirements. However, the information collection requirements of some preexisting forms are being revised to reduce the paperwork burden. Specifically, the information collection requirements in this rule reflect a decrease of 32,222 burden hours from the preexisting forms. This decrease reflects statutory changes enacted by sections 2701 and 2702 of the Small PHA Paperwork Reduction Act, title VII of the Housing and Economic Recovery Act of 2008 (HERA) (Pub. L. 110–289, approved July 30, 2008). Specifically, HERA excepts qualified PHAs from the requirement of section 5A of the U.S. Housing Act of 1937 (42 U.S.C. 1437 *et seq.*) to prepare and submit an Annual PHA Plan. Qualified PHAs under HERA are defined as those PHAs with less than 550 public housing units and Housing Choice Vouchers (HCV) combined that are not in troubled performance status. This provision significantly reduces the paperwork burdens and associated costs for qualified PHAs, which represent approximately 68 percent of the PHAs that administer public housing programs. Under HERA, qualified PHAs are exempt from preparing and submitting a PHA Annual Plan and are only required to submit the 5-Year PHA Plan once every 5 years. The sections in this rule that contain the current information collection requirements and the upcoming revisions that are awaiting OMB approval, as well as the estimated adjusted burden of the pending revisions, are set forth in the following table.

CFR Section (related forms referenced)	Number of respondents	Total annual responses	Average hours per response	Total annual burden hours
§ 905.604(k), Transition Plan, OMB Control No. 2577–0275	920	920	18.46	16,980
§ 905.300(b)(8) Annual Statement/Performance and Evaluation Report, HUD form 50075.1, OMB Control No. 2577–0265, current	3,163	3,163	8	25,304
§ 905.300(b)(8) Annual Statement/Performance and Evaluation Report, HUD form 50075.1, OMB Control No. 2577–0265, pending approval	1,551	1,551	4.18	6488
§ 905.300(b)(1) Capital Fund 5-Year Action Plan, HUD form 50075.2, OMB Control No. 2577–0226, current	3,163	3,163	3.00	9489
§ 905.300(b)(1) Capital Fund 5-Year Action Plan, HUD form 50075.2, OMB Control No. 2577–0226, pending approval	1,551	1,551	2.09	3,244
§ 903.3 PHA 5-Year and Annual Plan, HUD form 50075, OMB Control No. 2577–0226, current	4,139	4,139	4.28	17,719
§ 903.3 PHA 5-Year and Annual Plan, HUD form 50075, OMB Control No. 2577–0226, pending approval	4,053	4,053	2.6	10,558
Total current burden hours	.....	.....	.....	52,512
Total burden hours once pending forms are approved	.....	.....	.....	20,290

All estimates include the time for reviewing instructions, searching existing data sources, gathering or maintaining the needed data, and reviewing the information.

The docket file is available for public inspection. For information or a copy of the paperwork package submitted to OMB, contact: Colette Pollard at 202–708–0306 (this is not a toll free number) or via email at *Colette.Pollard@hud.gov.* 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.

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 rule does not impose any federal mandate on any state, local, or tribal government or the private sector within the meaning of UMRA.

Environmental Impact

A Finding of No Significant Impact with respect to the environment has been made at the proposed rule stage in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)), and remains applicable to this final rule. The Finding of No Significant Impact is available for public inspection between the hours of 8 a.m. and 5 p.m., weekdays, in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, an advance appointment to review the docket file must be scheduled by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Hearing- or speech-impaired individuals may access this number through TTY by calling the Federal Relay Service, at toll-free 800–877–8339.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a 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. This rule reflects the transition from PHA-wide accounting to an asset management model, and therefore changes some of the language regarding the Capital Fund formula to reflect the new accounting model. The only significant change in the Capital Fund formula calculation is a proposal to limit the number of years a PHA is eligible to receive RHF grants

to replace units removed from the inventory by demolition, disposition, or homeownership from 10 years to 5 years. The Capital Fund formula amount that is freed up because of fewer RHF grants will cause an increase in the amount of Capital Funds available to the remainder of the PHAs, which includes a large number of small PHAs. Since most small PHAs do not demolish or dispose of a significant number of public housing units, reducing RHF eligibility to 5 years should benefit small PHAs. Therefore, the undersigned certifies that this rule will not have a significant economic impact on a substantial number of small entities, and an initial regulatory flexibility analysis is not required.

Executive Order 13132, Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits, to the extent practicable and permitted by law, an agency from promulgating a regulation that has federalism implications and either imposes substantial direct compliance costs on state and local governments and is not required by statute or preempts state law, unless the relevant requirements of section 6 of the Executive Order are met. This rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Catalog of Federal Domestic Assistance Number

The Catalog of Federal Domestic Assistance numbers for 24 CFR parts 905, 941, 968, and 969 are 14.850, 14.872, 14.882, 14.883.

List of Subjects

24 CFR Part 903

Administrative practice and procedure, Public housing, Reporting and recordkeeping requirements.

24 CFR Part 905

Grant programs—housing and community development, Incorporation by reference, Public housing, Reporting and recordkeeping requirements.

24 CFR Part 941

Grant programs—housing and community development, Loan programs—housing and community development, Public housing.

24 CFR Part 968

Grant programs—housing and community development, Loan programs—housing and community development, Public housing, Reporting and recordkeeping requirements.

24 CFR Part 969

Grant programs—housing and community development, Low and moderate income housing, and Public housing.

Accordingly, for the reasons stated in the preamble, under the authority of 42 U.S.C. 3535(d), HUD amends 24 CFR chapter IX as follows:

PART 903—PUBLIC HOUSING AGENCY PLANS

■ 1. The authority citation for part 903 is revised to read as follows:

Authority: 42 U.S.C. 1437c; 42 U.S.C. 1437c–1; Pub. L. 110–289; 42 U.S.C. 3535d.

■ 2. Revise § 903.3 to read as follows:

§ 903.3 What is the purpose of this subpart?

(a) This subpart specifies the requirements for PHA plans, required by section 5A of the United States Housing Act of 1937 (42 U.S.C. 1437c–1) (the Act), as amended.

(b) The purpose of the plans is to provide a strategic planning framework for PHA management operations and capital planning:

(1) Local accountability; and

(2) An easily identifiable source by which public housing residents, participants in the tenant-based assistance program, and other members of the public may locate basic PHA policies, rules and requirements concerning the PHA's operations, programs and services.

(c) Title VII of the Housing and Economic Reform Act, Public Law 110–289, section 2702, amends 42 U.S.C. 1437c–1(b) to provide qualified PHAs an exemption from the requirement of section 5A of the Act to submit an annual PHA Plan. The term ''qualified PHA'' means a public housing agency that meets the following requirements:

(1) The sum of the number of public housing dwelling units administered by the agency, and the number of vouchers under section 8(o) of the United States Housing Act of 1937 (42 U.S.C. 1437f(o)) administered by the agency, is 550 or fewer; and

(2) The agency is not designated under section 42 U.S.C. 1437d(j)(2) as a troubled public housing agency, and does not have a failing score under SEMAP during the prior 12 months.

PART 905—THE PUBLIC HOUSING CAPITAL FUND PROGRAM

■ 3. The authority citation for part 905 is revised to read as follows:

Authority: 42 U.S.C. 1437g, 42 U.S.C. 1437z–2, 42 U.S.C. 1437z–7, and 3535(d).

■ 4. Revise subpart A to read as follows:

Subpart A—General

Subpart A—General

§ 905.100 Purpose, general description, and other requirements.

(a) *Purpose.* The Public Housing Capital Fund Program (Capital Fund Program or CFP) provides financial assistance to public housing agencies (PHAs) and resident management corporations (RMC) (pursuant to 24 CFR 964.225) to make improvements to existing public housing. The CFP also provides financial assistance to develop public housing, including mixed-finance developments that contain public housing units.

(b) *General description.* Congress appropriates amounts for the Capital Fund in HUD's annual appropriations. In order to receive a Capital Fund grant, the PHA must:

(1) Validate project-level information in HUD's data systems, as prescribed by HUD;

(2) Have an approved CFP 5-Year Action Plan;

(3) Enter into a Capital Fund Annual Contributions Contract (CF ACC) Amendment to the PHA's Annual Contributions Contract (as defined in 24 CFR 5.403) with HUD; and

(4) Provide a written certification and counsel's opinion that all property receiving Capital Fund assistance is under a currently effective Declaration of Trust (DOT) and is in compliance with the CF ACC and the Act.

(c) *Informational requirements.* Section 905.300 of this part describes the information to be submitted to HUD for the CFP. HUD uses the CF formula set forth in § 905.400 of this part, along with data provided by the PHA and other information, including, but not limited to, the high-performance information from the Real Estate Assessment Center (REAC) and location cost indices, to determine each PHA's annual grant amount. HUD notifies each PHA of the amount of the grant and provides a CF ACC Amendment that must be signed by the PHA and executed by HUD in order for the PHA to access the grant. After HUD executes the CF ACC Amendment, the PHA may draw down funds for eligible costs that

have been described in its CFP Annual Statement/Performance and Evaluation Report or CFP 5-Year Action Plan.

(d) *Eligible activities.* Eligible Capital Fund costs and activities as further described in subpart B of this part include, but are not limited to, making physical improvements to the public housing stock and developing public housing units to be added to the existing inventory. With HUD approval, a PHA may also leverage its public housing inventory by borrowing additional capital on the private market and pledging a portion of its annual Capital Funds for debt service, in accordance with § 905.500 of this part.

(e) *Obligation and expenditure requirements.* A PHA must obligate and expend its Capital Funds in accordance with § 905.306 of this part. The PHA will directly employ labor, either temporarily or permanently, to perform work (force account) or contract for the required work in accordance with 24 CFR part 85. Upon completion of the work, the PHA must submit an Actual Modernization Cost Certificate (AMCC) or Actual Development Cost Certificate (ADCC) and a final Performance and Evaluation Report (in accordance with § 905.322 of this part) to HUD to close out each Capital Fund grant.

(f) *Financing and development.* Section 905.500 of this part regulates financing activities using Capital Funds and Operating Funds. Section 905.600 of this part contains the development requirements, including those related to mixed-finance development, formerly found in 24 CFR part 941. Section 905.700 of this part describes the criteria for the use of Capital Funds for other security interests. Section 905.800 of this part addresses PHA compliance with Capital Fund requirements and HUD capability for review and sanction for noncompliance.

§ 905.102 Applicability.

All PHAs that have public housing units under an Annual Contributions Contract (ACC), as described in 24 CFR 5.403, are eligible to receive Capital Funds.

§ 905.104 HUD approvals.

All HUD approvals required in this part must be in writing and from an official designated to grant such approval.

§ 905.106 Compliance.

PHAs or owner/management entities or their partners are required to comply with all applicable provisions of this part. Execution of the CF ACC Amendment, submissions required by this part, and disbursement of Capital Fund grants from HUD are individually and collectively deemed to be the PHA's certification that it is in compliance with the provisions of this part and all other Public Housing Program Requirements. Noncompliance with any provision of this part or other applicable requirements may subject the PHA and/or its partners to sanctions contained in § 905.804 of this part.

§ 905.108 Definitions.

The following definitions apply to this part:

1937 Act. The term ''1937 Act'' is defined in 24 CFR 5.100.

Accessible. As defined in 24 CFR 8.3.

ACC. The Annual Contributions Contract between HUD and a PHA covering a public housing project or multiple public housing projects.

ACC Amendment. An Amendment to the ACC to reflect specific changes made to a PHA's public housing inventory or funding. An ACC Amendment may be a Capital Fund ACC Amendment, a Mixed-Finance ACC Amendment, a Capital Fund Financing ACC Amendment, or other form of amendment specified by HUD.

Additional Project Costs. The sum of the following HUD-approved costs related to the development of a public housing project, which are not included in the calculation of the Total Development Cost (TDC) limit, but are included in the maximum project cost as stated in § 905.314(b). Additional project costs include the following:

(1) Costs for the demolition or remediation of environmental hazards associated with public housing units that will not be rebuilt on the original site; and

(2) Extraordinary site costs that have been verified by an independent state-registered, licensed engineer (e.g., removal of underground utility systems; replacement of off-site underground utility systems; extensive rock and/or soil removal and replacement; and amelioration of unusual site conditions, such as unusual slopes, terraces, water catchments, lakes, etc.); and

(3) Cost effective energy-efficiency measures in excess of standard building codes.

Capital Fund (CF). The fund established under section 9(d) of the 1937 Act (42 U.S.C.) 1437g(d).

Capital Fund Annual Contributions Contract Amendment (CF ACC). An amendment to the Annual Contributions Contract (ACC) under the 1937 Act between HUD and the PHA containing the terms and conditions under which the Department assists the PHA in providing decent, safe, and sanitary housing for low-income families. The CF ACC must be in a form prescribed by HUD, under which HUD agrees to provide assistance in the development, modernization, and/or operation of a low-income housing project under the 1937 Act and the PHA agrees to modernize and operate the project in compliance with all Public Housing Requirements.

Capital Fund Program Fee. A fee that may be charged to a Capital Fund grant by the PHA to cover costs associated with oversight and management of the CFP by the PHA Central Office Cost Center (COCC). These costs include duties related to general capital planning, preparation of the Annual Plan, processing of the Line of Credit Control System (LOCCS), preparation of reports, drawing of funds, budgeting, accounting, and procurement of construction and other miscellaneous contracts. The CFP fee is the administrative cost for managing a Capital Fund grant for a PHA subject to asset management.

Community Renewal Costs. Community Renewal Costs consist of the sum of the following HUD-approved costs related to the development of a public housing project: planning (including proposal preparation); administration; site acquisition; relocation; demolition of—and site remediation of environmental hazards associated with—public housing units that will be replaced on the project site; interest and carrying charges; off-site facilities; community buildings and nondwelling facilities; contingency allowance; insurance premiums; any initial operating deficit; on-site streets; on site utilities; and other costs necessary to develop the project that are not covered under the Housing Construction Cost (HCC). Public housing capital assistance may be used to pay for Community Renewal Costs in an amount equivalent to the difference between the HCC paid for with public housing capital assistance and the TDC limit.

Cooperation agreement. An agreement, in a form prescribed by HUD, between a PHA and the applicable local governing body or bodies that assures exemption from real and personal property taxes, provides for local support and services for the development and operation of public housing, and provides for PHA payments in lieu of taxes (PILOT).

Date of Full Availability (DOFA). The last day of the month in which substantially all (95 percent or more) of the units in a public housing project are available for occupancy.

Declaration of Restrictive Covenant. The Declaration of Restrictive Covenant

is a legal instrument that binds the PHA and the Owner Entity to develop mixed-finance projects in compliance with Public Housing Requirements and restricts disposition of the property, including transferring, conveying, assigning, leasing, mortgaging, pledging or otherwise encumbering the property.

Declaration of Trust (DOT). A legal instrument that grants HUD an interest in public housing property. It provides public notice that the property must be operated in accordance with all public housing federal requirements, including the requirement not to convey or otherwise encumber the property unless expressly authorized by federal law and/or HUD.

Development. Any or all undertakings necessary for planning, land acquisition, demolition, construction, or equipment in connection with a public housing project.

Emergency work. Capital Fund related physical work items that if not done pose an immediate threat to the health or safety of residents, and which must be completed within one year of funding. Management Improvements are not eligible as emergency work and therefore must be covered by the CFP 5-Year Action Plan before the PHA may carry them out.

Energy audit. A systematic review of the energy requirements and consumption for property with the intent to identify potential opportunities for energy and water savings through improved operational efficiency or more efficient components.

Expenditure. Capital Funds disbursed by the PHA to pay for obligations incurred in connection with work included in a CFP 5-Year Action Plan that has been approved by the PHA Board of Commissioners and HUD. Total funds expended means cash actually disbursed and does not include retainage.

Federal Fiscal Year (FFY). The Federal Fiscal Year begins each year on October 1 and ends on September 30 of the following year.

Force account labor. Labor employed directly by the PHA on either a permanent or a temporary basis.

Fungibility. As it relates to the Capital Fund Program, fungibility allows the PHA to substitute work items between any of the years within the latest approved CFP 5-Year Action Plan, without prior HUD approval.

HCC. The sum of the following HUD-approved costs related to the development of a public housing project: dwelling unit hard costs (including construction and equipment), builder's overhead and profit, the cost of extending utilities from the street to the public housing project, finish landscaping, and the payment of Davis-Bacon wage rates.

Line of Credit Control System (LOCCS). LOCCS is a HUD grant disbursement system. LOCCS currently provides disbursement controls for over 100 HUD grant programs. LOCCS-Web is an intranet version of LOCCS for HUD personnel. eLOCCS is the Internet link to LOCCS data for HUD business partners.

Mixed-finance modernization. Use of the mixed-finance method of development to modernize public housing projects described in § 905.604.

Modernization. Modernization means the activities and items listed in § 905.200(b)(4–18).

Natural disaster. An extraordinary event, such as an earthquake, flood, or hurricane, affecting only one or few PHAs, but excluding presidentially declared emergencies and major disasters under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq*).

Obligation. A binding agreement for work or financing that will result in outlays, immediately or in the future. All obligations must be incorporated within the CFP 5-Year Action Plan that has been approved by the PHA Board of Commissioners and HUD. This includes funds obligated by the PHA for work to be performed by contract labor (i.e., contract award), or by force account labor (i.e., work actually started by PHA employees). Capital Funds identified in the PHA's CFP 5-Year Action Plan to be transferred to operations are obligated by the PHA once the funds have been budgeted and drawn down by the PHA. Once these funds are drawn down they are subject to the requirements of 24 CFR part 990.

Open grant. Any grant for which a cost certificate has not been submitted and which has not reached fiscal closeout as described in § 905.322 of this part.

Operating fund. Assistance provided under 24 CFR part 990 pursuant to section 9(e) of the 1937 Act (42 U.S.C. 1437g(e)) for the purpose of operation and management of public housing.

Owner entity. An entity that owns public housing units. In mixed-finance development, the Owner Entity may be the PHA, or may be an entity in which the PHA owns a partial interest, or may be an entity in which the PHA has no ownership interest. The Owner Entity is subject to the applicable requirements of this subpart.

Partner. A third-party entity with which the PHA has entered into a partnership or other contractual arrangement to provide for the mixed-finance development of public housing units pursuant to this subpart. The partner has primary responsibility with the PHA for the development and/or operation of the public housing units and is subject to the applicable requirements of subpart F of this part.

Physical Needs Assessment (PNA). A systematic review of all the major physical components of property to result in a long-term schedule for replacement of each component and estimated capital costs required to meet the replacement need.

PIH Information Center (PIC). PIH's current system for recording data concerning: the public housing inventory, the characteristics of public housing and Housing Choice Voucher —assisted families, the characteristics of PHAs, and performance measurement of PHAs receiving Housing Choice Voucher funding.

Public Housing Agency (PHA). Any state, county, municipality, or other governmental entity or public body or agency or instrumentality of these entities that is authorized to engage or assist in the development or operation of public housing under this part.

Public Housing Assessment System (PHAS). The assessment system under 24 CFR part 902 for measuring the properties and PHA management performance in essential housing operations, including rewards for high performers and consequences for poor performers.

Public housing capital assistance. Assistance provided by HUD under the Act in connection with the development of public housing under this part, including Capital Fund assistance provided under section 9(d) of the Act, public housing development assistance provided under section 5 of the Act, Operating Fund assistance used for capital purposes under section 9(g)(2) or 9(e)(1)(I) (with HUD's approval of such financing of rehabilitation and development of public housing units) of the Act, and HOPE VI grant assistance.

Public housing funds. Any funds provided through the Capital Fund or Other Public Housing Development Sources, such as HOPE VI, Choice Neighborhoods, Development Funds, disposition proceeds that a PHA may realize under section 18 of the 1937 Act (42 U.S.C. 1437p), or any other funds appropriated by Congress for public housing.

Public housing project. The term ''public housing'' means low-income housing, and all necessary appurtenances thereto, assisted under the 1937 Act, other than assistance under 42 U.S.C. 1437f of the 1937 Act (section 8). The term ''public housing''

includes dwelling units in a mixed-finance project that are assisted by a public housing agency with public housing capital assistance or Operating Fund assistance. When used in reference to public housing, the term ''project'' means housing developed, acquired, or assisted by a PHA under the 1937 Act, and the improvement of any such housing.

Public housing requirements. All requirements applicable to public housing including, but not limited to, the 1937 Act; HUD regulations; the Consolidated Annual Contributions Contract, including amendments; HUD notices; and all applicable federal statutes, executive orders, and regulatory requirements, as these requirements may be amended from time to time.

Reasonable cost. An amount to rehabilitate or modernize an existing structure that is not greater than 90 percent of the TDC for a new development of the same structure type, number, and size of units in the same market area. Reasonable costs are also determined with consideration of HUD regulations including 24 CFR part 85, and 2 CFR part 225 (codifying OMB Circular A–87).

Reconfiguration. The altering of the interior space of buildings (e.g., moving or removing interior walls to change the design, sizes, or number of units).

Uniform Federal Accessibility Standards (UFAS). As defined in 24 CFR 8.32; see also 24 CFR part 40.

§ 905.110 Incorporation by reference.

(a) Certain material is incorporated by reference into this part, with the approval of the Director of the **Federal Register**, under 5 U.S.C. 552(a) and 1 CFR part 51. To enforce any edition other than that specified in this section, HUD must publish notice of change in the **Federal Register** and the material must be available to the public. Incorporated material is available from the sources listed below and is available for inspection at HUD's Office of Policy Development and Research, Affordable Housing Research and Technology Division, Department of Housing and Urban Development, telephone number 202–408–4370 (this is not a toll-free number). This material is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030 (this is not a toll-free number) or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

(b) American Society of Heating, Refrigerating, and Air-Conditioning Engineers, Inc., 1791 Tulle Circle NE., Atlanta, GA 30329 (*http://www.ashrae.org/standards-research-technology/standards-guidelines*).

(1) ASHRAE 90.1–2010, ''Energy Standard for Buildings Except Low-Rise Residential Buildings,'' copyright 2010, IBR approved for §§ 905.200(b) and 905.312(b) of this part.

(2) [Reserved].

(c) International Code Council, 500 New Jersey Avenue NW., 6th Floor, Washington, DC 20001.

(1) International Energy Conservation Code (IECC), January 2009, IBR approved for §§ 905.200(b) and 905.312(b).

(2) [Reserved].

■ 5. Add subparts B, C, and D to read as follows:

Subpart B—Eligible Activities

Subpart C—General Program Requirements

Subpart D—Capital Fund Formula

Subpart B—Eligible Activities

§ 905.200 Eligible activities.

(a) *General.* Activities that are eligible to be funded with Capital Funds as identified in this section include only items specified in an approved CFP 5-Year Action Plan as identified in § 905.300, or approved by HUD for emergency and natural disaster assistance, other than presidentially declared natural disasters and emergencies.

(b) *Eligible activities.* Eligible activities include the development, financing, and modernization of public housing projects, including the redesign, reconstruction, and reconfiguration of public housing sites and buildings (including compliance with the accessible design and construction requirements contained in 24 CFR 8.32, 24 CFR part 40, 24 CFR part 100, 28 CFR 35.151, and 28 CFR part 36, as applicable) and the development of mixed-finance projects, including the following:

(1) *Modernization.* Modernization is defined in § 905.108 of this part;

(2) *Development.* Development refers to activities and related costs to add units to a PHA's public housing inventory under § 905.600 of this part, including: construction and acquisition with or without rehabilitation; any and all undertakings necessary for planning, design, financing, land acquisition, demolition, construction, or equipment, including development of public housing units, and buildings, facilities, and/or related appurtenances (i.e., nondwelling facilities/spaces). Development of mixed-finance projects include the provision of public housing through a regulatory and operating agreement, master contract, individual lease, condominium or cooperative agreement, or equity interest.

(3) *Financing.* Debt and financing costs (e.g., origination fees, interest) incurred by PHAs for development or modernization of PHA projects that involves the use of Capital Funds, including, but not limited to:

(i) Mixed finance as described in § 905.604 of this part;

(ii) The Capital Fund Financing Program (CFFP) as described in § 905.500 of this part; and

(iii) Any other use authorized by the Secretary under section 30 of the 1937 Act (42 U.S.C. 1437).

(4) *Vacancy reduction.* Physical improvements to reduce the number of units that are vacant. Not included are costs for routine vacant unit turnaround, such as painting, cleaning, and minor repairs. Vacancy reduction activities must be remedies to a defined vacancy problem detailed in a vacancy reduction program included in the PHA's CFP 5-Year Action Plan.

(5) *Nonroutine maintenance.* Work items that ordinarily would be performed on a regular basis in the course of maintenance of property, but have become substantial in scope because they have been postponed and involve expenditures that would otherwise materially distort the level trend of maintenance expenses. These activities also include the replacement of obsolete utility systems and dwelling equipment.

(6) *Planned code compliance.* Building code compliance includes

design and physical improvement costs associated with:

(i) Correcting violations of local building code or the Uniform Physical Condition Standards (UPCS) under the Public Housing Assessment System (PHAS), and

(ii) A national building code, such as those developed by the International Code Council or the National Fire Protection Association; and the IECC or ASHRAE 90.1–2010 (both incorporated by reference, see, § 905.110 of this part), for multifamily high-rises (four stories or higher), or a successor energy code or standard that has been adopted by HUD for new construction pursuant to section 109 of the Cranston-Gonzales National Affordable Housing Act, Public Law 101–625, codified at 42 U.S.C. 12709, or other relevant authority.

(7) *Management improvements.* Noncapital activities that are project-specific or PHA-wide improvements needed to upgrade or improve the operation or maintenance of the PHA's projects, to promote energy conservation, to sustain physical improvements at those projects, or correct management deficiencies. PHAs must be able to demonstrate the linkage between the management improvement and the correction of an identified management deficiency, including sustaining the physical improvements. HUD encourages PHAs, to the greatest extent feasible, to hire residents as trainees, apprentices, or employees to carry out activities under this part, and to contract with resident owned businesses as required by section 3 of the Housing and Community Development Act of 1968, 12 U.S.C. 1701u. Management improvement costs shall be fundable only for the implementation period of the physical improvements, unless a longer period, up to a maximum of 4 years, is clearly necessary to achieve performance targets. Eligible activities include the following costs:

(i) Training for PHA personnel in operations and procedures, including resident selection, rent collection and eviction;

(ii) Improvements to management, financial, and accounting control systems of the PHA;

(iii) Improvement of resident and project security;

(iv) Activities that assure or foster equal opportunity; and

(v) Activities needed in conjunction with capital expenditures to facilitate programs to improve the empowerment and economic self-sufficiency of public housing residents, including the costs for resident job training and resident business development activities to enable residents and their businesses to carry out Capital Fund-assisted activities.

(vi) Resident management costs not covered by the Operating Fund include:

(A) The cost of technical assistance to a resident council or RMC to assess feasibility of carrying out management functions for a specific development or developments;

(B) The cost to train residents in skills directly related to the operation and management of the development(s) for potential employment by the RMC;

(C) The cost to train RMC board members in community organization, board development, and leadership;

(D) The cost of the formation of an RMC; and

(E) Resident participation costs that promote more effective resident participation in the operation of the PHA in its Capital Fund activities, including costs for staff support, outreach, training, meeting and office space, childcare, transportation, and access to computers that are modest and reasonable.

(8) *Economic self-sufficiency.* Capital expenditures to facilitate programs to improve the empowerment and economic self-sufficiency of public housing residents.

(9) *Demolition and reconfiguration.* (i) The costs to demolish dwelling units or nondwelling facilities subject to prior approval by HUD, where required, and other related costs for activities such as relocation, clearing, and grading the site after demolition, and subsequent site improvements to benefit the remaining portion of the existing public housing property, as applicable.

(ii) The costs to develop dwelling units or nondwelling facilities approved by HUD, where required, and other related costs for activities such as relocation, clearing and grading the site prior to development.

(iii) The costs to reconfigure existing dwelling units to units with different bedroom sizes or to a nondwelling use.

(10) *Resident relocation and mobility counseling.* Relocation and other assistance (e.g., reimbursement to affected residents of reasonable out-of-pocket expenses incurred in connection with temporary relocation, including the cost of moving to and from temporary housing and any increase in monthly rent/utility costs) as may be required or permitted by applicable Public Housing Requirements for permanent or temporary relocation, as a direct result of modernization, development, rehabilitation, demolition, disposition, reconfiguration, acquisition, or an emergency or disaster.

(11) *Security and safety.* Capital expenditures designed to improve the security and safety of residents.

(12) *Homeownership.* Activities associated with public housing homeownership, as approved by HUD, such as:

(i) The cost of a study to assess the feasibility of converting rental units to homeownership units and the preparation of an application for the conversion to homeownership or for the sale of units;

(ii) Construction or acquisition of units;

(iii) Downpayment assistance;

(iv) Closing cost assistance;

(v) Subordinate mortgage loans;

(vi) Construction or permanent financing such as write downs for new construction, or acquisition with or without rehabilitation; and

(vii) Other activities in support of the primary homeownership activities above, including but not limited to:

(A) Demolition to make way for new construction;

(B) Abatement of environmentally hazardous materials;

(C) Relocation assistance and mobility counseling;

(D) Homeownership counseling;

(E) Site improvements; and

(F) Administrative and marketing costs.

(13) *Capital Fund-related legal costs* (e.g., legal costs related to preparing property descriptions for the DOT, zoning, permitting, environmental review, procurement, and contracting).

(14) *Energy efficiency.* Allowed costs include:

(i) Energy audit or updated energy audits to the extent Operating Funds are not available and the energy audit is included within a modernization program.

(ii) Integrated utility management and capital planning to promote energy conservation and efficiency measures.

(iii) Energy and water conservation measures identified in a PHA's most recently updated energy audit.

(iv) Improvement of energy and water-use efficiency by installing fixtures and fittings that conform to the American Society of Mechanical Engineers/ American National Standards Institute standards A112.19.2–1998 and A112.18.1–2000, or any revision thereto, applicable at the time of installation, and by increasing energy efficiency and water conservation by such other means as the Secretary determines are appropriate.

(v) The installation and use of Energy Star appliances whenever energy systems, devices, and appliances are replaced, unless it is not cost-effective

to do so, in accordance with Section 152 of the Energy Policy Act of 2005, 42 U.S.C. 15841.

(vi) Utility and energy management system automation, and metering activities, including changing mastermeter systems to individually metered systems if installed as a part of a modernization activity to upgrade utility systems; for example, electric, water, or gas systems of the PHA consistent with the requirements of 24 CFR part 965.

(15) *Administrative costs.* Any administrative costs, including salaries and employee benefit contributions, other than the Capital Fund Program Fee, must be related to a specific public housing development or modernization project and detailed in the CFP 5-Year Action Plan.

(16) *Audit.* Costs of the annual audit attributable to the portion of the audit covering the CFP in accordance with § 905.322(c) of this part.

(17) *Capital Fund Program Fee.* This fee covers costs associated with oversight and management of the CFP attributable to the HUD-accepted COCC as described in 24 CFR part 990 subpart H. These costs include duties related to capital planning, preparing the CFP Annual Statement/Performance and Evaluation Report, preparing the CFP 5-Year Action Plan, the monitoring of LOCCS, preparing reports, drawing funds, budgeting, accounting, and procuring construction and other miscellaneous contracts. This fee is not intended to cover costs associated with construction supervisory and inspection functions that are considered a front-line cost of the project.

(18) *Emergency activities.* Capital Fund related activities identified as emergency work, as defined in § 905.108 of this part, whether or not the need is indicated in the CFP 5-Year Action Plan.

§ 905.202 Ineligible activities and costs.

The following are ineligible activities and costs for the CFP:

(a) Costs not associated with a public housing project or development, as defined in § 905.604(b)(1);

(b) Activities and costs not included in the PHA's CFP 5-Year Action Plan, with the exception that expenditures for emergencies and disasters, as defined in § 905.204 of this subpart, that are not identified in the 5-year Action Plan because of their emergent nature are eligible costs;

(c) Improvements or purchases that are not modest in design and cost because they include amenities, materials, and design in excess of what is customary for the locality. Air conditioning is an eligible modest amenity;

(d) Any costs not authorized as outlined in 2 CFR part 225 (codifying OMB Circular A–87), including, but not limited to, indirect administrative costs and indemnification;

(e) Public housing operating assistance, except as provided in § 905.314(l) of this part;

(f) Direct provision of social services through either force account or contract labor. Examples of ineligible direct social services include, but are not limited to, salaries for social workers or GED teachers;

(g) Eligible costs that are in excess of the amount directly attributable to the public housing units when the physical or management improvements, including salaries and employee benefits and contributions, will benefit programs other than public housing, such as section 8 Housing Choice Voucher or local revitalization programs;

(h) Ineligible management improvements include:

(1) Costs for security guards or ongoing security services (Capital Funds may only be used for the initial capital (e.g., fencing, lights, and cameras) or noncapital (e.g., training of in-house security staff) management improvements but may not be used for the ongoing costs, such as security guards after the end of the implementation period of the physical improvements);

(2) General remedial education; and

(3) Job counseling, job development and placement, supportive services during training, and the hiring of a resident coordinator. No continued Capital Funds will be provided after the end of the implementation period of the management improvements. The PHA shall be responsible for finding other funding sources, reducing its ongoing management costs, or terminating the management activities;

(i) Eligible cost that is funded by another source and would result in duplicate funding; and

(j) Any other activities and costs that HUD may determine on a case-by-case basis.

§ 905.204 Emergencies and natural disasters.

(a) *General.* PHAs are required by the CF ACC to carry various types of insurance to protect it from loss. In most cases, insurance coverage will be the primary source of funding to pay repair or replacement costs associated with emergencies and natural disasters. Where the Department's Annual Appropriations Act establishes a set-aside from the Capital Fund appropriation for emergencies and natural disasters, the procedures in this section apply.

(b) *Emergencies and natural disasters.* An emergency is an unforeseen or unpreventable event or occurrence that poses an immediate threat to the health and safety of the residents that must be corrected within one year of funding. A natural disaster for purposes of the Capital Fund reserve, is a non-presidentially declared disaster. In the event an emergency or natural disaster arises, HUD may require a PHA to use any other source that may legally be available, including unobligated Capital Funds, prior to providing emergency or natural disaster funds from the set-aside. The Department will review, on a case-by-case basis, requests for emergency and natural disaster funding from PHAs.

(c) *Procedure to request emergency or natural disaster funds.* To obtain emergency or natural disaster funds, a PHA shall submit a written request in the form and manner prescribed by HUD. In a natural disaster where the PHA requires immediate relief to preserve the property and safety of the residents, the PHA may submit a preliminary request outlined in paragraph (d) of this section. Subsequently, the PHA is required to complete and submit the remaining information outlined in paragraph (e) of this section, at a time prescribed by HUD. For emergency requests, PHAs are to follow the procedures outlined in paragraph (e) of this section.

(d) *Procedure to request preliminary natural disaster grant for immediate preservation.* A PHA may request a preliminary grant only for costs necessary for immediate preservation of the property and safety of the residents. The application should include the reasonable identification of damage and preservation costs as determined by the PHA. An independent assessment will be required when the PHA submits the final request or when the PHA reconciles the preliminary application grant with the actual amounts received from the Federal Emergency Management Agency (FEMA), insurance carriers, and other natural disaster relief sources. Regardless of whether further funding from the set-aside is requested, at a time specified by HUD, the PHA will be expected to provide a reconciliation of all funds received, to ensure that the PHA does not receive duplicate funding.

(e) *Procedure for an emergency or a final request for natural disaster funds.* In the request the PHA shall:

(1) Identify the public housing project(s) with the emergency or natural disaster condition(s).

(2) Identify and provide the date of the conditions that present an unforeseen or unpreventable threat to the health, life, or safety of residents, in the case of emergency; or Natural disaster (e.g., hurricane, tornado, etc.).

(3) Describe the activities that will be undertaken to correct the emergency or the conditions caused by the natural disaster and the estimated cost.

(4) Provide an independent assessment of the extent of and the cost to correct the condition. The assessment must be specific as to the damage and costs associated with the emergency or natural disaster. An independent estimate of damage and repair cost is required as a part of the final natural disaster application. For natural disasters, the assessment must identify damage specifically caused by the natural disaster. The set-aside can be used only to pay costs to repair or replace a public housing project damaged as a result of the natural disaster, not for nonroutine maintenance or other improvements.

(5) Provide a copy of a currently effective DOT covering the property and an opinion of counsel that there are no preexisting liens or other encumbrances on the property.

(6) Demonstrate that without the requested funds from the set-aside, the PHA does not have adequate funds available to correct the emergency condition(s).

(7) Identify all other sources of available funds (e.g., insurance proceeds, FEMA).

(8) Any other material required by HUD.

(f) *HUD Action.* HUD shall review all requests for emergency or natural disaster funds. If HUD determines that a PHA's request meets the requirements of this section, HUD shall approve the request subject to the availability of funds in the set-aside, in the order in which requests are received and are determined approvable.

(g) *Submission of the CF ACC.* Upon being provided with a CF ACC Amendment from HUD, the PHA must sign and date the CF ACC Amendment and return it to HUD by the date established by HUD. HUD will execute the signed and dated CF ACC Amendment submitted by the PHA.

Subpart C—General Program Requirements

§ 905.300 Capital fund submission requirements.

(a) *General.* Unless otherwise stated, the requirements in this section apply to both qualified PHAs (as described in § 903.3(c) of this chapter) and nonqualified PHAs. Each PHA must complete a comprehensive physical needs assessment (PNA).

(1) *Applicability.* Small PHAs (PHAs that own or operate fewer than 250 public housing units) must comply with the requirements of this section beginning 30 days after the end of the federal fiscal year quarter following HUD's publication of a notice in the **Federal Register**.

(2) [Reserved].

(b) *Capital Fund program submission requirements.* At the time that the PHA submits the ACC Amendment(s) for its Capital Fund Grants(s) to HUD, the PHA must also submit the following items:

(1) *CFP 5-Year Action Plan.* (i) *Content.* The CFP 5-Year Action Plan must describe the capital improvements necessary to ensure long-term physical and social viability of the PHA's public housing developments, including the capital improvements to be undertaken within the 5-year period, their estimated costs, status of environmental review, and any other information required for participation in the CFP, as prescribed by HUD. In order to be entitled to fungibility, PHA's must have an approved 5-year Action Plan. Except in the case of emergency/disaster work, the PHA shall not spend Capital Funds on any work that is not included in an approved CFP 5-Year Action Plan and its amendments.

(ii) *Budget.* The Capital Fund Budget for each of the 5 years shall be prepared by a PHA using the form(s) prescribed by HUD. Work items listed in the budget must include, but are not limited to, the following:

(A) Where a PHA has an approved Capital Fund Financing Program (CFFP) loan, debt service payments for the grants from which the payments are scheduled;

(B) Where a PHA has an approved CFFP loan, the PHA shall also include all work and costs, including debt service payments, in the CFP 5-Year Action Plan. Work associated with the use of financing proceeds will be reported separately in a form and manner prescribed by HUD; or

(C) Work affecting health and safety and compliance with regulatory requirements such as section 504 of the Rehabilitation Act of 1973 and HUD's implementing regulations at 24 CFR part 8, and the lead-based paint poisoning prevention standards at 24 CFR part 35, before major systems (e.g., heating, roof, etc.) and other costs of lower priority.

(iii) PHA Criteria for Significant Amendment or Modification. The PHA must include in the basic criteria that the PHA will use for determining a significant amendment or modification to the CFP 5-Year Action Plan. In addition to the criteria established by the PHA, for the purpose of the CFP, a proposed demolition, disposition, homeownership, Capital Fund financing, development, or mixed-finance proposal are considered significant amendments to the CFP 5-Year Action Plan.

(iv) *Submission.* The PHA must submit a Board-approved CFP 5-Year Action Plan at least once every 5 years. The PHA may choose to update its CFP 5-Year Action Plan every year. The PHA shall indicate whether its CFP 5-Year Action Plan is fixed or rolling. Prior to submission to HUD, the 5-Year Action Plan must have been approved by the PHA's Board of Commissioners. In any given year that a PHA does not have a CFP 5-Year Action Plan that is approved by the PHA Board of Commissioners and HUD, the Capital Fund grant(s) for these PHAs will be reserved and obligated; however, the PHA will not have access to those funds until its CFP 5-Year Action Plan is approved by the PHA Board of Commissioners and HUD.

(v) Significant amendments or modification to the CFP 5 Year Action Plan. PHAs making significant amendments or modifications to the CFP 5-Year Action Plan, as defined in paragraph (b)(1)(iii) of this section, must follow the requirements of this section.

(A) A PHA after submitting its 5-Year Action Plan may amend or modify the plan. If the amendment or modification is a significant amendment or modification, as defined in paragraph (b)(1)(iii) of this section, the PHA:

(1) May not adopt the amendment or modification until the PHA has duly called a meeting of its Board of Commissioners (or similar governing body) and the meeting at which the amendment or modification is adopted, is open to the public; and

(2) May not implement the amendment or modification until notification of the amendment or modifications are provided to HUD and approved by HUD in accordance with HUD's plan review procedures, as provided in paragraph (b)(6) of this section.

(B) Each significant amendment or modification to a plan submitted to HUD is subject to the requirement of paragraph (b)(3) of this section.

(2) *Certifications required for receipt of Capital Fund grants.* The PHA is also required to submit various certifications to HUD, in a form prescribed by HUD, including, but not limited to:

(i) Certification of PIC Data;

(ii) Standard Form—Disclosure of Lobbying Activities;

(iii) Civil Rights Compliance, in a form prescribed by HUD; and

(iv) Certification of Compliance with Public Hearing Requirements.

(3) *Conduct of public hearing and Resident Advisory Board Consultation.* A PHA must annually conduct a public hearing and consult with the Resident Advisory Board (RAB) of the PHA to discuss the Capital Fund submission. The PHA may elect to conduct a separate annual public hearing in order to solicit public comments or to hold the annual public hearing at the same time as the hearing for the Annual PHA Plan, the 5-Year Plan, or the required annual hearing for qualified public housing authorities. The hearing must be conducted at a location that is convenient to the residents served by the PHA.

(i) Not later than 45 days before the public hearing is to take place, the PHA must:

(A) Make the Capital Fund submission along with the material required under this paragraph (b) available to the residents and the RAB; and

(B) Publish a notice informing the public that the information is available for review and inspection; that a public hearing will take place on the plan; and of the date, time, and location of the hearing.

(C) PHAs shall conduct reasonable outreach activities to encourage broad public participation in the review of the Capital Fund submission.

(4) *Public and RAB comments.* The PHA must consider the comments from the residents, the public, and the RAB on the Capital Fund submission, or any significant modification thereto. In submitting the final CFP 5-Year Action Plan to HUD for approval, or any significant amendment or modification to the 5-Year Action Plan to HUD for approval, the PHA must include a copy of the recommendations made by the RAB(s) and a description of the manner in which the PHA addressed these recommendations.

(5) *Consistency with Consolidated Plan.* The Capital Fund submission must be consistent with any applicable Consolidated Plan.

(6) *HUD review and approval.* The CFP submission requirements must meet the requirements of this part as well as the Public Housing Program Requirements as defined in § 905.108 of this part. A PHA is required to revise or correct information that is not in compliance, and HUD has the authority to impose administrative sanctions until the appropriate revisions are made. HUD will review the CFP submission requirements to determine whether:

(i) All of the information that is required to be submitted is included;

(ii) The information is consistent with the needs identified in the PNA and data available to HUD; and

(iii) There are any issues of compliance with applicable laws, regulations, or contract requirements that have not been addressed with the proposed use of the Capital Fund.

(7) *Time frame for submission of CFP requirements.* The requirements identified in this paragraph (b) must be submitted to HUD, in a format prescribed by HUD, at the time that the PHA submits its signed CF ACC Amendment.

(8) *Performance and Evaluation Report.* (i) All PHAs must prepare a CFP Annual Statement/Performance and Evaluation Report at a time and in a format prescribed by HUD. These reports shall be retained on file for all grants for which a final Actual Modernization Cost Certificate (AMCC) or an Actual Development Cost Certificate (ADCC) has not been submitted. A final Performance and Evaluation Report must be submitted in accordance with 24 CFR 905.322, at the time the PHA submits its AMCC or ADCC.

(ii) PHAs that are designated as troubled performers under PHAS (24 CFR part 902) or as troubled under the Section 8 Management Assessment Program (SEMAP) (24 CFR part 985), and/or were identified as noncompliant with section 9(j) obligation and expenditure requirements during the fiscal year, shall submit their CFP Annual Statement/Performance and Evaluation Reports to HUD for review and approval.

(iii) All other PHAs, that are not designated as troubled performers under PHAS and are not designated as troubled under SEMAP, and that were in compliance with section 9(j) obligation and expenditure requirements during the fiscal year, shall prepare a CFP Annual Statement/Performance and Evaluation report for all open grants and shall retain the report(s) on file at the PHA, to be available to HUD upon request.

(9) *Moving to Work (MTW) PHAs.* MTW PHAs are to submit the Capital Fund submissions as part of the MTW Plan annually, as required by the MTW Agreement.

(c) [Reserved]

(d) [Reserved]

§ 905.302 Timely submission of the CF ACC amendment by the PHA.

Upon being provided with a CF ACC Amendment from HUD, the PHA must sign and date the CF ACC Amendment and return it to HUD by the date established. HUD will execute the signed and dated CF ACC Amendment submitted by the PHA. If HUD does not receive the signed and dated Amendment by the submission deadline, the PHA will receive the Capital Fund grant for that year; however, it will have less than 24 months to obligate 90 percent of the Capital Fund grant and less than 48 months to expend these funds because the PHA's obligation start date and disbursement end date for these grants will remain as previously established by HUD.

§ 905.304 CF ACC term and covenant to operate.

(a) *Period of obligation to operate as public housing.* The PHA shall operate all public housing projects in accordance with the CF ACC, as amended, and applicable HUD regulations, for the statutorily prescribed period. These periods shall be evidenced by a recorded DOT on all public housing property. If the PHA uses Capital Funds to develop public housing or to modernize existing public housing, the CF ACC term and the covenant to operate those projects are as follows:

(1) *Development activities.* Each public housing project developed using Capital Funds shall establish a restricted use covenant, either in the DOT or as a Declaration of Restrictive Covenants, to operate under the terms and conditions applicable to public housing for a 40-year period that begins on the date on which the project becomes available for occupancy, as determined by HUD.

(2) *Modernization activities.* For PHAs that receive Capital Fund assistance, the execution of each new CF ACC Amendment establishes an additional 20-year period that begins on the latest date on which modernization is completed, except that the additional 20-year period does not apply to a project that receives Capital Fund assistance only for management improvements.

(3) *Operating Fund.* Any public housing project developed that receives Operating Fund assistance shall have a covenant to operate under requirements applicable to public housing for a 10-year period beginning upon the conclusion of the fiscal year for which such amounts were provided, except for such shorter period as permitted by HUD by an exception.

(b) *Mortgage or security interests.* The PHA shall not allow *any mortgage* or security interest in public housing assets, including under section 30 of the 1937 Act (42 U.S.C. 1437z–2), without prior written approval from HUD. PHAs that undertake financing unsecured by public housing assets shall include the following nonrecourse language in all financing documents as follows:

''This financing is non-recourse to any public housing property (real or personal property including all public housing assets or income), or disposition proceeds approved pursuant to Section 18 of the United States Housing Act of 1937 (unless explicitly permitted by HUD in the Section 18 approval letter).''

(c) *Applicability of latest expiration date.* All public housing subject to this part or required by law shall be maintained and operated as public housing, as prescribed, until the latest expiration date provided in section 9(d)(3) of the 1937 Act (42 U.S.C. 1437g(d)(3)) or any other provision of law or regulation mandating the operation of the housing as public housing, or under terms and conditions applicable to public housing, for a specified period of time.

§ 905.306 Obligation and expenditure of Capital Fund grants.

(a) *Obligation.* A PHA shall obligate each Capital Fund grant, including formula grants, Replacement Housing Factor (RHF) grants, Demolition and Disposition Transitional Funding (DDTF) grants, and natural disaster grants, no later than 24 months after, and emergency grants no later than 12 months after, the date on which the funds become available to the PHA for obligation, except as provided in paragraphs (c) and (d) of this section. However, a PHA with unobligated funds from a grant shall disregard this requirement for up to not more than 10 percent of the originally allocated funds from that grant. The funds become available to the PHA when HUD executes the CF ACC Amendment. With HUD approval, and subject to the availability of appropriations, the PHA can accumulate RHF grants for up to 5 years or until it has adequate funds to undertake replacement housing. The PHA shall obligate 90 percent of the RHF grant within 24 months from the date that the PHA accumulates adequate funds, except as provided in paragraph (c) of this section.

(b) *Items and costs.* For funds to be considered obligated, all items and costs must meet the definition of ''obligation'' in § 905.108 of this part.

(c) *Extension to obligation requirement.* The PHA may request an extension of the obligation deadline, and HUD may grant an extension for a period of up to 12 months, based on:

(1) The size of the PHA;

(2) The complexity of the CFP of the PHA;

(3) Any limitation on the ability of the PHA to obligate the amounts allocated for the PHA from the Capital Fund in a timely manner as a result of state or local law; or

(4) Any other factors that HUD determines to be relevant.

(d) *HUD extension for other reasons.* HUD may extend the obligation deadline for a PHA for such a period as HUD determines to be necessary, if HUD determines that the failure of the PHA to obligate assistance in a timely manner is attributable to:

(1) Litigation;

(2) Delay in obtaining approvals from the Federal Government or a state or local government that is not the fault of the PHA;

(3) Compliance with environmental assessment and abatement requirements;

(4) Relocating residents;

(5) An event beyond the control of the PHA; or

(6) Any other reason established by HUD by notice in the **Federal Register**.

(e) *Failure to obligate.* (1) For any month during the fiscal year, HUD shall withhold all new Capital Fund grants from any PHA that has unobligated funds in violation of paragraph (a) of this section. The penalty will be imposed once the violations of paragraph (a) are known. The PHA may cure the noncompliance by:

(i) Requesting in writing that HUD recapture the unobligated balance of the grant; or

(ii) Continuing to obligate funds for the grant in noncompliance until the noncompliance is cured.

(2) After the PHA has cured the noncompliance, HUD will release the withheld Capital Fund grant(s) minus a penalty of one-twelfth of the grant for each month of noncompliance.

(f) *Expenditure.* The PHA shall expend all grant funds within 48 months after the date on which funds become available, as described in paragraph (a) of this section. The deadline to expend funds may be extended only by the period of time of a HUD-approved extension of the obligation deadline. No other extensions of the expenditure deadline will be granted. All funds not expended will be recaptured.

§ 905.308 Federal requirements applicable to all Capital Fund activities.

(a) The PHA shall comply with the requirements of 24 CFR part 5 (General HUD Program Requirements; Waivers), 24 CFR part 85 (Administrative Requirements for Grants and Cooperative Agreements to State, Local and Federally Recognized Indian Tribal Governments), and this part.

(b) The PHA shall also comply with the following program requirements.

(1) *Nondiscrimination and equal opportunity.* The PHA shall comply with all applicable nondiscrimination and equal opportunity requirements, including, but not limited to, the Department's generally applicable nondiscrimination and equal opportunity requirements at 24 CFR 5.105(a) and the Architectural Barriers Act of 1968 (42 U.S.C. 4151 *et seq.*), and its implementing regulations at 24 CFR parts 40 and 41. The PHA shall affirmatively further fair housing in its use of funds under this part, which includes, but is not limited to, addressing modernization and development in the completion of requirements at 24 CFR 903.7(o).

(2) *Environmental requirements.* All activities under this part are subject to an environmental review by a responsible entity under HUD's environmental regulations at 24 CFR part 58 and must comply with the requirements of the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321 *et seq.*) and the related laws and authorities listed at 24 CFR 58.5. HUD may make a finding in accordance with 24 CFR 58.11 and may perform the environmental review itself under the provisions of 24 CFR part 50. In those cases where HUD performs the environmental review under 24 CFR part 50, it will do so before approving a proposed project, and will comply with the requirements of NEPA and the related requirements at 24 CFR 50.4.

(3) *Wage rates.* (i) Davis-Bacon wage rates. For all work or contracts exceeding $2,000 in connection with development activities or modernization activities (except for nonroutine maintenance work, as defined in § 905.200(b)(5) of this part), all laborers and mechanics employed on the construction, alteration, or repair shall be paid not less than the wages prevailing in the locality, as determined by the Secretary of Labor pursuant to the Davis-Bacon Act (40 U.S.C. 3142).

(ii) HUD-determined wage rates. For all operations work and contracts, including routine and nonroutine maintenance work (as defined in § 905.200(b)(5) of this part), all laborers and mechanics employed shall be paid

not less than the wages prevailing in the locality, as determined or adopted by HUD pursuant to section 12(a) of the 1937 Act, 42 U.S.C. 1437j(a).

(iii) *State wage rates.* Preemption of state prevailing wage rates as provided at 24 CFR 965.101.

(iv) *Volunteers.* The prevailing wage requirements of this section do not apply to volunteers performing development, modernization, or nonroutine maintenance work under the conditions set out in 24 CFR part 70.

(4) *Technical wage rates.* All architects, technical engineers, draftsmen, and technicians (other than volunteers under the conditions set out in 24 CFR part 70) employed in a development or modernization project shall be paid not less than the wages prevailing in the locality, as determined or adopted (subsequent to a determination under applicable state or local law) by HUD.

(5) *Lead-based paint poisoning prevention.* The PHA shall comply with the Lead-Based Paint Poisoning Prevention Act (LPPPA) (42 U.S.C. 4821 *et seq.*), the Residential Lead-Based Paint Hazard Reduction Act (42 U.S.C. 4851 *et seq.*), and the Lead Safe Housing Rule and the Lead Disclosure Rule at 24 CFR part 35.

(6) *Fire safety.* A PHA shall comply with the requirements of section 31 of the Federal Fire Prevention and Control Act of 1974 (15 U.S.C. 2227).

(7) *Flood insurance and floodplain requirements.* The PHA will not engage in the acquisition, construction, or improvement of a public housing project located in an area that has been identified by the FEMA as having special flood hazards, unless:

(i) The requirements of 24 CFR part 55, Floodplain Management, have been met, including a determination by a responsible entity under 24 CFR part 58 or by HUD under 24 CFR part 50 that there is no practicable alternative to locating in an area of special flood hazards and the minimization of unavoidable adverse impacts;

(ii) Flood insurance on the building is obtained in compliance with the Flood Disaster Protection Act of 1973 (42 U.S.C. 4001 *et seq.*); and

(iii) The community in which the area is situated is participating in the National Flood Insurance Program in accordance with 44 CFR parts 59 through 79, or less than one year has passed since FEMA notification regarding flood hazards.

(8) *Coastal barriers.* In accordance with the Coastal Barriers Resources Act (16 U.S.C. 3501 *et seq.*), no financial assistance under this part may be made available within the Coastal Barrier Resources System.

(9) *Displacement, relocation, and real property acquisition.* All acquisition or rehabilitation activities carried out under the Capital Fund, including acquisition of any property for development, shall comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA) (42 U.S.C. 4601–4655) and with implementing regulations at 49 CFR part 24. Demolition or disposition under section 18 of the 1937 Act, 42 U.S.C. 1437p, is covered by the relocation provisions at 24 CFR 970.21.

(10) *Procurement and contract requirement.* PHAs and their contractors shall comply with section 3 of the Housing and Community Development Act of 1968 (12 U.S.C. 1701u) and HUD's implementing rules at 24 CFR part 135.

§ 905.310 Disbursements from HUD.

(a) The PHA shall initiate a fund requisition from HUD only when funds are due and payable, unless HUD approves another payment schedule as authorized by 24 CFR 85.21.

(b) The PHA shall maintain detailed disbursement records to document eligible expenditures (e.g., contracts or other applicable documents), in a form and manner prescribed by HUD.

§ 905.312 Design and construction.

The PHA shall meet the following design and construction standards, as applicable, for all development and modernization.

(a) Physical structures shall be designed, constructed, and equipped to be consistent with the neighborhoods they occupy; meet contemporary standards of modest design, comfort, and livability (see also § 905.202(c) of this part); promote security; promote energy conservation; and be attractive so as to harmonize with the community.

(b) All development projects shall be designed and constructed in compliance with:

(1) A national building code, such as those developed by the International Code Council or the National Fire Protection Association; and the IECC or ASHRAE 90.1–2010 (both incorporated by reference, see § 905.110 of this part), for multifamily high-rises (four stories or higher), or a successor energy code or standard that has been adopted by HUD pursuant to 42 U.S.C. 12709 or other relevant authority;

(2) Applicable state and local laws, codes, ordinances, and regulations;

(3) Other federal requirements, including fire protection and safety standards implemented under section 31 of the Fire Administration Authorization Act of 1992, 15 U.S.C. 2227 and HUD minimum property standards (e.g., 24 CFR part 200, subpart S);

(4) Accessibility Requirements as required by section 504 of the Rehabilitation Act (29 U.S.C. 794) and implementing regulations at 24 CFR part 8; title II of the Americans with Disabilities Act (42 U.S.C. 12101 *et seq.*) and implementing regulations at 28 CFR part 35; and, if applicable, the Fair Housing Act (42 U.S.C. 3601–3619) and implementing regulations at 24 CFR part 100; and

(5) Occupancy of high-rise elevator structures by families with children. Pursuant to 42 U.S.C. 1437d(a), a high-rise elevator structure shall not be provided for families with children regardless of density, unless the PHA demonstrates and HUD determines that there is no practical alternative.

(c) All modernization projects shall be designed and constructed in compliance with:

(1) The modernization standards as prescribed by HUD;

(2) Accessibility requirements as required by section 504 of the Rehabilitation Act (29 U.S.C. 794) and implementing regulations at 24 CFR part 8; title II of the Americans with Disabilities Act (42 U.S.C. 12101 *et seq.*) and implementing regulations at 28 CFR part 35; and, if applicable, the Fair Housing Act (42 U.S.C. 3601–3619) and implementing regulations at 24 CFR part 100; and

(3) Cost-effective energy conservation measures, identified in the PHA's most recently updated energy audit.

(d) Pursuant to the Energy Policy Act of 2005, in purchasing appliances, PHAs shall purchase appliances that are Energy Star products or Federal Energy Management Program designed products, unless the PHA determines that the purchase of these appliances is not cost effective.

§ 905.314 Cost and other limitations.

(a) *Eligible administrative costs.* Where the physical or management improvement costs will benefit programs other than Public Housing, such as the Housing Choice Voucher program or local revitalization programs, eligible administrative costs are limited to the amount directly attributable to the public housing program.

(b) *Maximum project cost.* The maximum project cost represents the total amount of public housing capital assistance used in connection with the development of a public housing project, and includes:

(1) Project costs that are subject to the TDC limit (i.e., HCC and Community Renewal Costs); and

(2) Project costs that are not subject to the TDC limit (i.e., Additional Project Costs). The total project cost to be funded with public housing capital assistance, as set forth in the proposal and as approved by HUD, becomes the maximum project cost stated in the ACC Amendment. Upon completion of the project, the actual project cost is determined based upon the amount of public housing capital assistance expended for the project, and this becomes the maximum project cost for purposes of the ACC Amendment.

(c) *TDC limit.* (1) Public housing funds, including Capital Funds, may not be used to pay for HCC and Community Renewal Costs in excess of the TDC limit, as determined under paragraph (b)(2) of this section. However, HOPE VI grantees will be eligible to request a TDC exception for public housing and HOPE VI funds awarded in FFY 1996 and prior years. PHAs may also request a TDC exception for integrated utility management, capital planning, and other capital and management activities that promote energy conservation and efficiency. HUD will examine the request for TDC exceptions to ensure that they would be cost-effective, so as to ensure that up-front expenditures subject to the exceptions would be justified by future cost savings.

(2) *Determination of TDC limit.* HUD will determine the TDC limit for a public housing project as follows:

(i) *Step 1: Unit construction cost guideline.* HUD will first determine the applicable ''construction cost guideline'' by averaging the current construction costs as listed in two nationally recognized residential construction cost indices for publicly bid construction of a good and sound quality for specific bedroom sizes and structure types. The two indices HUD will use for this purpose are the R.S. Means cost index for construction of ''average'' quality and the Marshall & Swift cost index for construction of ''good'' quality. HUD has the discretion to change the cost indices to other such indices that reflect comparable housing construction quality through a notice published in the **Federal Register**.

(ii) *Step 2: Bedroom size and structure types.* The construction cost guideline is then multiplied by the number of units for each bedroom size and structure type.

(iii) *Step 3: Elevator and nonelevator type structures.* HUD will then multiply the resulting amounts from step 2 by 1.6 for elevator type structures and by 1.75 for nonelevator type structures.

(iv) *Step 4: TDC limit.* The TDC limit for a project is calculated by adding the resulting amounts from step 3 for all the public housing units in the project.

(3) *Costs not subject to the TDC limit.* Additional project costs are not subject to the TDC limit.

(4) *Funds not subject to the TDC limit.* A PHA may use funding sources not subject to the TDC limit (e.g., Community Development Block Grant (CDBG) funds, low-income housing tax credits, private donations, private financing, etc.) to cover project costs that exceed the TDC limit or the HCC limit described in this paragraph (c). Such funds, however, may not be used for items that would result in substantially increased operating, maintenance, or replacement costs, and must meet the requirements of section 102 of the Department of Housing and Urban Development Reform Act of 1989 (Pub. L. 101–235, approved December 15, 1989) (42 U.S.C. 3545). These funds must be included in the project development cost budget.

(d) *Housing Construction Costs (HCC).* (1) *General.* A PHA may not use Capital Funds to pay for HCC in excess of the amount determined under paragraph (d)(2) of this section.

(2) *Determination of HCC limit.* HUD will determine the HCC limit as listed in at least two nationally recognized residential construction cost indices for publicly bid construction of a good and sound quality for specific bedroom sizes and structure types. The two indices HUD will use for this purpose are the R.S. Means cost index for construction of ''average'' quality and the Marshal & Swift cost index for construction of ''good'' quality. HUD has the discretion to change the cost indices to other such indices that reflect comparable housing construction quality through a notice published in the **Federal Register**. The resulting construction cost guideline is then multiplied by the number of public housing units in the project, based upon bedroom size and structure type. The HCC limit for a project is calculated by adding the resulting amounts for all public housing units in the project.

(3) The HCC limit is not applicable to the acquisition of existing housing, whether or not such housing will be rehabilitated. The TDC limit is applicable to such acquisition.

(e) *Community Renewal Costs.* Capital Funds may be used to pay for Community Renewal Costs in an amount equivalent to the difference between the HCC paid for with public housing capital assistance and the TDC limit.

(f) *Rehabilitation of existing public housing projects.* The HCC limit is not applicable to the rehabilitation of existing public housing projects. The TDC limit for modernization of existing public housing is 90 percent of the TDC limit as determined under paragraph (c) of this section. This limitation does not apply to the rehabilitation of any property acquired pursuant to § 905.600 of this part.

(g) *Modernization cost limits.* If the modernization costs are more than 90 percent of the TDC, then the project shall not be modernized. Capital Funds shall not be expended to modernize an existing public housing development that fails to meet the HUD definition of reasonable cost found in § 905.108 of this part, except for:

(1) Emergency work;

(2) Essential maintenance necessary to keep a public housing project habitable until the demolition or disposition application is approved; or

(3) The costs of maintaining the safety and security of a site that is undergoing demolition.

(h) *Administrative cost limits and Capital Fund Program Fee.* (1) Administrative cost limits (for non-asset-management PHAs). The PHA shall not budget or expend more than 10 percent of its annual Capital Fund grant on administrative costs, in accordance with the CFP 5-Year Action Plan.

(2) Capital Fund Program Fee (for asset-management PHAs). For a PHA that is under asset management, the Capital Fund Program Fee and administrative cost limits are the same. For the Capital Fund Program Fee, a PHA may charge a management fee of up to 10 percent of the annual CFP formula grant(s) amount, excluding emergency and disaster grants and also excluding any costs related to lead-based paint or asbestos testing, in-house architectural and engineering work, or other special administrative costs required by state or local law.

(i) Modernization. The PHA shall not budget or expend more than 10 percent of its annual Capital Fund grant on administrative costs, in accordance with its CFP 5-Year Action Plan. The 10 percent limit excludes any costs related to lead-based paint or asbestos testing, in-house Architectural and Engineering work, or other special administrative costs required by state or local law.

(ii) Development. For development work with Capital Fund and RHF grants, the administrative cost limit is 3 percent of the total project budget, or, with HUD's approval, up to 6 percent of the total project budget.

(i) *Management improvement cost limits.* In Fiscal Year (FY) 2014, a PHA shall not use more than 18 percent of its annual Capital Fund grant for eligible

management improvement costs identified in its CFP 5-Year Action Plan. In FY 2015, a PHA shall not use more than 16 percent of its annual Capital Fund grant for eligible management improvement costs identified in its CFP 5-Year Action Plan. In FY 2016, a PHA shall not use more than 14 percent of its annual Capital Fund grant for eligible management improvement costs identified in its CFP 5-Year Action Plan. In FY 2017, a PHA shall not use more than 12 percent of its annual Capital Fund grant for eligible management improvement costs identified in its CFP 5-Year Action Plan. In FY 2018 and thereafter, a PHA shall not use more than 10 percent of its annual Capital Fund grant for eligible management improvement costs identified in its CFP 5-Year Action Plan. Management improvements are an eligible expense for PHAs participating in asset management.

(j) *Types of labor.* A PHA may use force account labor for development and modernization activities if included in a CFP 5-Year Action Plan that is approved by the PHA Board of Commissioners and HUD. HUD approval to use force account labor is not required when the PHA is designated as a high performer under PHAS.

(k) *RMC activities.* When the entire development, financing, or modernization activity, including the planning and architectural design, is administered by an RMC, the PHA shall not retain any portion of the Capital Funds for any administrative or other reason, unless the PHA and the RMC provide otherwise by contract.

(l) *Capital Funds for operating costs.* A PHA may use Capital Funds for operating costs only if it is included in the CFP 5-Year Action Plan that is approved by the PHA Board of Commissioners and HUD, and limited as described in paragraphs (l)(1) and (2) of this section. Capital Funds identified in the CFP 5-Year Action Plan to be transferred to operations are obligated once the funds have been budgeted and drawn down by the PHA. Once such transfer of funds occurs, the PHA must follow the requirements of 24 CFR part 990 with respect to those funds.

(1) *Large PHAs.* A PHA with 250 or more units may use no more than 20 percent of its annual Capital Fund grant for activities that are eligible under the Operating Fund at 24 CFR part 990.

(2) *Small PHAs.* A PHA with less than 250 units, that is not designated as troubled under PHAS, may use up to 100 percent of its annual Capital Fund grant for activities that are eligible under the Operating Fund at 24 CFR part 990, except that the PHA must have determined that there are no debt service payments, significant Capital Fund needs, or emergency needs that must be met prior to transferring 100 percent of its funds to operating expenses.

§ 905.316 Procurement and contract requirements.

(a) *General.* PHAs shall comply with 24 CFR 85.36, and HUD implementing instructions, for all capital activities including modernization and development, except as provided in paragraph (c) in this section.

(b) *Contracts.* The PHA shall use all contract forms prescribed by HUD. If a form is not prescribed, the PHA may use any Office of Management and Budget (OMB) approved form that contains all applicable federal requirements and contract clauses.

(c) *Mixed-finance development projects.* Mixed-finance development partners may be selected in accordance with 24 CFR 905.604(h). Contracts and other agreements with mixed-finance development partners must specify that they comply with the requirements of §§ 905.602 and 905.604 of this part.

(d) *Assurances of completion.* Notwithstanding 24 CFR 85.36(h), for each construction contract over $100,000, the contractor shall furnish the PHA with the following:

(1) A bid guarantee from each bidder, equivalent to 5 percent of the bid price; and

(2) One of the following:

(i) A performance bond and payment bond for 100 percent of the contract price;

(ii) A performance bond and a payment bond, each for 50 percent or more of the contract price;

(iii) A 20 percent cash escrow;

(iv) A 10 percent irrevocable letter of credit with terms acceptable to HUD, or

(v) Any other payment method acceptable to HUD.

(e) *Procurement of recovered materials.* PHAs that are state agencies and agencies of a political subdivision of a state that are using assistance under this part for procurement, and any person contracting with such PHAs with respect to work performed under an assisted contract, must comply with the requirements of section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. In accordance with section 6002, these agencies and persons must procure items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR part 247 that contain the highest percentage of recovered material practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds $10,000 or the value of the quantity acquired in the preceding fiscal year exceeded $10,000; must procure solid waste management services in a manner that promotes energy and resource recovery; and must have established an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

§ 905.318 Title and deed.

The PHA, or, in the case of mixed-finance, the Owner Entity, shall obtain title insurance that guarantees the title is good and marketable before taking title to any and all sites and properties acquired with public housing funds. Immediately upon taking title to a property, the PHA or Owner Entity shall record the deed and a Declaration of Trust or, in the case of mixed finance, a Declaration of Restrictive Covenants, in the form and in the manner and order prescribed by HUD. The PHA shall at all times maintain a recorded Declaration of Trust or Declaration of Restrictive Covenants in the form and in the manner and order prescribed by HUD on all public housing projects covering the term required by this part.

§ 905.320 Contract administration and acceptance of work.

(a) *Contract administration.* The PHA is responsible, in accordance with 24 CFR 85.36, for all contractual and administrative issues arising out of their procurements. The PHA shall maintain full and complete records on the history of each procurement transaction.

(b) *Inspection and acceptance.* The PHA, or, in the case of mixed finance, the Owner Entity shall carry out inspections of work in progress and goods delivered, as necessary, to ensure compliance with existing contracts. If, upon inspection, the PHA determines that the work and/or goods are complete, satisfactory and, as applicable, otherwise undamaged, except for any work that is appropriate for delayed completion, the PHA shall accept the work. The PHA shall determine any holdback for items of delayed completion and the amount due and payable for the work that has been accepted, including any conditions precedent to payment that are stated in the construction contract or contract of sale. The contractor shall be paid for items only after the PHA inspects and accepts that work.

(c) *Guarantees and warranties.* The PHA or, in the case of mixed finance, the Owner Entity, shall specify the guaranty period and amounts to be withheld, as applicable, and shall

provide that all contractor, manufacturer, and supplier warranties required by the construction and modernization documents shall be assigned to the PHA. The PHA shall inspect each dwelling unit and the overall project approximately 3 months after the beginning of the project guaranty period, 3 months before its expiration, and at other times as may be necessary to exercise its rights before expiration of any warranties. The PHA shall require repair or replacement of all defective items prior to the expiration of the guaranty or warranty periods.

(d) *Notification of completion.* The PHA, or in the case of mixed finance, the Owner Entity, shall require that all contractors and developers notify the PHA in writing when the contract work, including any approved off-site work, will be completed and ready for inspection.

§ 905.322 Fiscal closeout.

(a) *General.* Each Capital Fund grant and/or development project is subject to fiscal closeout. Fiscal closeout includes the submission of a cost certificate; an audit, if applicable; a final Performance and Evaluation Report; and HUD approval of the cost certificate.

(b) *Submission of cost certificate.* (1) When an approved development or modernization activity is completed or when HUD terminates the activity, the PHA must submit to HUD the:

(i) Actual Development Cost Certificate (ADCC) within 12 months. For purposes of the CF ACC, costs incurred between the completion of the development and the date of full availability (DOFA) becomes the actual development cost; and

(ii) Actual Modernization Cost Certificate (AMCC) for each grant, no later than 12 months after the expenditure deadline but no earlier than the obligation end date. A PHA with under 250 units with an approved CFP 5-Year Action Plan for use of 100 percent of the Capital Fund grant in operations may submit the cost certificate any time after the funds have been budgeted to operations and withdrawn, as described in § 905.314(l) of this part.

(2) If the PHA does not submit the cost certificate and the final CFP Annual Statement/Performance and Evaluation Report within the period prescribed in this section, HUD may impose restrictions on open Capital Fund grants; e.g., establish review thresholds, set the grant to ''auto review'' (HUD automatically reviews it on a periodic basis), or suspend grants, until the cost certificate for the affected grant is submitted. These restrictions may be imposed by HUD after notification of the PHA.

(c) *Audit.* The cost certificate is a financial statement subject to audit pursuant to 24 CFR 85.26. After submission of the cost certificate to HUD, the PHA shall provide the cost certificate to its independent public auditor (IPA) as part of its annual audit. After audit, the PHA will notify HUD of the grants included in the audit, any exceptions noted by the PHA auditor, and the schedule to complete corrective actions recommended by the auditor.

(d) *Review and approval.* For PHAs exempt from the audit requirements, HUD will review and approve the cost certificate based on available information regarding the Capital Fund grant. For PHAs subject to an audit, HUD will review the information from the annual audit provided by the PHA and approve the certificate after all exceptions, if any, have been resolved.

(e) *Recapture.* All Capital Funds in excess of the actual cost incurred for the grant are subject to recapture. Any funds awarded to the PHA that are returned or any funds taken back from the PHA in a fiscal year after the grant was awarded are subject to recapture.

§ 905.324 Data reporting requirements.

The PHA shall provide, at minimum, the following data reports, at a time and in a form prescribed by HUD:

(a) The Performance and Evaluation Report as described in § 905.300(b)(8) of this part;

(b) Updates on the PHA's building and unit data as required by HUD;

(c) Reports of obligation and expenditure; and

(d) Any other information required for participation in the Capital Fund Program.

§ 905.326 Records.

(a) The PHA will maintain full and complete records of the history of each Capital Fund grant, including, but not limited to, CFP 5-Year Action Plans, procurement, contracts, obligations, and expenditures.

(b) The PHA shall retain for 5 years after HUD approves either the actual development or modernization cost certificate all documents related to the activities for which the Capital Fund grant was received, unless a longer period is required by applicable law.

(c) HUD and its duly authorized representatives shall have full and free access to all PHA offices, facilities, books, documents, and records, including the right to audit and make copies.

Subpart D—Capital Fund Formula

§ 905.400 Capital Fund formula (CF formula).

(a) *General.* This section describes the formula for allocating Capital Funds to PHAs.

(b) *Formula allocation based on relative needs.* HUD shall allocate Capital Funds to the PHAs in accordance with the CF formula. The CF formula measures the existing modernization needs and accrual needs of PHAs.

(c) *Allocation for existing modernization needs under the CF formula.* HUD shall allocate one-half of the available Capital Fund amount based on the relative existing modernization needs of PHAs, determined in accordance with paragraph (d) of this section.

(d) *PHAs with 250 or more units in FFY 1999, except the New York City and Chicago Housing Authorities.* The estimates of the existing modernization needs for these PHAs shall be based on the following:

(1) Objective measurable data concerning the following PHA, community, and project characteristics applied to each project:

(i) The average number of bedrooms in the units in a project (Equation coefficient 4604.7);

(ii) The total number of units in a project (Equation coefficient: 10.17);

(iii) The proportion of units in a project in buildings completed in 1978 or earlier. In the case of acquired projects, HUD will use the DOFA unless the PHA provides HUD with the actual date of construction completion. When the PHA provides the actual date of construction completion, HUD will use that date (or, for scattered sites, the average dates of construction of all the buildings), subject to a 50-year cap. (Equation coefficient: 4965.4);

(iv) The cost index of rehabilitating property in the area (Equation coefficient: −10608);

(v) The extent to which the units of a project were in a nonmetropolitan area as defined by the United States Bureau of the Census (Census Bureau) during FFY 1996 (Equation coefficient: 2703.9);

(vi) The PHA is located in the Southern census region, as defined by the Census Bureau (Equation coefficient: −269.4);

(vii) The PHA is located in the Western census region, as defined by the Census Bureau (Equation coefficient: −1709.5);

(viii) The PHA is located in the Midwest census region as defined by the Census Bureau (Equation coefficient: 246.2); and

(2) An equation constant of 13851.

(i) *Newly constructed units.* Units with a DOFA date of October 1, 1991, or after, shall be considered to have a zero existing modernization need.

(ii) *Acquired projects.* Projects acquired by a PHA with a DOFA date of October 1, 1991, or after, shall be considered to have a zero existing modernization need.

(3) *For New York City and Chicago Housing Authorities, based on a large sample of direct inspections.* Prior to the cost calibration in paragraph (d)(5) of this section, the number used for the existing modernization need of family projects shall be $16,680 in New York City and $24,286 in Chicago, and the number for elderly projects shall be $14,622 in New York City and $16,912 in Chicago.

(i) *Newly constructed units.* Units with a DOFA date of October 1, 1991, or after, shall be considered to have a zero existing modernization need.

(ii) *Acquired projects.* Projects acquired by a PHA with a DOFA date of October 1, 1991, or after, shall be considered to have a zero existing modernization need.

(4) *PHAs with fewer than 250 units in FFY 1999.* The estimates of the existing modernization need shall be based on the following:

(i) Objective measurable data concerning the PHA, community, and project characteristics applied to each project:

(A) The average number of bedrooms in the units in a project. (Equation coefficient: 1427.1);

(B) The total number of units in a project. (Equation coefficient: 24.3);

(C) The proportion of units in a project in buildings completed in 1978 or earlier. In the case of acquired projects, HUD shall use the DOFA date unless the PHA provides HUD with the actual date of construction completion, in which case HUD shall use the actual date of construction completion (or, for scattered sites, the average dates of construction of all the buildings), subject to a 50-year cap. (Equation coefficient: −1389.7);

(D) The cost index of rehabilitating property in the area, as of FFY 1999. (Equation coefficient: −20163);

(E) The extent to which the units of a project were in a nonmetropolitan area as defined by the Census Bureau during FFY 1996. (Equation coefficient: 6157.7);

(F) The PHA is located in the Southern census region, as defined by the Census Bureau. (Equation coefficient: 4379.2);

(G) The PHA is located in the Western census region, as defined by the Census Bureau. (Equation coefficient: 3747.7);

(H) The PHA is located in the Midwest census region as defined by the Census Bureau. (Equation coefficient: −2073.5); and

(ii) An equation constant of 24762.

(A) *Newly constructed units.* Units with a DOFA date of October 1, 1991, or after, shall be considered to have a zero existing modernization need.

(B) *Acquired projects.* Projects acquired by a PHA with a DOFA date of October 1, 1991, or after, shall be considered by HUD to have a zero existing modernization need.

(5) *Calibration of existing modernization need for cost index of rehabilitating property in the area.* The estimated existing modernization need determined under paragraphs (d)(1), (2), or (3) of this section shall be adjusted by the values of the cost index of rehabilitating property in the area.

(6) *Freezing of the determination of existing modernization need.* FFY 2008 is the last fiscal year that HUD will calculate the existing modernization need. The existing modernization need will be frozen for all developments at the calculation as of FFY 2008 and will be adjusted for changes in the inventory and paragraph (d)(4) of this section.

(e) *Allocation for accrual needs under the CF formula.* HUD shall allocate the other half of the remaining Capital Fund amount based on the relative accrual needs of PHAs, determined in accordance with this paragraph of this section.

(1) PHAs with 250 or more units, except the New York City and Chicago Housing Authorities. The estimates of the accrual need shall be based on the following:

(i) Objective measurable data concerning the following PHA, community, and project characteristics applied to each project:

(A) The average number of bedrooms in the units in a project. (Equation coefficient: 324.0);

(B) The extent to which the buildings in a project average fewer than 5 units. (Equation coefficient: 93.3);

(C) The age of a project, as determined by the DOFA date. In the case of acquired projects, HUD shall use the DOFA date unless the PHA provides HUD with the actual date of construction completion, in which case HUD shall use the actual date of construction (or, for scattered sites, the average dates of construction of all the buildings), subject to a 50-year cap. (Equation coefficient: −7.8);

(D) Whether the development is a family project. (Equation coefficient: 184.5);

(E) The cost index of rehabilitating property in the area. (Equation coefficient: −252.8);

(F) The extent to which the units of a project were in a nonmetropolitan area as defined by the Census Bureau during FFY 1996. (Equation coefficient: −121.3);

(G) PHA size of 6,600 or more units in FFY 1999. (Equation coefficient: −150.7);

(H) The PHA is located in the Southern census region, as defined by the Census Bureau. (Equation coefficient: 28.4);

(I) The PHA is located in the Western census region, as defined by the Census Bureau. (Equation coefficient: −116.9);

(J) The PHA is located in the Midwest census region as defined by the Census Bureau. (Equation coefficient: 60.7); and

(ii) An equation constant of 1371.9.

(2) For the New York City and Chicago Housing Authorities, based on a large sample of direct inspections. Prior to the cost calibration in paragraph (e)(4) of this section the number used for the accrual need of family developments is $1,395 in New York City, and $1,251 in Chicago, and the number for elderly developments is $734 in New York City and $864 in Chicago.

(3) PHAs with fewer than 250 units. The estimates of the accrual need shall be based on the following:

(i) Objective measurable data concerning the following PHA, community, and project characteristics applied to each project:

(A) The average number of bedrooms in the units in a project. (Equation coefficient: 325.5);

(B) The extent to which the buildings in a project average fewer than 5 units. (Equation coefficient: 179.8);

(C) The age of a project, as determined by the DOFA date. In the case of acquired projects, HUD shall use the DOFA date unless the PHA provides HUD with the actual date of construction completion. When provided with the actual date of construction completion, HUD shall use this date (or, for scattered sites, the average dates of construction of all the buildings), subject to a 50-year cap. (Equation coefficient: −9.0);

(D) Whether the project is a family development. (Equation coefficient: 59.3);

(E) The cost index of rehabilitating property in the area. (Equation coefficient: −1570.5);

(F) The extent to which the units of a project were in a nonmetropolitan area as defined by the Census Bureau during

FFY 1996. (Equation coefficient: −122.9);

(G) The PHA is located in the Southern census region, as defined by the Census Bureau. (Equation coefficient: −564.0);

(H) The PHA is located in the Western census region, as defined by the Census Bureau. (Equation coefficient: −29.6);

(I) The PHA is located in the Midwest census region as defined by the Census Bureau. (Equation coefficient: −418.3); and

(ii) An equation constant of 3193.6.

(4) *Calibration of accrual need for the cost index of rehabilitating property in the area.* The estimated accrual need determined under either paragraph (e)(2) or (3) of this section shall be adjusted by the values of the cost index of rehabilitation.

(f) *Calculation of number of units.* (1) *General.* For purposes of determining the number of a PHA's public housing units and the relative modernization needs of PHAs:

(i) HUD shall count as one unit:

(A) Each public housing and section 23 bond-financed CF unit, except that each existing unit under the Turnkey III program shall count as one-fourth of a unit. Units receiving operating subsidy only shall not be counted.

(B) Each existing unit under the Mutual Help program.

(ii) HUD shall add to the overall unit count any units that the PHA adds to its inventory when the units are under CF ACC amendment and have reached DOFA by the date that HUD establishes for the FFY in which the CF formula is being run (hereafter called the ''reporting date''). New CF units and those reaching DOFA after the reporting date shall be counted for CF formula purposes in the following FFY.

(2) *Replacement units.* Replacement units newly constructed on or after October 1, 1998, that replace units in a project funded in FFY 1999 by the Comprehensive Grant formula system or the Comprehensive Improvement Assistance Program (CIAP) formula system shall be given a new CF ACC number as a separate project and shall be treated as a newly constructed development as outlined in § 905.600 of this part.

(3) *Reconfiguration of units.* Reconfiguration of units may cause the need to be calculated by the new configuration based on the formula characteristics in the building and unit's PIC module (refer to the formula sections here). The unit counts will be determined by the CF units existing after the reconfiguration.

(4) *Reduction of units.* For a project losing units as a result of demolition and disposition, the number of units on which the CF formula is based shall be the number of units reported as eligible for Capital Funds as of the reporting date. Units are eligible for funding until they are removed due to demolition and disposition in accordance with a schedule approved by HUD.

(g) *Computation of formula shares under the CF formula.* (1) *Total estimated existing modernization need.* The total estimated existing modernization need of a PHA under the CF formula is the result of multiplying for each project the PHA's total number of formula units by its estimated existing modernization need per unit, as determined by paragraph (d) of this section, and calculating the sum of these estimated project needs.

(2) *Total accrual need.* The total accrual need of a PHA under the CF formula is the result of multiplying for each project the PHA's total number of formula units by its estimated accrual need per unit, as determined by paragraph (e) of this section, and calculating the sum of these estimated accrual needs.

(3) *PHA's formula share of existing modernization need.* A PHA's formula share of existing modernization need under the CF formula is the PHA's total estimated existing modernization need divided by the total existing modernization need of all PHAs.

(4) *PHA's formula share of accrual need.* A PHA's formula share of accrual need under the CF formula is the PHA's total estimated accrual need divided by the total existing accrual need of all PHAs.

(5) *PHA's formula share of capital need.* A PHA's formula share of capital need under the CF formula is the average of the PHA's share of existing modernization need and its share of accrual need (by which method each share is weighted 50 percent).

(h) *CF formula capping.* (1) For units that are eligible for funding under the CF formula (including replacement housing units discussed below), a PHA's CF formula share shall be its share of capital need, as determined under the CF formula, subject to the condition that no PHA's CF formula share for units funded under the CF formula can be less than 94 percent of its formula share had the FFY 1999 formula system been applied to these CF formula-eligible units. The FFY 1999 formula system is based upon the FFY 1999 Comprehensive Grant formula system for PHAs with 250 or more units in FFY 1999 and upon the FFY 1999 Comprehensive Improvement Assistance Program (CIAP) formula system for PHAs with fewer than 250 units in FFY 1999.

(2) For a Moving to Work (MTW) PHA whose MTW agreement provides that its CF formula share is to be calculated in accordance with the previously existing formula, the PHA's CF formula share, during the term of the MTW agreement, may be approximately the formula share that the PHA would have received had the FFY 1999 formula funding system been applied to the CF formula eligible units.

(i) *Replacement Housing Factor to reflect formula need for developments with demolition or disposition occurring on or after October 1, 1998, and prior to September 30, 2013.* (1) *RHF generally.* PHAs that have a reduction in the number of units attributable to demolition or disposition of units during the period (reflected in data maintained by HUD) that lowers the formula unit count for the CFF calculation qualify for application of an RHF, subject to satisfaction of criteria stated in paragraph (i)(5) of this section

(2) *When applied.* The RHF will be added, where applicable:

(i) For the first 5 years after the reduction of units described in paragraph (i)(1) of this section; and

(ii) For an additional 5 years if the planning, leveraging, obligation, and expenditure requirements are met. As a prior condition of a PHA's receipt of additional funds for replacement housing provided for the second 5-year period or any portion thereof, a PHA must obtain a firm commitment of substantial additional funds, other than public housing funds, for replacement housing, as determined by HUD.

(3) *Computation of RHF.* The RHF consists of the difference between the CFF share without the CFF share reduction of units attributable to demolition or disposition and the CFF share that resulted after the reduction of units attributable to demolition or disposition.

(4) *Replacement housing funding in FFYs 1998 and 1999.* Units that received replacement housing funding in FFY 1998 will be treated as if they had received 2 years of replacement housing funding by FFY 2000. Units that received replacement housing funding in FFY 1999 will be treated as if they had received one year of replacement housing funding as of FFY 2000.

(5) *PHA Eligibility for the RHF.* A PHA is eligible for this factor only if the PHA satisfies the following criteria:

(i) The PHA will use the funding in question only for replacement housing;

(ii) The PHA will use the restored funding that results from the use of the replacement factor to provide

replacement housing in accordance with the PHA's 5-Year Action Plan, as approved by HUD under part 903 of this chapter as well as the PHA's Board of Commissioners;

(iii) The PHA has not received funding for public housing units that will replace the lost units under Public Housing Development, Major Reconstruction of Obsolete Public Housing, HOPE VI, Choice Neighborhoods, Rental Assistance Payment (RAP), or programs that otherwise provide for replacement with public housing units;

(iv) The PHA, if designated as a troubled PHA by HUD, and not already under the direction of HUD or an appointed receiver, in accordance with part 902 of this chapter, uses an Alternative Management Entity, as defined in part 902 of this chapter, for development of replacement housing and complies with any applicable provisions of its Memorandum of Agreement executed with HUD under that part; and

(v) The PHA undertakes any development of replacement housing in accordance with applicable HUD requirements and regulations.

(6) *Failure to provide replacement housing in a timely fashion.* (i) A PHA will be subject to the actions described in paragraph (i)(7)(ii) of this section if the PHA does not:

(A) Use the restored funding that results from the use of the RHF to provide replacement housing in a timely fashion, as provided in paragraph (i)(7)(i) of this section and in accordance with applicable HUD requirements and regulations, and

(B) Make reasonable progress on such use of the funding, in accordance with applicable HUD requirements and regulations.

(ii) If a PHA fails to act as described in paragraph (i)(6)(i) of this section, HUD will require appropriate corrective action under these regulations, may recapture and reallocate the funds, or may take other appropriate action.

(7) *Requirement to obligate and expend RHF funds within the specified period.* (i) In addition to the requirements otherwise applicable to obligation and expenditure of funds, PHAs are required to obligate assistance received as a result of the RHF within:

(A) 24 months from the date that funds become available to the PHA; or

(B) With specific HUD approval, 24 months from the date that the PHA accumulates adequate funds to undertake replacement housing.

(ii) To the extent the PHA has not obligated any funds provided as a result of the RHF within the time frames required by this paragraph, or has not expended such funds within a reasonable time, HUD shall recapture the unobligated amount of the grant.

(j) *Demolition and Disposition Transitional Funding (DDTF) to reflect formula need for developments with demolition or disposition on or after October 1, 2013.* (1) *DDTF generally.* In FFY 2014 and thereafter, PHAs that have a reduction in the number of units occurring in FFY 2013 and attributable to demolition or disposition are automatically eligible to receive Demolition and Disposition Transitional Funding. The DDTF will be included in their annual Capital Fund grant for a 5-year period to offset the reduction in funding a PHA would receive from removing units from inventory. DDTF is subject to the criteria stated in paragraph (j)(4) of this section.

(2) *When applied.* DDTF will be added to a PHA's annual CFP grant, where applicable, for 5 years after the reduction of units described in paragraph (j)(1) of this section.

(3) *Computation of DDTF.* The DDTF consists of the difference between the CFF share without the CFF share reduction of units attributable to demolition or disposition and the CFF share that resulted after the reduction of units attributable to demolition or disposition.

(4) *PHA eligibility for the DDTF.* A PHA is eligible for this factor only if the PHA satisfies the following criteria:

(i) The PHA will automatically receive the DDTF for reduction of units in accordance with paragraph (j)(1) of this section, unless the PHA rejects the DDTF funding for that fiscal year in writing;

(ii) The PHA will use the funding in question for eligible activities under the Capital Fund Program, found at 905.200—such as modernization and development—that are included in the PHA's HUD approved CFP 5-Year Action Plan.

(iii) The PHA has not received funding for public housing units that will replace the lost units from disposition proceeds, or under Public Housing Development, Major Reconstruction of Obsolete Public Housing, HOPE VI, Choice Neighborhoods, RAP, or programs that otherwise provide for replacement with public housing units;

(iv) The PHA, if designated as a troubled PHA by HUD, and not already under the direction of HUD or an appointed receiver, in accordance with part 902 of this chapter, uses an Alternative Management Entity, as defined in part 902 of this chapter, and complies with any applicable provisions of its Memorandum of Agreement executed with HUD under that part; and

(v) The PHA undertakes any eligible activities in accordance with applicable HUD requirements and regulations.

(5) *Requirement to obligate and expend DDTF funds within the specified period.* (i) In addition to the requirements otherwise applicable to obligation and expenditure of Capital Funds, including 42 U.S.C. 1437g(j) and the terms of the appropriation from Congress, PHAs are required to obligate funds received as a result of the DDTF within 24 months from the date that funds become available to the PHA; or

(ii) To the extent the PHA has not obligated any funds provided as a result of the DDTF within the time frames required by this paragraph, or expended such funds within a reasonable time frame, HUD shall reduce the amount of DDTF to be provided to the PHA.

(k) *RHF Transition.* (1) PHAs that would be newly eligible for RHF in FFY 2014 will receive 5 years of DDTF.

(2) PHAs that received a portion of a first increment RHF grant in FY 2013, for units removed from inventory prior to the reporting date of June 30, 2012, will receive up to 10 years of funding consisting of the remainder of first-increment RHF, subject to the requirements of § 905.400(i) of this part, and, if eligible, 5 years of DDTF, subject to the requirements of § 905.400(j) of this part.

(3) PHAs that received a portion of a second increment RHF grant in FY 2013, for units removed from inventory prior to the reporting date of June 30, 2012, will continue to receive the remaining portion of the 5-year increment as a separate second increment RHF grant, as described in § 905.400(i) of this part.

(l) *Performance reward factor.* (1) *High performer.* A PHA that is designated a high performer under the PHA's most recent final PHAS score may receive a performance bonus that is:

(i) Three (3) percent above its base formula amount in the first 5 years these awards are given (for any year in this 5-year period in which the performance reward is earned); or

(ii) Five (5) percent above its base formula amount in future years (for any year in which the performance reward is earned);

(2) *Condition.* The performance bonus is subject only to the condition that no PHA will lose more than 5 percent of its base formula amount as a result of the redistribution of funding from nonhigh performers to high performers.

(3) *Redistribution.* The total amount of Capital Funds that HUD has recaptured

or not allocated to PHAs as a sanction for violation of expenditure and obligation requirements shall be allocated to the PHAs that are designated high performers under PHAS.

■ 6. Add subparts F, G, and H to read as follows:

Subpart F—Development Requirements

Subpart G—Other Security Interests

Subpart H—Compliance, HUD Review, Penalties, and Sanctions

Subpart F—Development Requirements

§ 905.600 General.

(a) *Applicability.* This subpart F applies to the development of public housing units to be included under an ACC and which will receive funding from public housing funds. PHAs must comply, or cause the Owner Entity and its contractors to comply, as applicable, with all of the applicable requirements in this subpart. Pursuant to § 905.106 of this part, when a PHA, a PHA partner, and/or an Owner Entity submits a development proposal and, if applicable, a site acquisition proposal, and executes an ACC covering the public housing units being developed, it is deemed to have certified by those executed submissions its compliance with this subpart. Noncompliance with any provision of this subpart or other applicable statutes or regulations, or the ACC Amendment, and any amendment thereto may subject the PHA, the PHA's partner and/or the Owner Entity to sanctions contained in § 905.804 of this part.

(b) *Description.* A PHA may develop public housing through the construction of new units or the acquisition, with or without rehabilitation, of existing units. A PHA may use any generally accepted method of development including, but not limited to:

(1) *Conventional.* The PHA designs a project on a property it owns. The PHA then competitively selects an entity to build or rehabilitate the project.

(2) *Turnkey.* The PHA advertises for and competitively selects a developer who will develop public housing units on a site owned or to be owned by the developer. Following HUD approval of the development proposal, the PHA and the developer execute a contract of sale and the developer builds the project. Once the project is complete, the developer sells it to the PHA.

(3) *Acquisition with or without rehabilitation.* The PHA acquires an existing property that requires substantial, moderate, or no repair. Any repair work is done by PHA staff or contracted out by the PHA. The PHA must certify that the property was not constructed with the intent of selling it to the PHA or, alternatively, the PHA must certify that HUD requirements were followed in the development of the property.

(4) *PHA use of force account labor.* The PHA uses staff to carry out new construction or rehabilitation, as provided in § 905.314(j) of this part.

(5) *Mixed finance.* Development or modernization of public housing units where the public housing units are owned in whole or in part by an entity other than a PHA, pursuant to Section 905.604.

(c) *Development process.* The general development process for public housing development, using any method and with any financing, is as follows:

(1) The PHA will identify a site to be acquired or a public housing project to be developed or redeveloped. The PHA or its Partner and/or the Owner Entity will prepare a site acquisition proposal pursuant to § 905.608 of this part and/or a development proposal pursuant to § 905.606 of this part for submission to HUD or as otherwise directed by HUD. The PHA may request predevelopment funding necessary for preparation of the acquisition proposal and/or development proposal, as stated in § 905.612(a) of this part.

(2) The PHA must consult with affected residents prior to submission of an acquisition proposal, development proposal, or both to HUD to solicit resident input into development of the public housing project.

(3) After HUD approval of the site acquisition proposal and/or development proposal, HUD and the PHA shall execute the applicable ACC Amendment for the public housing units and record a Declaration of Trust or Declaration of Restrictive Covenants on all property acquired and/or to be developed. The PHA may then commence development of the units.

(4) Upon completion of the public housing project, the PHA will establish the DOFA. After the DOFA, the PHA will submit a cost certificate to HUD attesting to the actual cost of the project that will be subject to audit.

(d) *Funding sources.* A PHA may engage in development activities using any one or a combination of the following sources of funding:

(1) Capital Funds;

(2) HOPE VI funds;

(3) Choice Neighborhoods funds;

(4) Proceeds from the sale of units under a homeownership program in accordance with 24 CFR part 906;

(5) Proceeds resulting from the disposition of PHA-owned land or improvements;

(6) Private financing used in accordance with § 905.604 of this part, Mixed-finance development;

(7) Capital Fund Financing Program (CFFP) proceeds under § 905.500 of this part;

(8) Proceeds resulting from an Operating Fund Financing Program (OFFP) approved by HUD pursuant to 24 CFR part 990; and

(9) Funds available from any other eligible sources.

§ 905.602 Program requirements.

(a) *Local cooperation.* Except as provided under § 905.604(i) of this part for mixed-finance projects, the PHA must enter into a Cooperation Agreement with the applicable local governing body that includes sufficient authority to cover the public housing being developed under this subpart, or provide an opinion of counsel that the existing, amended, or supplementary Cooperation Agreement between the jurisdiction and the PHA includes the project or development.

(b) *New construction limitation.* These requirements apply to the development (including new construction and acquisition) of public housing. All proposed new development projects must meet both of the following requirements:

(1) *Limitation on the number of units.* A PHA may not use Capital Funds to pay for the development cost of public housing units if such development would result in a net increase in the number of public housing units that the PHA owned, assisted, or operated on October 1, 1999. Subject to approval by the Secretary, a PHA may develop public housing units in excess of the limitation if:

(i) The units are available and affordable to eligible low-income families and the CF formula does not provide additional funding for the specific purpose of constructing, modernizing, and operating such excess units; or

(ii) The units are part of a mixed-finance project or otherwise leverage

significant additional investment, and the cost of the useful life of the projects is less than the estimated cost of providing tenant-based assistance under section 8(o) of the 1937 Act.

(2) *Limitations on cost.* A PHA may not construct public housing unless the cost of construction is less than the cost of acquisition or acquisition and rehabilitation of existing units, including the amount required to establish, as necessary, an upfront reserve for replacement accounts for major repairs. A PHA shall provide evidence of compliance with this subpart either by:

(i) Demonstrating through a cost comparison that the cost of new construction in the neighborhood where the PHA proposes to construct the housing is less than the cost of acquisition of existing housing, with or without rehabilitation, in the same neighborhood; or

(ii) Documenting that there is insufficient existing housing in the neighborhood to acquire.

(c) *Existing PHA-owned nonpublic housing properties.* Nonpublic housing properties may be used in the development of public housing units provided all requirements of the 1937 Act and the development requirements of this part are met.

(d) *Site and neighborhood standards.* Each proposed site to be newly acquired for a public housing project or for construction or rehabilitation of public housing must be reviewed and approved by the field office as meeting the following standards, as applicable:

(1) The site must be adequate in size, exposure, and contour to accommodate the number and type of units proposed. Adequate utilities (e.g., water, sewer, gas, and electricity) and streets shall be available to service the site.

(2) The site and neighborhood shall be suitable to facilitating and furthering full compliance with the applicable provisions of title VI of the Civil Rights Act of 1964, title VIII of the Civil Rights Act of 1968, Executive Order 11063, and HUD regulations issued under these statutes.

(3) The site for new construction shall not be located in an area of minority concentration unless:

(i) There are already sufficient, comparable opportunities outside areas of minority concentration for housing minority families in the income range that is to be served by the proposed project; or

(ii) The project is necessary to meet overriding housing needs that cannot feasibly be met otherwise in that housing market area. ''Overriding housing needs'' shall not serve as the basis for determining that a site is acceptable if the only reason that these needs cannot otherwise feasibly be met is that, due to discrimination because of race, color, religion, creed, sex, disability, familial status, or national origin, sites outside areas of minority concentration are unavailable.

(4) The site for new construction shall not be located in a racially mixed area if the project will cause a significant increase in the proportion of minority to nonminority residents in the area.

(5) Notwithstanding the foregoing, after demolition of public housing units a PHA may construct public housing units on the original public housing site or in the same neighborhood if the number of replacement public housing units is significantly fewer than the number of public housing units demolished. One of the following criteria must be satisfied:

(i) The number of public housing units being constructed is not more than 50 percent of the number of public housing units in the original development; or

(ii) In the case of replacing an occupied development, the number of public housing units being constructed is the number needed to house current residents who want to remain at the site, so long as the number of public housing units being constructed is significantly fewer than the number being demolished; or

(iii) The public housing units being constructed constitute no more than 25 units.

(6) The site shall promote greater choice of housing opportunities and avoid undue concentration of assisted persons in areas containing a high proportion of low-income persons.

(7) The site shall be free from adverse environmental conditions, natural or manmade, such as: Toxic or contaminated soils and substances; mudslide or other unstable soil conditions; flooding; septic tank backups or other sewage hazards; harmful air pollution or excessive smoke or dust; excessive noise or vibrations from vehicular traffic; insect, rodent, or vermin infestation; or fire hazards. The neighborhood shall not be seriously detrimental to family life. It shall not be filled with substandard dwellings nor shall other undesirable elements predominate, unless there is a concerted program in progress to remedy the undesirable conditions.

(8) The site shall be accessible to social, recreational, educational, commercial, and health facilities; health services; and other municipal facilities and services that are at least equivalent to those typically found in neighborhoods consisting largely of similar unassisted standard housing. The availability of public transportation must be considered.

(9) The site shall be accessible to a range of jobs for low-income workers and for other needs. The availability of public transportation must be considered, and travel time and cost via public transportation and private automobile must not be excessive. This requirement may be given less consideration for elderly housing.

(10) The project may not be built on a site that has occupants unless the relocation requirements at § 905.308(b)(9) of this part are met.

(11) The site shall not be in an area that HUD has identified as having special flood hazards and in which the sale of flood insurance has been made available under the National Flood Insurance Act of 1968, unless the development is covered by flood insurance required by the Flood Disaster Protection Act of 1973 and meets all applicable HUD standards and local requirements.

(e) *Relocation.* All acquisition or rehabilitation activities carried out with public housing funds must comply with the provisions of § 905.308(b)(9).

(f) *Environmental requirements.* All activities under this part are subject to an environmental review by a responsible entity under HUD's environmental regulations at 24 CFR Part 58 and must comply with the requirements of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and the related laws and authorities listed at 24 CFR 58.5. HUD may make a finding in accordance with 24 CFR 58.11 and may perform the environmental review itself under the provisions of 24 CFR Part 50. In those cases where HUD performs the environmental review under 24 CFR Part 50, it will do so before approving a proposed project, and will comply with the requirements of NEPA and the related requirements at 24 CFR 50.4.

§ 905.604 Mixed-finance development.

(a) *General.* Mixed-finance development refers to the development (through new construction or acquisition, with or without rehabilitation) or modernization of public housing, where the public housing units are owned in whole or in part by an entity other than a PHA. If the public housing units being developed are 100 percent owned by the PHA, the project is not a mixed-finance project and will be not be subject to mixed-finance development requirements. However, all other development requirements of part 905

are applicable, and, if the project includes both public housing funds and private funding for development, the project may be subject to other applicable program requirements; e.g., the Capital Fund Financing Program, Operating Fund Financing Program, Public Housing Mortgage Program, etc.

(1) *Ownership.* There are various potential scenarios for the ownership structure of a mixed-finance project, such as: public housing units may be owned entirely by a private entity; a PHA may co-own with a private entity; or a PHA affiliate or instrumentality may own or co-own the units.

(2) *Partnerships.* PHAs may choose to enter into a partnership or other contractual arrangement with a third party entity for the mixed-finance development and/or ownership of public housing units.

(3) *Funding.* Funding for mixed-finance developments may include one or a combination of funding sources, pursuant to § 905.600(d) of this part.

(4) *Modernization.* A mixed-finance project that involves modernization, rather than new construction, shall maintain the DOFA date that existed prior to modernization and shall be subject to the provisions of § 905.304(a)(2) of this part regarding the applicable period of obligation to operate the public housing units.

(b) *Definitions applicable to this subpart.* (1) *Mixed-finance.* The development (through new construction or acquisition, with or without rehabilitation) or modernization of public housing, using public housing, nonpublic housing, or a combination of public housing and nonpublic housing funds, where the public housing units are owned in whole or in part by an entity other than the PHA. A mixed-finance development may include 100 percent public housing (if there is an Owner Entity other than the PHA) or a mixture of public housing and nonpublic housing units.

(2) *Owner Entity.* As defined in § 905.108 of this part.

(3) *PHA instrumentality.* An instrumentality is an entity related to the PHA whose assets, operations, and management are legally and effectively controlled by the PHA, and through which PHA functions or policies are implemented, and which utilizes public housing funds or public housing assets for the purpose of carrying out public housing development functions of the PHA. An instrumentality assumes the role of the PHA, and is the PHA under the Public Housing Requirements, for purposes of implementing public housing development activities and programs, and must abide by the Public Housing Requirements. Instrumentalities must be authorized to act for and to assume such responsibilities. For purposes of development, ownership of public housing units by an instrumentality would be considered mixed-finance development.

(4) *PHA affiliate.* An affiliate is an entity, other than an instrumentality, formed by a PHA and in which a PHA has a financial or ownership interest or participates in its governance. The PHA has some measure of control over the assets, operations, or management of the affiliate, but such control does not rise to the level of control to qualify the entity as an instrumentality. For the purposes of development, ownership of public housing units by an affiliate would be considered mixed-finance development.

(5) *Public housing funds.* As defined in § 905.108 of this part.

(c) *Structure of projects.* Each mixed-finance project must be structured to:

(1) Ensure the continued operation of the public housing units in accordance with all Public Housing Requirements;

(2) Ensure that public housing funds committed to a mixed-finance project are used only to pay for costs associated with the public housing units, including such costs as demolition, site work, infrastructure, and common area improvements.

(3) To ensure that the amount of public housing funds committed to a project is proportionate to the number of public housing units contained in the project. To meet this ''pro rata test,'' the proportion of public housing funds compared to total project funds committed to a project must not exceed the proportion of public housing units compared to total number of units contained in the project. For example, if there are a total of 120 units in the project and 50 are public housing units, the public housing units are 42 percent of the total number of units in the project. Therefore the amount of public housing funds committed to the project cannot exceed 42 percent of the total project budget, unless otherwise approved by the Secretary. However, if public housing funds are to be used to pay for more than the pro rata cost of common area improvements, HUD will evaluate the proposal to ensure that common area improvements will benefit the residents in the development in a mixed-income project; and

(4) Ensure that the project is within the Total Development Cost (TDC) and Housing Construction Cost (HCC) limits pursuant to § 905.314(c) and (d) of this part.

(d) *Process.* Except as provided in this section, development of a mixed-finance project under this subpart is subject to the same requirements as development of public housing by a PHA entirely with public housing funds, as stated in § 905.600 of this part. PHAs must submit an acquisition proposal under § 905.608 and/or a development proposal under § 905.606 or as otherwise specified by HUD.

(e) *Conflicts.* In the event of a conflict between the requirements for a mixed-finance project and other requirements of this subpart, the mixed-finance Public Housing Requirements shall apply, unless HUD determines otherwise.

(f) *HUD approval.* For purposes of this section only, any action or approval that is required by HUD pursuant to the requirements set forth in this section shall be construed to mean HUD Headquarters, unless the field office is authorized in writing by Headquarters to carry out a specific function in this section.

(g) *Comparability.* Public housing units built in a mixed-financed development must be comparable in size, location, external appearance, and distribution to nonpublic housing units within the development.

(h) *Mixed-finance procurement.* The requirements of 24 CFR Part 85 and 24 CFR 905.316 are applicable to this subpart with the following exceptions:

(1) PHAs may select a development partner using competitive proposals procedures for qualifications-based procurement, subject to negotiation of fair and reasonable compensation and compliance with TDC and other applicable cost limitations;

(2) An Owner Entity (which, as a private entity, would normally not be subject to 24 CFR Part 85) shall be required to comply with 24 CFR Part 85 if HUD determines that the PHA or PHA instrumentality, or either of their members or employees, exercises significant decision making functions within the Owner Entity with respect to managing the development of the proposed units. HUD may, on a case-by-case basis, exempt such an Owner Entity from the need to comply with 24 CFR Part 85 if it determines that the Owner Entity has developed an acceptable alternative procurement plan.

(i) *Identity of interest.* If the Owner Entity or partner (or any other entity with an identity of interest with the Owner Entity or partner) of a mixed-finance project wants to serve as the general contractor for the mixed-finance project, it may award itself the construction contract only if:

(1) The identity of interest general contractor's bid is the lowest bid submitted in response to a request for bids; or

(2) The PHA submits a written justification to HUD that includes an independent third-party cost estimate that demonstrates that the identity of interest general contractor's costs are less than or equal to the independent third-party cost estimate; and

(3) HUD approves the identity of interest general contractor in conjunction with HUD's approval of the development proposal for the mixed-finance project.

(j) *Operating Subsidy-Only and Capital Fund-Only Assistance.* (1) *General.* This section refers to the mixed-finance development of public housing units that will be developed without public housing funds but will receive operating subsidy, or will be developed with public housing funds but will not receive operating subsidy.

(2) *Operating Subsidy-Only Development.* Operating Subsidy-Only Development refers to mixed-finance projects where public housing units are developed without the use of public housing funds, but for which HUD agrees to provide operating subsidies under Section 9(e) of the 1937 Act. These types of project are subject to the following provisions:

(i) The newly developed public housing units will be included in the calculation of the Capital Fund formula in § 905.400 of this part.

(ii) An ACC Amendment will be executed to include the new public housing units. The term of the ACC Amendment will be determined based on the assistance as provided in § 905.304, unless reduced by the Secretary.

(iii) There shall be no disposition of the public housing units without the prior written approval of HUD, during, and for 10 years after the end of, the period in which the public housing units receive operating subsidy from the PHA, as required by 42 U.S.C. 1437g(3), as those requirements may be amended from time to time. However, if the PHA is no longer able to provide operating subsidies to the Owner Entity pursuant to Section 9(e) of the 1937 Act, the PHA may (on behalf of the Owner Entity) request that HUD terminate the Declaration of Trust or Declaration of Restrictive Covenants, as applicable. Termination under this section does not require disposition approval from HUD pursuant to Section 18 of the 1937 Act, 42 U.S.C. 1437p. However, the PHA must provide public housing residents with a decent, safe, sanitary, and affordable unit to which they can relocate, which may include a public housing unit in another development or a Housing Choice Voucher, and pay for the tenant's reasonable moving costs. The URA is not applicable in this situation.

(iv) Where the PHA elects in the future to use public housing funds for modernization of these units, the PHA must execute an ACC Amendment with a 20-year use restriction and record a Declaration of Trust or Declaration of Restrictive Covenants, in accordance with § 905.304. There may be no disposition of the public housing units without the prior written approval of HUD during the 20-year period, and the public housing units shall be maintained and operated in accordance with all applicable Public Housing Requirements (including the ACC), as those requirements may be amended from time to time.

(3) *Capital Fund-Only Development.* Capital Fund-Only projects refers to mixed-finance projects where a PHA and its partners may develop public housing units using public housing funds for development of new units, but for which HUD will not be providing operating subsidy under Section 9(e) of the Act, 42 U.S.C. 1437g(e). These types of projects are subject to the following provisions:

(i) The newly developed public housing units will not be included in the calculation of the Operating Fund formula.

(ii) The PHA must sign an ACC Amendment, with a 40-year use restriction, for development of new units and record a Declaration of Trust or Declaration of Restrictive Covenants in accordance with § 905.304 of this part, unless the time period is reduced by the Secretary.

(iii) There shall be no disposition of the public housing units, without the prior written approval of HUD, during a 40-year period, and the public housing units shall be maintained and operated in accordance with all applicable Public Housing Requirements (including the ACC), as required by section 9(d)(3) of the 1937 Act, 42 U.S.C. 1437g(d)(3), as those requirements may be amended from time to time.

(4) *Procedures.* PHAs must follow the development approval process identified in § 905.600.

(k) *Mixed-finance operations: Deviation from HUD requirements pursuant to section 35(h) of the 1937 Act, 42 U.S.C. 1437z–7(h).* (1) *Deviation.* If a PHA enters into a contract with an entity that owns or operates a mixed-finance project, and the terms of the contract obligate the entity to operate and maintain a specified number of units in the project as public housing units, the contract may include terms that allow the Owner Entity to deviate from otherwise applicable Public Housing Requirements regarding rents, income eligibility, and other areas of public housing management with respect to all or a portion of the public housing units, subject to the following conditions:

(i) There are a significant number of units in the mixed-finance project that are not public housing units;

(ii) There is a reduction in appropriations under Section 9(e) of the 1937 Act (see 42 U.S.C. 1437g(e)) or a change in applicable law that results in the PHA being unable to fulfill its contractual obligation to the Owner Entity with respect to the public housing units;

(iii) Prior to implementation of the contractual terms related to deviation from the Public Housing Requirements, HUD approves an Alternative Management Plan for the mixed-finance project; and

(iv) The deviation shall be to the extent necessary to preserve the viability of those units while maintaining the low-income character of the units to the maximum extent practicable.

(2) *Preparation of an Alternative Management Plan.* Should the PHA and the Owner Entity determine a need to deviate from the Public Housing Requirements, the PHA, on behalf of the Owner Entity, must submit an Alternative Management Plan to HUD for review and approval prior to implementation of any changes. The Plan must include the following:

(i) A statement describing the Owner Entity's reasons for deviating from the Public Housing Requirements;

(ii) An explanation of the Owner Entity's proposed remedies, including, but not limited to:

(A) How the Owner Entity will select the residents (including the number and income levels of the families proposed to be admitted to the public housing units) and units to be affected by the proposed change;

(B) The Owner Entity's timetable for implementing the Alternative Management Plan;

(C) The impact on existing residents. Note that for any resident who is unable to remain in the unit as a result of implementation of the Alternative Management Plan, the resident must be relocated to a public housing unit or given a Housing Choice Voucher by the PHA or by another entity as provided for in the contractual agreement between the PHA and the Owner Entity;

(iii) An amendment to the existing contractual agreement between the PHA and the Owner Entity that includes provisions which ensure that:

(A) An update on the Alternative Management Plan is submitted annually to HUD to ensure that implementation of the provisions of the Alternative Management Plan continue to be appropriate;

(B) The Owner Entity complies with the requirements of this subpart in its management and operation of the public housing units in accordance with the Alternative Management Plan;

(C) The Owner Entity provides the PHA any income that is generated by the public housing units in excess of the Owner Entity's expenses on behalf of those units, as a result of implementation of provisions in the Alternative Management Plan;

(D) The Owner Entity reinstates all Public Housing Requirements (including rent and income eligibility requirements) with respect to the original number of public housing units and number of bedrooms in the mixed-finance development, following the PHA's reinstatement of operating subsidies at the level originally agreed to in its contract with the Owner Entity; and

(iv) Additional evidence. The PHA must provide documentation that:

(A) The Owner Entity has provided copies of the Alternative Management Plan to residents of the project and provided the opportunity for review and comment prior to submission to HUD. The Owner Entity must have provided written notice to each of the public housing residents in the mixed-finance development of its intention to implement the Alternative Management Plan. Such notice must comply with all relevant federal, state, and local substantive and procedural requirements and, at a minimum, provide public housing residents 90 days advance notice of any proposal to increase rents or to relocate public housing residents to alternative housing;

(B) The revenues being generated by the public housing units (in combination with the reduced allocation of Operating Subsidy resulting primarily from a reduction in appropriations or changes in applicable law such that the PHA is unable to comply with its contractual obligations to the Owner Entity) are inadequate to cover the reasonable and necessary operating expenses of the public housing units. Documentation should include a financial statement showing actual operating expenses and revenues over the past 5 years and the projected expenses and revenues over the next 10 years;

(C) A demonstration that the PHA cannot meet its contractual obligation, and;

(D) The Owner Entity has attempted to offset with regard to the project, the impact of reduced operating subsidies or changes in applicable law by all available means; including the use of other public and private development resources, the use of cash flow from any nonpublic housing units, and funds from other operating deficient reserves.

(3) *HUD review.* HUD will review the Alternative Management Plan to ensure that the plan meets the requirements of this subpart and that any proposed deviation from the Public Housing Requirements will be implemented only to the extent necessary to preserve the viability of the public housing units. Upon completion of HUD's review, HUD will either approve or disapprove the Alternative Management Plan. Reasons for HUD disapproval may include, but are not limited to, the following:

(i) The justification for deviation from the Public Housing Requirements does not qualify in accordance with section 35(h) of the Act (42 U.S.C. 1437z–7(h)).

(ii) The proposed deviation(s) from the Public Housing Requirements are not limited to preserving the viability of the public housing units.

(iii) The information that HUD requires to be included in the Alternative Management Plan has not been included, is not accurate, or does not support the need for deviation from the Public Housing Requirements.

(iv) HUD has evidence that the proposed Alternative Management Plan is not in compliance with other federal requirements, including civil rights laws.

(4) *HUD reevaluation and reapproval.* The PHA, on behalf of the Owner Entity, must provide to HUD, for HUD approval, an annual update on the implementation of the Alternative Management Plan. The update must provide the status of the project and whether the circumstances originally triggering the need for the conditions contained in the Alternative Management Plan remain valid and appropriate. Any proposed changes in the Alternative Management Plan should also be identified. Once the annual update of the Alternative Management Plan is properly submitted, the existing Alternative Management Plan shall remain in effect until such time as HUD takes additional action to approve or disapprove the annual update.

§ 905.606 Development proposal.

(a) *Development proposal.* Prior to developing public housing, either through new construction or through acquisition, with or without rehabilitation, a PHA must submit a development proposal to HUD in the form prescribed by HUD, which will allow HUD to assess the viability and financial feasibility of the proposed development. A development proposal must be submitted for all types of public housing development, including mixed-finance. Failure to submit and obtain HUD approval of a development proposal may result in the public housing funds used in conjunction with the project being deemed ineligible expenses. In determining the amount of information to be submitted by the PHA, HUD shall consider whether the documentation is required for HUD to carry out mandatory statutory, regulatory, or Executive order reviews; the quality of the PHA's past performance in implementing development projects under this subpart; the PHA's demonstrated administrative capability; and other program requirements. The development proposal shall include some or all of the following documentation, as deemed necessary by HUD.

(1) *Project description.* A description of the proposed project, including:

(i) Proposed development method (e.g., mixed-finance, new construction, acquisition with or without rehabilitation, turnkey, etc.), including the extent to which the PHA will use force account labor and use procured contractors. For new construction projects, the PHA must meet the program requirements contained in § 905.602. For projects involving acquisition of existing properties less than 2 years old, the PHA must include an attestation from the PHA and the owner of the property that the property was not constructed with the intent that it would be sold to the PHA or, if it was constructed with the intent that it be sold to the PHA, that it was constructed in compliance with all applicable requirements (e.g., Davis Bacon wage rates, accessibility, etc.);

(ii) Type of residents to occupy the units (e.g., family, elderly, persons with disabilities, or families that include persons with disabilities);

(iii) Number and type of unit (detached, semidetached, row house, walkup, elevator), with bedroom count, broken out by public housing vs. nonpublic housing, if applicable;

(iv) The type and size of nondwelling space, if applicable; and

(v) Schematic drawings of the proposed buildings, unit plans, and additional information regarding plans and specifications, as needed by HUD to review the project.

(2) *Site information.* An identification and description of the proposed site and neighborhood, a site plan, and a map of the neighborhood.

(3) *Participant description.* Identification of participating parties and a description of the activities to be undertaken by each of the participating parties and the PHA; and the legal and business relationships between the PHA and each of the participating parties, as applicable.

(4) *Development project schedule.* A schedule for the development project that includes each major stage of development, through and including the submission of an Actual Development Cost Certificate to HUD.

(5) *Accessibility.* A PHA must provide sufficient information for HUD to determine that dwelling units and other public housing facilities meet accessibility requirements specified at § 905.312 of this part, including, but not limited to, the number, location, and bedroom size distribution of accessible dwelling units (see 24 CFR 8.32 and 24 CFR part 40).

(6) *Project costs.* (i) *Budgets.* To allow HUD to assess sources of funding and projected uses of funds, the PHA shall submit a project budget, in the form prescribed by HUD, reflecting the total permanent development budget for the project, including all sources and uses of funds, including hard and soft costs. The PHA shall also submit a budget for the construction period and a construction draw schedule showing the timing of construction financing contributions and disbursements. In addition, the PHA shall submit an independent construction cost estimate or actual construction contract that supports the permanent and construction budgets.

(ii) *TDC calculation.* The PHA must submit a calculation of the TDC and HCC, subject to § 905.314 of this part.

(iii) *Financing.* A PHA must submit a detailed description of all financing necessary for the implementation of the project, specifying the sources and uses. In addition, HUD may require documents related to the financing (e.g., loan documents, partnership or operating agreement, regulatory and operating agreement, etc.) to be submitted in final draft form as part of the development proposal. Upon financial closing, HUD may also require final, executed copies of these documents to be submitted to HUD for final approval, per § 905.612(b)(2) of this part.

(A) *Commitment of funds.* Documents submitted pursuant to this section must irrevocably commit funds to the project. Irrevocability of funds means that binding legal documents—such as loan agreements, mortgages, deeds of trust, partnership agreements or operating agreements, or similar documents committing funds—have been executed by the applicable parties; though disbursement of such funds may be subject to meeting progress milestones, the absence of default, and/or other conditions generally consistent with similar non-public housing transactions. For projects involving revolving loan funds, the irrevocability of funds means that funds in an amount identified to HUD as the maximum revolving loan have been committed pursuant to legally binding documents; though disbursement of such funds may be subject to meeting progress milestones, the absence of default, and/or other conditions generally consistent with similar affordable housing transactions. The PHA must confirm the availability of each party's financing, the amount and source of financing committed to the proposal by the parties, and the irrevocability of those funds.

(B) *Irrevocability of funds.* To ensure the irrevocable nature of the committed funds, the PHA shall review the legal documents committing such funds to ensure that the progress milestones and conditions precedent contained in such contracts are generally consistent with similar affordable housing transactions; that the PHA and/or its Owner Entity know of no impediments that would prevent the project from moving forward consistent with the project milestones and conditions precedent; and, after conducting sufficient due diligence, that such documents are properly executed by persons or entities legally authorized to bind the entity committing such funds.

(C) *Third-party documents.* The PHA is not required to ensure the availability of funds by enforcing documents to which it is not a party.

(D) *Opinion of counsel.* As part of the proposal, the PHA may certify as to the irrevocability of funds through the submission of an opinion of the PHA's counsel attesting that counsel has examined the availability of the participating parties' financing, and the amount and source of financing committed to the project by the participating parties, and has determined that such financing has been irrevocably committed, as defined in paragraph (a)(6)(iii)(A) of this section, and that such commitments are consistent with the project budget submitted under paragraph (a)(6)(i) of this section.

(7) *Operating pro-forma/Operating Fund methodology.* To allow HUD to assess the financial feasibility of projects, PHAs shall submit a 10-year operating pro-forma, including all assumptions, to assure that operating expenses do not exceed operating income. For mixed-finance development, the PHA must describe its methodology for providing and distributing operating subsidy to the Owner Entity for the public housing units.

(8) *Local Cooperation Agreement.* A PHA may elect to exempt all public housing units in a mixed-finance project from the payment in lieu of taxes provisions under section 6(d) of the Act, 42 U.S.C. 1437d(d), and from the finding of need and cooperative agreement provisions under sections 5(e)(1)(ii) and (e)(2) of the Act, 42 U.S.C. 1437c(e)(1)(ii) and (e)(2), and instead subject units to local real estate taxes, but only if the PHA provides documentation from an authorized official of the local jurisdiction that development of the units is consistent with the jurisdiction's comprehensive housing affordability strategy. If the PHA does not elect this exemption, the Cooperation Agreement as provided in § 905.602(a) is required and must be submitted.

(9) *Environmental requirements.* The PHA must provide an approved Request for Release of Funds and environmental certification, submitted in accordance with 24 CFR part 58, or approval in accordance with 24 CFR part 50. HUD will not approve a development proposal without the appropriate environmental approval.

(10) *Market analysis.* For a mixed-finance development that includes nonpublic housing units, the PHA must include an analysis of the projected market for the proposed project.

(11) *Program income and fees.* The PHA must provide information identifying fees to be paid to the PHA, the PHA's partner(s), the Owner Entity, and/or other participating parties identified by HUD and on the receipt and use of program income.

(b) *Additional HUD-requested information.* PHAs are required to provide any additional information that HUD may need to assess the development proposal.

§ 905.608 Site acquisition proposal.

(a) *Submission.* When a PHA determines that it is necessary to acquire vacant land for development of public housing through new

construction, using public housing funds, prior to submission and approval of a development proposal under § 905.606 of this part, the PHA must submit an acquisition proposal to HUD for review and approval prior to acquisition. The acquisition proposal shall include the following:

(b) *Justification.* A justification for acquiring property prior to development proposal submission and approval.

(c) *Description.* A description of the property (i.e., the proposed site and/or project) to be acquired.

(d) *Project description; site and neighborhood standards.* An identification and description of the proposed project, site plan, and neighborhood, together with information sufficient to enable HUD to determine that the proposed site meets the site and neighborhood standards at § 905.602(d) of this part.

(e) *Zoning.* Documentation that the proposed project is permitted by current zoning ordinances or regulations, or evidence to indicate that needed rezoning is likely and will not delay the project.

(f) *Appraisal.* Documentation attesting that an appraisal of the proposed property by an independent, state certified appraiser has been conducted and that the acquisition is in compliance with § 905.308(b)(9) of this part. The purchase price of the site/property may not exceed the appraised value without HUD approval.

(g) *Schedule.* A schedule of the activities to be carried out by the PHA.

(h) *Environmental assessment.* An environmental review or request for HUD to perform the environmental review pursuant to § 905.308(b)(2) of this part.

§ 905.610 Technical processing.

(a) *Review.* HUD shall review all development proposals and site acquisition proposals for compliance with the statutory, Executive order, and regulatory requirements applicable to the development of public housing and the project. HUD's review will evaluate whether the proposed sources and uses of funds are eligible and reasonable, and whether the financing and other documentation establish to HUD's satisfaction that the development is financially viable and structured so as to adequately protect the federal investment of funds in the development. For this purpose, HUD will consider the PHA's proposed methodology for allocating operating subsidies on behalf of the public housing units, the projected revenue to be generated by any nonpublic housing units in a mixed-finance development, and the 10-year operating pro forma and other information contained in the development proposal.

(b) *Subsidy layering analysis.* After the PHA submits the documentation required under paragraph (a) of this section, HUD or its designee (e.g., the State Housing Finance Agency) shall carry out a subsidy layering analysis, pursuant to section 102(d) of the Department of Housing and Urban Development Reform Act of 1989 (42 U.S.C. 3545) (see 24 CFR part 4), to determine that the amount of assistance being provided for the development is not more than necessary to make the assisted activity feasible after taking into account the other governmental assistance.

(c) *Safe harbor standards.* For mixed-finance projects, in order to expedite the mixed-finance review process and control costs, HUD may make available safe harbor and maximum fee ranges for a number of costs. If a project is at or below a safe harbor standard, no further review will be required by HUD. If a project is above a safe harbor standard, additional review by HUD will be necessary. In order to approve terms above the safe harbor, the PHA must demonstrate to HUD in writing that the negotiated terms are appropriate for the level of risk involved in the project, the scope of work, any specific circumstances of the development, and the local or national market for the services provided.

(d) *Approval.* If HUD determines that a site acquisition proposal or a development proposal is approvable, HUD shall notify the PHA in writing of its approval. The HUD approval of a development proposal will include the appropriate form of ACC for signature. The PHA must execute the ACC and return it to HUD for execution. Until HUD approves a development proposal, a PHA may only expend public housing funds for predevelopment costs, as provided in § 905.612 of this part.

(e) *Amendments to approved development proposals.* HUD must approve any material change to an approved development proposal. HUD defines material change as:

(1) A change in the number of public housing units;

(2) A change in the number of bedrooms by an increase/decrease of more than 10 percent;

(3) A change in cost or financing by an increase/decrease of more than 10 percent; or

(4) A change in the site.

§ 905.612 Disbursement of Capital Funds—predevelopment costs.

(a) *Predevelopment costs.* After a new development project has been included in the CFP 5-Year Action Plan that has been approved by the PHA Board of Commissioners and HUD, a PHA may use funding for predevelopment expenses. Predevelopment funds may be expended in accordance with the following requirements:

(1) Predevelopment assistance may be used to pay for materials and services related to proposal development and project soft costs. It may also be used to pay for costs related to the demolition of units on a proposed site. Absent HUD approval, predevelopment assistance may not be used to pay for site work, installation of infrastructure, construction, or other hard costs related to a development.

(2) For non-mixed-finance projects, predevelopment funding up to 5 percent of the total amount of the public housing funds committed to a project does not require HUD approval. HUD shall determine on a case-by-case basis that an amount greater than 5 percent may be drawn down by a PHA to pay for necessary and reasonable predevelopment costs, based upon a consideration of the nature and scope of activities proposed to be carried out by the PHA. Before a request for predevelopment assistance in excess of 5 percent may be approved, the PHA must provide to HUD information and documentation specified in §§ 905.606 and 905.608 of this part, as HUD deems appropriate.

(3) For mixed-finance projects, all funding for predevelopment costs must be reviewed and approved by HUD prior to expenditure.

(4) The requirements in paragraph (b) of this section to disburse funds for mixed-financed projects in an approved ratio to other public and private funding do not apply to disbursement of predevelopment funds.

(b) *Standard drawdown requirements.* (1) *General.* If HUD determines that the proposed development is approvable, it may execute with the PHA the applicable ACC Amendment to provide funds for the purposes and in the amounts approved by HUD. Upon approval of the development proposal and all necessary documentation evidencing and implementing the development plan, the PHA may disburse amounts as are necessary and consistent with the approved development proposal without further HUD approval, unless HUD determines that such approval is necessary. Once HUD approves the site acquisition proposal, the PHA may request funds

for acquisition activities. Each Capital Fund disbursement from HUD is deemed to be an attestation of compliance by the PHA with the requirements of this part, as prescribed in § 905.106 of this part. If HUD determines that the PHA is in noncompliance with any provision of this part, the PHA may be subject to the sanctions in § 905.800, subpart H, of this part.

(2) *Mixed-finance projects.* For mixed-finance projects, prior to PHA disbursement of public housing funds, except predevelopment funds identified in paragraph (a) of this section, HUD may require a PHA to submit to HUD, for review and approval, copies of final, fully executed, and, where appropriate, recorded documents, submitted as part of the development proposal process. Upon completion of the project, the ratio of public housing funds to non-public housing funds for the overall project must remain as reflected in the executed documents. The ratio does not apply during the construction period.

Subpart G—Other Security Interests

§ 905.700 Other security interests.

(a) The PHA may not pledge, mortgage, enter into a transaction that provides recourse to public housing assets, or otherwise grant a security interest in any public housing project, portion thereof, or other property of the PHA without the written approval of HUD.

(b) The PHA shall submit the request in the form and manner prescribed by HUD.

(c) HUD shall consider:

(1) The ability of the PHA to complete the financing, the improvements, and repay the financing;

(2) The reasonableness of the provisions in the proposal; or

(3) Any other factors HUD deems appropriate.

Subpart H—Compliance, HUD Review, Penalties, and Sanctions

§ 905.800 Compliance.

As provided in § 905.106 of this part, PHAs or other owner/management entities and their partners are required to comply with all applicable provisions of this part. Execution of the CF ACC Amendment received from the PHA, submissions required by this part, and disbursement of Capital Fund grants from HUD are individually and collectively deemed to be the PHA's certification that it is in compliance with the provisions of this part and all other Public Housing Program Requirements. Noncompliance with any provision of this part or other applicable requirements may subject the PHA and/or its partners to sanctions contained in § 905.804 of this part.

§ 905.802 HUD review of PHA performance.

(a) *HUD determination.* HUD shall review the PHA's performance in completing work in accordance with this part. HUD may make such other reviews when and as it determines necessary. When conducting such a review, HUD shall, at minimum, make the following determinations:

(1) HUD shall determine whether the PHA has carried out its activities under this part in a timely manner and in accordance with its CFP 5-Year Action Plan and other applicable requirements.

(2) HUD shall determine whether the PHA has a continuing capacity to carry out its Capital Fund activities in a timely manner.

(3) HUD shall determine whether the PHA has accurately reported its obligation and expenditures in a timely manner.

(4) HUD shall determine whether the PHA has accurately reported required building and unit data for the calculation of the formula.

(5) HUD shall determine whether the PHA has obtained approval for any CFFP or OFFP proposal and any PHA development proposal.

(b) [Reserved]

§ 905.804 Sanctions.

(a) If at any time, HUD finds that a PHA has failed to comply substantially with any provision this part, HUD may impose one or a combination of sanctions, as it determines is necessary. Sanctions associated with failure to obligate or expend in a timely manner are specified at § 905.306 of this part. Other possible sanctions that HUD may impose for noncompliance by the PHA include, but are not limited to, the following:

(1) Issue a corrective action order, at any time, by notifying the PHA of the specific program requirements that the PHA has violated, and specifying that any of the corrective actions listed in this section must be taken. Any corrective action ordered by HUD shall become a condition of the CF ACC Amendment.

(2) Require reimbursement from non-HUD sources.

(3) Limit, withhold, reduce, or terminate Capital Fund or Operating Fund assistance.

(4) Issue a Limited Denial of Participation or Debar responsible PHA officials, pursuant to 2 CFR parts 180 and 2424.

(5) Withhold assistance to the PHA under section 8 of the Act, 42 U.S.C. 1437f.

(6) Declare a breach of the CF ACC with respect to some or all of the PHA's functions.

(7) Take any other available corrective action or sanction as HUD deems necessary.

(b) *Right to appeal.* Before taking any action described in paragraph (a) of this section, HUD shall notify the PHA of its finding and proposed action and provide to the PHA an opportunity, within a prescribed period of time, to present any arguments or additional facts and data concerning the finding and proposed action to HUD's Assistant Secretary for Public and Indian Housing.

PART 941—[REMOVED]

■ 7. Under the authority of 42 U.S.C. 3535(d), remove part 941, consisting of §§ 941.101–941.616.

PART 968—[REMOVED]

■ 8. Under the authority of 42 U.S.C. 3535(d), remove part 968, consisting of §§ 968.101–968.435.

PART 969—[REMOVED]

■ 9. Under the authority of 42 U.S.C. 3535(d), remove part 969, consisting of §§ 969.101–969.107.

Dated: September 18, 2013.

Sandra B. Henriquez,

Assistant Secretary for Public and Indian Housing.

[FR Doc. 2013–23230 Filed 10–23–13; 8:45 am]

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Part IV

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Determination of Endangered Status for *Chromolaena frustrata* (Cape Sable Thoroughwort), *Consolea corallicola* (Florida Semaphore Cactus), and *Harrisia aboriginum* (Aboriginal Prickly-Apple); Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–ES–R4–2012–0076; 4500030113]

RIN 1018–AY08

Endangered and Threatened Wildlife and Plants; Determination of Endangered Status for Chromolaena frustrata (Cape Sable Thoroughwort), Consolea corallicola (Florida Semaphore Cactus), and Harrisia aboriginum (Aboriginal Prickly-Apple)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), determine endangered status for three plants: *Chromolaena frustrata* (Cape Sable thoroughwort), *Consolea corallicola* (Florida semaphore cactus), and *Harrisia aboriginum* (aboriginal prickly-apple), under the Endangered Species Act of 1973, as amended. These plants are endemic to South Florida. This final rule implements the protections provided by the Act for these species.

DATES: This rule is effective on November 25, 2013.

ADDRESSES: This final rule is available on the Internet at *http://www.regulations.gov* and at *http://www.fws.gov/verobeach/.* Comments and materials we received, as well as supporting documentation used in preparation of this rule, are available for public inspection at *http://www.regulations.gov.* All of the comments, materials, and documentation that we considered in this rulemaking are available by appointment, during normal business hours, at U.S. Fish and Wildlife Service, South Florida Ecological Services Office, 1339 20th Street, Vero Beach, FL 32960; telephone 772–562–3909; facsimile 772–562–4288.

FOR FURTHER INFORMATION CONTACT: Larry Williams, Field Supervisor, U.S. Fish and Wildlife Service, South Florida Ecological Services Office, 1339 20th Street, Vero Beach, FL 32960; telephone 772–562–3909; facsimile 772–562–4288. Persons who use a telecommunications device for the deaf (TDD), may 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), a species may warrant protection through listing if it is an endangered or threatened species throughout all or a significant portion of its range. Listing a species as an endangered or threatened species can only be completed by issuing a rule.

The Service proposed to designate critical habitat for *Chromolaena frustrata* concurrent with the proposed listing rule and is preparing a final rule to designate critical habitat for the plant that will be published in the near future. We found critical habitat to be not prudent in the proposed rule for *Consolea corallicola* and *Harrisia aboriginum* because of the potential for an increase in poaching. However, we re-evaluated the prudency determination for both cacti based on public comment and the already available information in the public domain that indicates where these species can be found. Consequently, we have determined critical habitat is prudent for both species. We have also found that critical habitat is determinable for both species. We intend to publish a proposed rule designating critical habitat for both species in the near future..

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. We have determined that *Chromolaena frustrata, Consolea corallicola,* and *Harrisia aboriginum* meet the definition of an endangered species based on Factors A, D, and E. *Consolea corallicola* and *H. aboriginum* meet the definition of endangered species based on Factors B and C under the Act as well.

Peer review and public comment. We sought comments from seven independent specialists to ensure that our designation is based on scientifically sound data, assumptions, and analyses. We invited these peer reviewers to comment on our listing proposal. We received six peer review responses. The peer reviewers generally concurred with our methods and conclusions, and they provided additional information, clarifications, and suggestions to improve this final listing rule. We considered all comments and information we received during the comment periods.

Previous Federal Actions

Please refer to the proposed listing rule for *Chromolaena frustrata, Consolea corallicola,* and *Harrisia aboriginum* (October 11, 2012; 77 FR 61836) for a detailed description of previous Federal actions concerning these species. *Consolea corallicola* was known as both *Opuntia spinosissima* and *Opuntia corallicola* in previous Federal actions.

Summary of Comments and Recommendations

We requested that the public submit written comments on the proposed listing rule for *Chromolaena frustrata, Consolea corallicola,* and *Harrisia aboriginum* during two comment periods. The first comment period opened with the publication of the proposed rule on October 11, 2012, and closed on December 10, 2012 (77 FR 61836). Legal notices were published in six newspapers for the proposed rule. The second comment period opened with the publication on July 8, 2013 of a notice of availability for the draft economic analysis and reopening of the public comment period on the proposed listing, critical habitat designation, and associated draft economic analysis. We accepted public comments through August 7, 2013 (78 FR 40669). We also contacted appropriate Federal and State agencies, scientific experts and organizations, and other interested parties and invited them to comment on the proposal. We did not receive any requests for a public hearing.

The October 11, 2012, proposed rule contained both the proposed listing of these three plants, as well as the proposed designation of critical habitat for *Chromolaena frustrata.* Therefore, we received combined comments from the public on both actions. However, in this final rule we will only address comments that apply to the proposed listing of the three species. Comments on the proposed critical habitat designation for *Chromolaena frustrata* will be addressed in the final critical habitat rule.

All substantive information provided during comment periods has either been incorporated directly into this final determination or is addressed below.

Peer Reviewer Comments

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited expert opinions from seven knowledgeable individuals with scientific expertise that included familiarity with at least one of three the species and its habitat, biological needs, and threats; the geographical region of

South Florida in which these species occur; and conservation biology principles. We received responses from six of the peer reviewers we contacted.

We reviewed all comments for substantive issues and new information regarding *Chromolaena frustrata, Consolea corallicola,* and *Harrisia aboriginum.* The peer reviewers generally concurred with our methods and conclusions, and provided additional information, clarifications, and suggestions to improve the final listing rule. Peer reviewer comments are addressed in the following summary and incorporated into this final rule as appropriate.

(1) *Comment:* One peer reviewer provided clarification of the species description and biology of *Harrisia aboriginum* based on his 2012 dissertation, which included a revised monograph of the genus *Harrisia* supported by molecular studies and morphological characteristics. Clarifications included the number of spines per cluster toward the base of plants (up to 20), color of flower hairs (white), length of the flower, timing of flower opening (at night), and duration of flowers (one night). He also commented that plants seem to prefer partial shade rather than full sun or deep shade.

Our Response: We appreciate the information provided for *Harrisia aboriginum* and have updated the species description and habitat information for *H. aboriginum* accordingly.

(2) *Comment:* One peer reviewer provided corrections to the past taxonomy that has been applied to *Harrisia aboriginum,* adding the synonym *Harrisia gracilis* (Mill.) Britton var. *aboriginum* (Small ex Britton & Rose) D. B. Ward to the list of previous names, and clarifying that the synonym *Harrisia donae-antoniae* Hooten is an illegitimate name. His recent monograph of the genus *Harrisia* supports *H. aboriginum* as a legitimate taxon and genetically distinct species (Franck 2012, pp. 96, 113). Another peer reviewer supported *H. aboriginum* as a distinct species with the same reference noted above.

Our Response: We agree the distinctiveness of *Harrisia aboriginum* is clearly supported by the most recent genetic studies, and we appreciate the information provided. We have included it in the *Taxonomy* section for *H. aboriginum.*

(3) *Comment:* One peer reviewer provided references that do not use the name *Consolea corallicola* and instead use *Opuntia corallicola.*

Our Response: We acknowledge that this synonym has been used for the species, and we have updated the taxonomy section accordingly.

(4) *Comment:* One peer reviewer commented that The Nature Conservancy (TNC) purchased land in the Florida Keys to conserve *Consolea corallicola,* and that this effort should be documented in the listing rule.

Our Response: We agree that TNC purchased the Little Torch Hammock Preserve on Little Torch Key to conserve *Consolea corallicola* in 1988. In the proposed rule, we omitted details regarding the species' locations because we had determined that publicizing the locations may increase poaching of the species. However, we have since determined that location information is already available to the public, and we have now incorporated this information in the *Current Range* and *Factor A* sections for *C. corallicola* in this final rule.

(5) *Comment:* One peer reviewer commented that the rule should include information regarding the efforts of local botanical gardens to conserve *Chromolaena frustrata, Consolea corallicola,* and *Harrisia aboriginum.*

Our Response: We agree and have incorporated information on efforts undertaken by Fairchild Tropical Botanic Garden, Key West Botanical Garden, and Marie Selby Botanical Garden. We have also incorporated new information provided by another peer reviewer regarding *ex situ* conservation holdings at Fairchild Tropical Botanic Garden and Key West Botanical Garden under the *Factor E* discussion, below.

(6) *Comment:* One peer reviewer provided research findings on the seed longevity and germination rates for *Chromolaena frustrata* and *Harrisia aboriginum.*

Our Response: We incorporated this new information into the *Reproductive Biology and Genetics* section for *Chromolaena frustrata* and *Harrisia aboriginum.*

(7) *Comment:* One peer reviewer provided information regarding *Cactoblastis* moth control. The U. S. Department of Agriculture (USDA) Agricultural Research Service's Center for Medical, Agricultural, and Veterinary Entomology in Tallahassee, Florida, is using containment methods in addition to hand removal, including the use of female sex pheromone wing traps and irradiation techniques, to control the spread of *Cactoblastis cactorum.*

Our Response: We incorporated this new information on *Cactoblastis cactorum* under the *Factor C* discussion, below.

(8) *Comment:* One peer reviewer commented that a permit is not required from the Florida Division of Agriculture and Consumer Services (FDACS) Division of Plant Industry for the harvest of plant species listed as threatened on the Florida Regulated Plant Index, as indicated in the proposed listing rule. Instead, only written permission from the landowner is required. A FDACS permit is required for species listed as endangered by the State of Florida. Any species listed under the Endangered Species Act is automatically listed as endangered by FDACS.

Our Response: We have incorporated the correction concerning harvesting of plants and permits in this final rule under the *Factor D* discussion, below.

(9) *Comment:* One peer reviewer provided a correction as to the number of reintroduction sites where planted *Consolea corallicola* remain.

Our Response: We did not include the plantings at Torchwood Hammock Preserve on Key Largo as a reintroduction. Instead, we consider this a population augmentation, as the planted cacti are on the same site within 1 km (0.62 mile) of the wild population. However, because an additional reintroduction was implemented on Key Largo since the proposed listing rule was published, there are now four reintroduction sites that continue to support *Consolea corallicola.* We appreciate the information provided and have incorporated it into the *Current Range* section for *C. corallicola.*

(10) *Comment:* One peer reviewer emphasized the threat of hurricane-induced storm surge events, and provided additional information regarding storm surge impacts, stating that Hurricane Wilma in 2005 killed 18 of 41 *Consolea corallicola* plants (43.9 percent) remaining at one reintroduction site.

Our Response: We appreciate the new information provided and have incorporated it into the *Demographics* and *Factor E* sections for *Consolea corallicola.*

(11) *Comment:* One peer reviewer provided new survey data for the reintroduced population of *Consolea corallicola* at Dagny Johnson Key Largo Hammock Botanical State Park based on the most recently conducted survey.

Our Response: We appreciate the information provided and have incorporated it into the *Current Range* section for *Consolea corallicola.*

(12) *Comment:* One peer reviewer clarified the habitats that support *Chromolaena frustrata* in Everglades National Park (ENP). In particular, rockland hammock does not occur in

the coastal area of ENP. Instead, the habitat where *C. frustrata* occurs should be classified as coastal hardwood hammock (*sensu* Rutchey *et al.* 2006, p. 21). While similar in overall vegetation structure and disturbance regime, coastal hardwood hammock differs from rockland hammock in that it develops on elevated marl ridges with a thin layer of organic matter. The species composition also differs somewhat from rockland hammock. The commenter also clarified the associated species most frequently observed with *C. frustrata* in buttonwood forest habitat at ENP.

Our Response: The clarification concerning this habitat in ENP has been incorporated in the *Habitat* and *Current Range* sections for *Chromolaena frustrata* and throughout this final rule.

(13) *Comment:* One peer reviewer commented that he followed up with several of the herbaria identified by Moldenke (1944, p. 530) as repositories for specimens collected in support of that publication. Those herbaria were unable to locate the *C. frustrata* specimen (Moldenke 5770) that resulted in the report of this species from Turner River Mound. As a result, the peer reviewer agrees with the decision in the proposed rule to exclude Turner River Mound in ENP as part of the historical distribution of this species.

Our Response: This is in agreement with our findings. We have incorporated this supporting information into the *Historic Range* section for *Chromolaena frustrata.*

Comments From States

The three species only occur in Florida, and we received one comment from the State of Florida regarding the listing proposal. That comment is addressed below. We note, however, that two peer reviewers were from State of Florida agencies (FDACS and Florida Department of Environmental Protection (FDEP)). Their comments are addressed above.

(14) *Comment:* One commenter from FDACS expressed support for the listing and designation of critical habitat for *Chromolaena frustrata,* and stated that their 2010 assessment determined that the species is known from five populations totaling about 1,000 plants.

Our Response: The Service has more recent data sources (*i.e.,* Duquesnel 2012, pers. comm.; Sadle 2012b, pers. comm.) that document additional populations and individuals than that considered by FDACS. We appreciate the commenter's support of our determinations for *Chromolaena frustrata.*

Public Comments

During the first comment period, we received four comment letters directly addressing the proposed listing. During the second comment period, we received no public comment letters that addressed the proposed listing. Comments we received are grouped below into four general issues.

Issue 1: Insufficient Evidence of Population Declines

(15) *Comment:* One commenter stated that the Service relied upon insufficient evidence of threats to *Chromolaena frustrata, Consolea corallicola,* and *Harrisia aboriginum* and selectively overlooked uncertainties, data gaps, and evidence of increases in populations.

Our Response: The Act requires that we identify species of wildlife and plants that are endangered or threatened based on the best scientific and commercial data available. Historical species records, when compared to more recent surveys, indicate that these species were previously more abundant and widespread. Repeated surveys over time have demonstrated declining numbers of plants and loss of entire populations of all three species based on a number of factors. The proposed rule contains a detailed evaluation of threats to all three species, including habitat modification and loss to development and sea level rise, and loss of individuals to hurricanes and storm surge. *Consolea corallicola* and *Harrisia aboriginum* are also affected by disease, predation, and poaching. These threats have caused the loss of individuals and populations, resulting in small, isolated populations and an overall reduction in these species' ranges.

There is no evidence of population increase for *Chromolaena frustrata,* and the only population increases known for *Consolea corallicola* and *Harrisia aboriginum* are through clonal fragmentation. No seedlings of either species have been observed in the wild. *Chromolaena frustrata* and *Consolea corallicola* are extirpated from half of the islands where they occurred in the Florida Keys. The *Consolea corallicola* population on Little Torch Key has declined 50 percent, and only the population on Swan Key appears stable. *Harrisia aboriginum* is extirpated from its northernmost range at Tierra Ceia in Manatee County and on Cayo Costa Island in Lee County, and other populations have suffered historical losses due to development and poaching. Based on this information and information provided in our above response, we believe there is sound scientific information to support our final determination of these three plants as endangered species.

(16) *Comment: Chromolaena frustrata* still occupies its historical range. The Service acknowledges that it knows little about the species' population trends, or even how they reproduce. Absent such knowledge, it is unclear how the Service found the species to be in decline.

Our Response: While little is known about the dynamics or trends of individual *C. frustrata* populations, entire populations have been extirpated and the species' historical range is reduced. *Chromolaena frustrata* has been extirpated from half of the islands in the Florida Keys where it once occurred (Bradley and Gann 2004, p. 4). It no longer occurs on Key Largo, Big Pine Key, Fiesta Key, Knight's Key, or Key West (Bradley and Gann 2004, pp. 4–6). Based on this information and information discussed in our response to Comment 15, above, we believe there is sound scientific information from which to conclude that the species' range has declined, and continues to decline, to support our final determination that this plant is an endangered species.

(17) *Comment:* In its analysis of population trends, the Service looked at only four populations of *Consolea corallicola.* The largest population is entirely stable. One population of 9 to 11 plants was reported to have suffered high mortality rates, but the other two populations were declared to be in decline without any discussion by the Service and without providing the studies that allegedly support that conclusion.

Our Response: Of the two wild populations of *C. corallicola,* the largest, located in Biscayne National Park, appears stable over the past decade. However, population decline has occurred in the other wild population, located on Little Torch Key, which now consists of 9 to 11 adult plants and hundreds of small juveniles originating from fallen pads. While the number of small plants has fluctuated, no new plants have reached maturity, and the number of adult plants in this population has declined more than 50 percent over the past 10 years, due to crown rot and damage caused by the *Cactoblastis* moth and hurricanes (Higgins 2007, pers. comm.; Gun 2012, pers. comm.).

Experimental plantings of *Consolea corallicola* were attempted at several sites on State and Federal conservation lands in the Florida Keys from 1996 to 2004. These plantings were largely unsuccessful, with most plants succumbing to *Cactoblastis* moth

damage or crown rot. Plants currently remain at only three of the original sites, and these have declined to just a few plants each. Reintroduced plants have not attained larger size classes seen at wild sites (Duquesnel 2012, pers. comm.; Stiling 2013, pers. comm.). The lack of success with reintroduction of *C. corallicola* has helped to elucidate threats, emphasized the importance of protecting existing natural populations, and provided a perspective on the challenges we will face in recovering this species. Since the proposed rule was published, one additional population reintroduction was attempted on State land on Key Largo. It is too early to determine whether or not this reintroduction will be successful.

(18) *Comment:* The Service has no information about *Harrisia aboriginum's* population trends prior to 2004, and the 2004 information contains surveys of only 2 of the 12 known populations. Significantly, based on the information presented by the Service, it does not look like these populations have been re-surveyed since 2004. It seems unlikely that reasonably credible trends could be established based on a single survey. The 10 remaining cited populations were also only surveyed once (in 2007). Still, the Service, without support, declares many of them to be in decline.

Our Response: Trends could be established for 10 of 12 *Harrisia aboriginum* occurrences based on repeated surveys of these sites in 1981, 2004, and 2007 (see Morris and Miller 1981; Bradley *et al.* 2004; Woodmansee *et al.* 2007); of these 10 populations, 7 showed declines during this period. Table 3 in this final rule also provides these data and illustrates these declines.

Issue 2: Climate Change

(19) *Comment:* One commenter remarked that listing the three proposed species as endangered species based on climate change is too speculative and, therefore, contrary to the Act.

Our Response: 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. We have determined that the threats contributing to the listing of *Chromolaena frustrata, Consolea corallicola,* and *Harrisia aboriginum* are from Factors A, D, and E. Additionally, the threats contributing to the listing of *Consolea corallicola* and *H. aboriginum* are from Factors B and C. Therefore, we have not identified the effects of climate change as the sole threat contributing to the listing of these species.

As is the case with all stressors that we assess, even if we conclude that a species is currently affected or is likely to be negatively affected by one or more climate-related impacts, it does not necessarily follow that the species meets the definition of an endangered species or a threatened species under the Act. However, if a species is listed as endangered or threatened, knowledge regarding its vulnerability to, and known or anticipated impacts from, climate-associated changes in environmental conditions can be used to help devise appropriate strategies for its recovery.

It is a widely accepted that changes in climate are occurring worldwide (IPCC 2007, p. 30). Our analyses under the Act include consideration of ongoing and projected changes in climate. A range of projections suggests sea level rise is the largest climate-driven challenge to low-lying coastal areas of southern Florida, including the Florida Keys (U.S. Climate Change Science Program (CCSP) 2008, pp. 5–31, 5–32). All three plants occur in habitats near sea level in areas of south Florida where considerable habitat is projected to be lost to sea level rise by 2100 (Saha *et al.* 2011, p. 81; Zhang *et al.* 2011, p. 129). Prior to inundation, the habitats that support these species are expected to undergo a transition to salt marshes or mangroves (Saha *et al.* 2011, pp. 81–82, 105). Habitats for these species are restricted to relatively immobile geologic features separated by large expanses of flooded, inhospitable wetland or ocean, leading us to conclude that these habitats will likely not be able to migrate as sea level rises (Saha *et al.* 2011, pp. 103–104).

Based on our analysis of threats, we have determined that all three species are now, or will be, affected by multiple threats, including habitat loss and modification due to development and sea level rise, competition from nonnative species, and the apparent inadequacy of existing regulatory mechanisms. All three species are at increased risk of extinction due to these threats because populations are few and mostly small. Because of the species' low numbers, shrinking habitats, and human-created barriers to natural habitat migration, it will be difficult for these species to disperse to suitable habitats as sea levels rise.

(20) *Comment:* One commenter stated that the Service should use a timeframe through at least 2100 to analyze the climate change threats to the plant species.

Our Response: In our review of climate change forecasts, models, and analyses, we find that sea level rise projections through 2100 are the standard in current scientific literature (IPCC 2007, p. 45; Grinsted *et al.* 2010, p. 468; Jevrejeva *et al.* 2010, p. 4; NRC 2010, p. 2; Pfeffer *et al.* 2008, p. 1340; Rahmstorf *et al.* 2012, p. 3; USACE 2011, EC 1165–2–212, p. B–11). Likewise, the downscaled models for South Florida provide projections out to 2100 (see Zhang *et al.* 2011, p. 129; TNC 2011, p. 1). These studies represent the best available science and provide a solid basis for applying the 2100 timeframe to the climate change analyses for these plant species.

(21) *Comment:* One commenter stated that the Service should analyze the impacts of sea level rise of up to 2 meters on the three plants' habitat because this falls within the range of likely scenarios.

Our Response: In our review of climate change forecasts, we find that sea level rise up to 2 m (6.6 ft) is within the range of projections for global sea level rise. To accommodate the large uncertainty in sea level rise projections, it is necessary to estimate effects from a range of scenarios and projections. In the proposed rule, we cited a study that used a range of 18 cm (7 in) to 140 cm (4.6 ft) (TNC 2010, p. 1) based on projections from IPCC (2007) and Rahmstorf (2007). Subsequently, the scientific community has continued to model sea level rise. Recent scientific literature indicates a movement towards accelerated sea level rise. Observed sea level rise rates are already trending along the higher end of the 2007 IPCC estimates, and it now widely held that sea level rise will exceed the levels projected by the IPCC (Rahmstorf *et al.* 2012, p. 1; Grinsted *et al.* 2010, p. 470). Taken together, these studies support the use of higher end estimates now prevalent in the scientific literature. Recent studies have estimated global mean sea level rise of 1 to 2 m (3.3 to 6.6 ft) by 2100 as follows: 0.75 to 1.90 m (2.5 to 6.2 ft; Vermeer and Rahmstorf 2009, p. 21527), 0.8 to 2.0 m (2.6 to 6.6 ft; Pfeffer *et al.* 2008, p. 1342), 0.9 to 1.3 m (2.6 to 4.3 ft; Grinsted *et al.* 2010, p. 461), and 0.6 to 1.6 m (2.0 to 5.2 ft; Jevrejeva *et al.* 2010, p. 1). Zhang *et al.* (2011, p. 136) provide the most recent downscaled inundation modeling for south Florida, and they model sea level rise up to 1.8 m (5.9 ft) in the Florida Keys. We incorporated additional

analysis for each species in the *Factor A* section of this final rule.

(22) *Comment:* One commenter stated that the threat of sea level rise will not occur within the ''reasonably foreseeable future,'' as that term has been defined and applied under the Act.

Our Response: The term ''foreseeable'' is not expressly defined in the Act to allow flexibility to consider situations on a case-by-case basis (Office of the Solicitor Opinion M–37021, p. 7). ''Foreseeable future'' relates to the ability to make predictions that can reasonably be relied on because they are based on a careful extrapolation grounded in data and logic (Office of the Solicitor Opinion M–37021, p. 8). The Service maintains that sea level rise will affect the three species within timeframes served by existing sea level rise projection models referenced throughout this rule.

The Service has determined that sea level rise and the related impacts of climate change have already created a clear and present threat to these plant species, and that this threat will continue into the future; the threat posed by the most optimistic scenarios of greenhouse gas emissions in the 21st century represents a foreseeable extinction risk to these species. Because of the extreme fragmentation of remaining habitat and isolation of remaining populations, and the accelerating rate at which sea level rise is projected to occur (Grinsted *et al.* 2010, p. 470), it will be particularly difficult for these species to disperse to suitable habitat as existing habitat is modified and lost due to sea level rise. The ultimate effect of these impacts is likely to result in reduced suitable habitat, exacerbated by other threats such as development and corresponding decreases in population numbers.

(23) *Comment:* One commenter stated that the Service must take into account the added impacts from more severe hurricanes and increasing storm surge and coastal flooding on the habitat of *Chromolaena frustrata, Consolea corallicola,* and *Harrisia aboriginum.*

Our Response: Increased hurricane severity and storm surge wave heights are projected as a result of climate change. While some level of hurricane and storm surge may reduce competition and help maintain the open-canopy conditions that are suitable for these species, hurricanes and storm surge of greater magnitude are likely to increase the losses to populations during these events. In addition, storm surge events may act as tipping points for plant communities already transitioning to saline habitats due to sea level rise.

In the proposed rule, we determined that past hurricanes and storm surge events have already created a clear and present threat to these plant species. Additional information is included in this final rule that represents the best available science with regard to the threat of increased hurricane and storm surge severity.

(24) *Comment:* One commenter stated that the Service bases its predictions on a model that projects a sea level increase of 18 cm (7 in) in the Keys occurring 86 years in the future. Significantly, both IPCC and the Service acknowledge that climate change impacts can really only be reliably forecasted 30 to 50 years in the future.

Our Response: The Service has considered a variety of information derived from numerous climate models rather than relying on one single climate model. While many components of climate can only be reliably forecast 30 to 50 years into the future, current research papers overwhelmingly use the year 2100 for sea level rise projections. To accommodate the large uncertainty in sea level rise projections, it is necessary to estimate inundation losses from a range of possible scenarios (see response to comment 21). In the proposed rule, our analysis for *Chromolaena frustrata, Consolea corallicola,* and *Harrisia aboriginum* relied upon a range of sea level rise projections modeled by TNC (2011) based on IPCC (2007) and Rahmstorf *et al.* (2007) scenarios and downscaled projections to develop inundation models for the Florida Keys. These scenarios projected a potential sea level rise range of 18 cm to 140 cm (7 in to 4.6 ft) by 2100 (TNC 2011, p. 1), resulting in the inundation of 38 to 92 percent of the Florida Keys land area. In this final rule, we include updated projections for sea level rise and modeling for habitat loss and modification from sea level rise.

The best scientific and commercial data available indicate that several populations are currently being negatively affected by increasing salinity, and projections indicate that nearly all populations will be negatively affected by 2100. In the *Factor A* section of this final rule, we analyze the effects that sea level rise will have on the three species based on the current range of projections that represent the best available science for the areas and habitats where the three species occur.

(25) *Comment:* One commenter stated that in spite of the remoteness of potential sea level rise, the Service claims a foreseeable harm based on a study done in 1980 on palm trees, citing Morris and Miller (1981, p. 10).

Our Response: Morris and Miller (1981, p. 10) and other studies referenced in the rule serve to demonstrate that the effects of sea level rise on plant communities have been observed in the past and are presently driving changes in plant communities in coastal south Florida. Similar changes in plant communities have been observed in the Florida Keys due to saltwater intrusion (Ross *et al.* 1994, p. 144; 2009, p. 471). Please refer to the *Factor A* section of this final rule for a complete discussion of habitat loss and modification from sea level rise.

(26) *Comment:* One commenter stated that the coastal communities inhabited by the three plant species are threatened by increasing saltwater intrusion. Restoring freshwater inflow might be the only mechanism to mitigate, in the short term, the effects of rising sea levels in the Everglades (Saha *et al.* 2011, p. 105).

Our Response: The restoration of freshwater flows into the Everglades is one of the primary goals of the Comprehensive Everglades Restoration Program (CERP), a Service initiative. However, we lack the data on how this will restore historical conditions or create new conditions, or how long it will take for these changes to become measurable, and what, if any, benefits will occur for the three plants.

(27) *Comment:* One commenter stated that the three plant species face significant risks from coastal squeeze that occurs when habitat is pressed between rising sea levels and coastal development that prevents landward movement.

Our Response: We agree. This is especially true in the Florida Keys and along the Gulf coast of Florida. Development patterns in the Keys tend to occur on higher elevations. The U.S. 1 highway corridor generally follows the high spine (occupying much of the higher elevation areas) of the upper Keys, while also presenting a barrier to the migration of species and habitats. On the Gulf coast, coastal squeeze will affect some areas that support *Harrisia aboriginum.* Occurrences in coastal berm habitat on Longboat Key and Manasota Key are especially susceptible to this effect. The habitats that currently support the three plants are restricted to relatively immobile geologic features separated by large expanses of flooded, inhospitable wetland or ocean, leading us to conclude that these habitats will likely not be able to migrate as sea level rises (Saha *et al.* 2011, pp. 103–104). We discuss this issue below, in the *Factor E* section of this final rule under *Climate Change and Sea Level Rise.*

(28) *Comment:* One commenter stated that if the Service lists the three plant species as endangered and continues to count climate change among the threats to the species, then the Service should consider proposing a special rule under section 4(d) of the Act to exclude otherwise lawful activities, such as greenhouse gas emissions, from those actions that others may allege to constitute ''take'' of the species.

Our Response: Under section 4(d) of the Act, the Secretary of the Interior has discretion to issue such regulations as she deems necessary and advisable to provide for the conservation of the species. The Secretary also has the discretion to prohibit by regulation with respect to a threatened species any act prohibited by section 9(a)(1) of the Act. All three plant species are being listed as endangered species. Thus, a special rule under section 4(d) of the Act is not applicable.

The Service and the National Marine Fisheries Service (Services) issued a final rule amending interagency regulations governing implementation of the Act on December 16, 2008 (73 FR 76272). These regulations became effective on January 15, 2009, and clarify and otherwise modify regulatory requirements related to consultation with the Services mandated by section 7(a) of the Act. It is the Service's view that there is no requirement to consult on greenhouse gas (GHG) emissions' contribution to global warming and the associated impacts on listed species. Impacts associated with global warming do not constitute or meet the definition of ''effects of the action'' under the regulations (50 CFR 402.02 and 50 CFR 402.03(b)(1) and (c)). Although the changes were crafted in broad general terms appropriate to the purpose of the regulations, the Services acknowledged that they were intended to address the new challenge we face with global warming and climate change.

Issue 3: Poaching and Critical Habitat Prudency Determinations

(29) *Comment:* Two commenters stated that the Service provided no information supporting its conclusion that designating critical habitat would increase poaching of *Consolea corallicola* and *Harrisia aboriginum.* The commenters further stated that the threat of unauthorized collection would not increase with designation of critical habitat because the public already has access to information about known locations of the species.

Our Response: In the proposed rule, we determined that designating critical habitat was not prudent for *Consolea corallicola* and *Harrisia aboriginum.* Cacti are affected by poaching worldwide because of the large demand from collectors. Although limited, poaching has been documented for both *Consolea corallicola* and *Harrisia aboriginum.* Reports and notes included with surveys going back several decades identify poaching as a threat. We based our determination that poaching may increase because the listing of these species would draw attention to their existence and rarity, possibly creating a greater demand among cactus collectors. The Service postulated that publication of maps in the **Federal Register** could facilitate poaching of these species by making it easier to find exact locations where the species are located. After a thorough re-evaluation of the publicly available information regarding the locations of these cacti, we have determined that the current locations of the two cacti are currently available in sources readily accessed by the public. These include online conservation databases, scientific journals, and documents found on agency Web sites. We now acknowledge that publishing critical habitat maps would not provide much, if any, in the way of details helpful to locate these species, beyond what is already publicly available. In addition, because locations are largely available, the increased threat comes more from the attention drawn by listing the species, rather than the publication of maps depicting critical habitat. For this reason, we have re-assessed our prudency determination that designating critical habitat would likely increase the threat of poaching. Consequently, we have determined our original prudency determination was incorrect. We will publish a proposed rule to designate critical habitat for *Consolea corallicola* and *Harrisia aboriginum.*

Issue 4. Availability of Findings

(30) *Comment:* One commenter stated that the Service failed to provide any supporting materials for any of these proposed actions on *http://www.regulations.gov* or on the Service's Web site. The Service must make studies available to the public per Executive Order (E.O.) 13563.

Our Response: Executive Order 13563, section 2(b), states that ''To the extent feasible and permitted by law, each agency shall . . . provide, for both proposed and final rules, timely online access to the rulemaking docket on regulations.gov, including relevant scientific and technical findings, in an open format . . . For proposed rules, such access shall include, to the extent feasible and permitted by law, an opportunity for public comment on all pertinent parts of the rulemaking docket, including relevant scientific and technical findings.''

The Service provided its scientific and technical findings in the proposed rule as published in the **Federal Register** and posted on *http://www.regulations.gov.* In addition, a list of the references we used to support our findings was provided at the time of the publication of the October 11, 2012, proposed rule, and is still available, in the rulemaking docket on *http://www.regulations.gov* at Docket No. FWS–ES–R4–2012–0076. These materials are also available for viewing at the Service's South Florida Ecological Services Field Office by appointment (see **FOR FURTHER INFORMATION CONTACT**). Although all material is available, copies may be provided only for those documents not covered by copyright restrictions.

Summary of Changes From Proposed Rule

In the Background section, we made the following changes: (1) We clarified and expanded the species description for *Harrisia aboriginum;* (2) we added more information to the *Taxonomy* sections for *Consolea corallicola* and *Harrisia aboriginum;* (3) we incorporated information about the pollination biology of *Chromolaena frustrata;* (4) we incorporated information on seed longevity and germination rates for *Chromolaena frustrata* and *Harrisia aboriginum;* (5) we included new survey data for the reintroduced population of *Consolea corallicola* at Dagny Johnson Key Largo Hammock Botanical State Park; (6) we included information about a *Consolea corallicola* reintroduction that was recently implemented on Key Largo, since the time the proposed rule was published; (7) we corrected the number of reintroduction sites where out-planted *Consolea corallicola* remain; (8) we corrected the name we use to describe the habitat of *Chromolaena frustrata* in ENP; and (9) we added extirpated populations to tables 1, 2, and 3.

In the Summary of Factors Affecting the Species section, we made the following changes: (1) We included additional information about USDA work to develop new techniques to control the spread of *Cactoblastis cactorum;* (2) we incorporated new information about ongoing conservation efforts by nonprofit institutions; (3) we expanded the discussion of population declines for *Harrisia aboriginum* and *Consolea corallicola;* (4) we expanded our climate change analysis for all three species to include more projections

across a wider range of scenarios; and (5) we expanded our discussion of hurricane and storm surge impacts.

Background

Please refer to the proposed listing rule for *Chromolaena frustrata, Consolea corallicola,* and *Harrisia aboriginum* (October 11, 2012; 77 FR 61836) for the complete background information. The sections below represent summaries of that information, and incorporate new additions and edits based on peer review and public comments.

Summary of Biological Status

For more information on these species' habitats, ecology, and life history, and on the factors affecting these species, please refer to the proposed listing rule for *Chromolaena frustrata, Consolea corallicola,* and *Harrisia aboriginum* published in the **Federal Register** on October 11, 2012 (77 FR 61836).

We have evaluated the biological status of these species and threats affecting their continued existence. Our assessment is based upon the best available scientific and commercial data and the opinion of the species experts.

Chromolaena frustrata

Chromolaena frustrata (Family: Asteraceae) is a perennial herbaceous plant. Mature plants are 15 to 25 centimeters (cm) (5.9 to 9.8 inches (in)) tall with erect stems. The blue to lavender flowers are borne in heads, usually in clusters of two to six. Flowers are produced mostly in the fall, though sometimes year round (Nesom 2006, pp. 544–545).

Taxonomy

Chromolaena frustrata was first reported by Chapman, from the Florida Keys in 1886, naming it *Eupatorium heteroclinium* (Chapman 1889, p. 626). Synonyms include *Eupatorium frustratum* B.L. Robinson and *Osmia frustrata* (B.L. Robinson) Small.

Climate

The climate of south Florida where *Chromolaena frustrata* occurs is classified as tropical savanna and is characterized by distinct wet and dry seasons, a monthly mean temperature above 18 degrees Celsius (°C) (64.4 degrees Fahrenheit (°F)) in every month of the year, and annual rainfall averaging 75 to 150 cm (30 to 60 in) (Gabler *et al.* 1994, p. 211).

Habitat

Chromolaena frustrata grows in open canopy habitats, including coastal berms and coastal rock barrens, and in semi-open to closed canopy habitats, including buttonwood forests, coastal hardwood hammocks, and rockland hammocks. *C. frustrata* is often found in the shade of associated canopy and subcanopy plant species; these canopies buffer *C. frustrata* from full exposure to the sun (Bradley and Gann 1999, p. 37).

Detailed descriptions of coastal berm, coastal rock barren, rockland hammock, and buttonwood forest are presented in the proposed listing rule for *Chromolaena frustrata, Consolea corallicola,* and *Harrisia aboriginum* (77 FR 61836; October 11, 2012). Peer reviewers provided new information identifying coastal hardwood hammock as the community type supporting *Chromolaena frustrata* in ENP and identified associated species found in buttonwood forest in ENP. We include a full description of the coastal hardwood hammock and a revised description of the buttonwood forest communities below.

Coastal Hardwood Hammock

Coastal hardwood hammock that supports *Chromolaena frustrata* in Everglades National Park is a species-rich, tropical hardwood forest. Though similar in most characteristics, coastal hardwood hammock develops on a substrate consisting of elevated marl ridges with a very thin layer of organic layer (Sadle pers. comm. 2012a). Marl is an unconsolidated sedimentary rock or soil consisting of clay and lime. The plant species composition of coastal hardwood hammocks also differs somewhat from that of rockland hammock. Typical tree and shrub species include *Capparis flexuosa* (bayleaf capertree), *Coccoloba diversifolia* (pigeon plum), *Piscidia piscipula* (Jamaican dogwood), *Sideroxylon foetidissimum* (false mastic), *Eugenia foetida* (Spanish stopper), *Swietenia mahagoni* (West Indies mahogany), *Ficus aurea* (strangler fig), *Sabal palmetto* (cabbage palm), *Eugenia axillaris* (white stopper), *Zanthoxylum fagara* (wild lime), *Sideroxylon celastrinum* (saffron plum), and *Colubrina arborescens* (greenheart) (Rutchey *et al.* 2006, p. 21). Herbaceous species that occur in coastal hardwood forest include *Acanthocereus tetragonus* (triangle cactus), *Alternanthera flavescens* (yellow joyweed), *Batis maritime* (turtleweed), *Borrichia arborescens* (seaside oxeye), *Borrichia frutescens* (bushy seaside oxeye), *Caesalpinia bonduc* (grey nicker), *Capsicum annuum* (bird pepper), *Galactia striata* (Florida hammock milkpea), *Heliotropium angiospermum* (scorpion's tail), *Passiflora suberosa* (corkystem passionflower), *Rivina humilis* (pigeonberry), *Salicornia perennis* (perennial glasswort), *Sesuvium portulacastrum* (seapurslane), and *Suaeda linearis* (sea blite). Ground cover is often limited in closed canopy areas and abundant in areas where canopy disturbance has occurred or where this community intergrades with buttonwood forest (Sadle 2012a, pers. comm.).

The sparsely vegetated edges or interior portions of rockland and coastal hardwood hammock where the canopy is open are the areas that have light levels sufficient to support *Chromolaena frustrata.* However, the dynamic nature of the habitat means that areas not currently open may become open in the future as a result of canopy disruption from hurricanes, while areas currently open may develop more dense canopy over time, eventually rendering that portion of the hammock unsuitable for *C. frustrata.*

Buttonwood Forest

Forests dominated by buttonwood often exist in upper tidal areas, especially where mangrove swamp transitions to rockland or coastal hardwood hammock. These buttonwood forests have canopy dominated by *Conocarpus erectus* (button mangrove) and often have an understory dominated by *Borrichia frutescens, Lycium carolinianum* (Christmasberry), and *Limonium carolinianum* (sea lavender) (Florida Natural Areas Inventory (FNAI) 2010d, p. 4). In ENP, the species most frequently observed in association with *Chromolaena frustrata* are *Capparis flexuosa, Borrichia frutescens, Alternanthera flavescens, Rivina humilis, Sideroxylon celastrinum, Heliotropium angiospermum, Eugenia foetida, Batis maritima, Acanthocereus tetragonus,* and *Sesuvium portulacastrum* (Sadle 2012a, pers. comm.).

Temperature, salinity, tidal fluctuation, substrate, and wave energy influence the size and extent of buttonwood forests (FNAI 2010e, p. 3). Buttonwood forests often grade into salt marsh, coastal berm, rockland hammock, coastal hardwood hammock, and coastal rock barren (FNAI 2010d, p. 5).

Historical Range

Chromolaena frustrata was historically known from Monroe County, both on the Florida mainland and the Florida Keys, and in Miami-Dade County along Florida Bay (Bradley and Gann 1999, p. 36). The species was observed historically on Big Pine Key, Boca Grande Key, Fiesta Key, Key Largo,

Key West, Knight's Key, Lignumvitae Key, Long Key, Upper Matecumbe Key, and Lower Matecumbe Key (Bradley and Gann 1999, p. 36; Bradley and Gann 2004, pp. 4–7).

Current Range

In Everglades National Park, 11 *Chromolaena frustrata* populations supporting approximately 1,600 to 2,600 plants occur in buttonwood forests and coastal hardwood hammocks from the Coastal Prairie Trail near the southern tip of Cape Sable to Madeira Bay (Sadle 2007 and 2012b, pers. comm.).

In the Florida Keys, *Chromolaena frustrata* is now only known from Upper Matecumbe Key, Lower Matecumbe Key, Lignumvitae Key, Long Key, Big Munson Island, and Boca Grande Key (Bradley and Gann 2004, pp. 3–4). It no longer exists on Key Largo, Big Pine Key, Fiesta Key, Knight's Key, or Key West (Bradley and Gann 2004, pp. 4–6). Populations of *C. frustrata* are identified in table 1.

TABLE 1—POPULATIONS OF CHROMOLAENA FRUSTRATA

Population	Ownership	Numbers of plants	Habitat
Everglades National Park—Flamingo District.	Federal—National Park Service ...	1,634–2,633 (Sadle 2012b, pers. comm.).	buttonwood forest, coastal hardwood hammock.
Upper Matecumbe Key—Choate Tract.	State—Florida Department of Environmental Protection.	18 (Bradley and Gann 2004, pp. 3–6).	coastal rock barren, rockland hammock.
Lower Matecumbe Key—Klopp Tract.	State—Florida Department of Environmental Protection.	15 (Duquesnel 2012, pers. comm.).	coastal rock barren, rockland hammock.
Lignumvitae Key	State—Florida Department of Environmental Protection.	81 (Bradley and Gann 2004, pp. 3–6).	rockland hammock.
Long Key State Park	State—Florida Department of Environmental Protection.	200 (Bradley and Gann 2004, pp. 3–6).	coastal rock barren.
Long Key—North Layton Hammock.	State—Florida Department of Environmental Protection—and Private.	162 (Bradley and Gann 2004, pp. 3–6).	coastal rock barren, rockland hammock.
Big Munson Island	Private	4,500 (Bradley and Gann 2004, pp. 3–6).	rockland hammock.
Key West National Wildlife Refuge—Boca Grande Key.	Federal—Fish and Wildlife Service.	25 (Bradley and Gann 2004, pp. 3–6).	rockland hammock.
Key Largo	unknown	0 (Bradley and Gann 2004, pp. 3–6).	unknown.
Big Pine Key	unknown	0 (Bradley and Gann 2004, pp. 3–6).	unknown.
Fiesta Key	unknown	0 (Bradley and Gann 2004, pp. 3–6).	unknown.
Knight's Key	unknown	0 (Bradley and Gann 2004, pp. 3–6).	unknown.
Key West	unknown	0 (Bradley and Gann 2004, pp. 3–6).	unknown.

Reproductive Biology and Genetics

The reproductive biology and genetics of *Chromolaena frustrata* have received little study. Fresh *C. frustrata* seeds show a germination rate of 65 percent, but germination rates decrease to 27 percent after the seeds are subjected to freezing, suggesting that long-term seed storage may present difficulties (Kennedy *et al.* 2012, pp. 40, 50–51). While there have been no studies on the reproductive biology of *C. frustrata,* we can draw some generalizations from other species of *Chromolaena,* which reproduce sexually. New plants originate from seeds. Pollinators are likely to be generalists, such as butterflies, bees, flies, and beetles. Seed dispersal is largely by wind (Lakshmi *et al.* 2011, p. 1).

Population Demographics

Chromolaena frustrata is relatively a short-lived plant; therefore it must successfully reproduce more often than a long-lived species to maintain populations. *C. frustrata* populations are demographically unstable, experiencing sudden steep declines due to the effects of hurricanes and storm surges. However, the species appears to be able to rebound at affected sites within a few years (Bradley 2009, pers. comm.). The large population observed at Big Munson Island in 2003 likely resulted from thinning of the rockland hammock canopy caused by Hurricane Georges in 1998 (Bradley and Gann 2004, p. 4). Populations that are subject to wide demographic fluctuations are generally more vulnerable to random extinction events and negative consequences arising from small populations, such as genetic bottlenecks (see discussion below under Factor E.

Consolea corallicola

Consolea corallicola (Family: Cactaceae) is a tree-like cactus; mature plants grow 2 meters (m) (6 feet (ft)) tall with an erect main trunk, which is elliptical or oval in cross section and armed with spines. The flowers are bright red and 1.3 to 1.9 cm (0.50 to 0.75 in) wide, and the fruits are yellow, egg-shaped, and 2.5 to 5.1 cm (1 to 2 in) long (Small 1930, pp. 25–26; Anderson 2001, pp. 170–171).

Taxonomy

John Kunkel Small discovered and described *Consolea corallicola* in 1930 (Small 1930, pp. 25–26). While some authors still place this species in the genus *Opuntia* (Wunderlin and Hansen 2013b, no page number; ITIS 2013b, no page number), genetic studies by Gordon and Kubisiak (1998, p. 209) confirmed that the Florida plants are a genetically distinct species. Recent taxonomic treatments accept the genus *Consolea* and apply the name *C. corallicola* to the Florida species (Areces-Mallea 1996, pp. 224–226; Anderson 2001, pp. 170–171; Parfitt and Gibson 2004, pp. 92–94). The Family Cactaceae (cactus) has been the subject of many revisions over the past century, and we expect this trend will continue as molecular (genetic) methods are used to re-examine the relationships within the family. Synonyms include *Opuntia corallicola* (Small) Werdermann (Parfitt and Gibson 2004, p. 94).

Climate

The climate of south Florida where *Consolea corallicola* occurs is classified as tropical savanna, as described above for *Chromolaena frustrata.*

Habitat

Consolea corallicola occurs in rockland hammocks (Small 1930, pp. 25–26; Benson 1982, p. 531); coastal berm, and buttonwood forests (Bradley and Gann 1999, p. 77; Gann *et al.* 2002, p. 480; Higgins 2007, pers. comm.). *Consolea corallicola* occurs on sandy soils and limestone rockland soils with little organic matter (Small 1930, pp. 25–26) and seems to prefer areas where canopy cover and sun exposure are moderate (Grahl and Bradley 2005, p. 4). Detailed descriptions of coastal berm, rockland hammock, and buttonwood forest are presented in the proposed listing rule for *Chromolaena frustrata, Consolea corallicola,* and *Harrisia aboriginum* (October 11, 2012; 77 FR 61836).

Historical Range

Consolea corallicola was known historically from three islands of the Florida Keys in Monroe County: Key Largo, Big Pine Key, and Little Torch Key (Small 1930, pp. 25–26), and from Swan Key, a small island in Biscayne Bay in Miami-Dade County (Bradley and Woodmansee 2002, p. 810).

Current Range

The current range of *Consolea corallicola* includes two naturally occurring populations, one on Swan Key in Biscayne National Park (BNP), Miami-Dade County, and one at the Nature Conservancy's (TNC) Torchwood Hammock Preserve on Little Torch Key, a small island in the Florida Keys, Monroe County (Bradley and Gann 1999, p. 77; Bradley and Woodmansee 2002, p. 810). These naturally occurring populations account for fewer than 1,000 plants (see table 2).

Experimental plantings of *Consolea corallicola* were conducted at several sites on State and Federal conservation lands in the Florida Keys from 1996 to 2012. These reintroductions have been largely unsuccessful in establishing self-sustaining populations at these sites because most plants succumbed to damage or disease caused by the *Cactoblastis* moth (*Cactoblastis cactorum* (Lepidoptera: Pyralidae)). The plantings were supported by the Florida Forest Service, Conservation and Management program. Two hundred and forty cacti were planted at six different sites in the lower Florida Keys in 2000, but by 2013, only 10 and 11 plants remained at the Little Torch Key, and the Upper Sugarloaf Key sites, respectively. No plants survived on Big Pine Key, Cudjoe Key, No Name Key, or Ramrod Key. Ninety-six cacti were planted at Little Torch Key in 1996, but all died within 12 years. One-hundred and eighty cacti were planted at Saddlebunch Key in 1998, but only four were alive by 2013. As of 2013, plants survive at four reintroduction sites on State-owned lands—Dagny Johnson Key Largo Hammocks State Botanical Park, Dove Creek Hammock, Saddlebunch Key, and Upper Sugarloaf Key (Stiling 2007, p. 2; Stiling 2009, pers. comm.; Stiling 2010, pp. 190, 193–194; Stiling 2013, p. 2; Stiling 2013, pers. comm.; Duquesnel 2008, 2009, 2011a, 2011b, pers. comm.). These sites together represent fewer than 50 plants that survived the reintroduction trials. A reintroduction consisting of 300 small plants was installed in August 2012, at Dove Creek Hammock on Key Largo (Stiling 2013, p. 2). It is too early to judge the success of this effort. Populations of *Consolea corallicola* are provided in table 2 and are discussed below.

TABLE 2—POPULATIONS OF *Consolea corallicola*

Population	Ownership	Number of plants	Habitat	Trend
Swan Key, Biscayne National Park.	Federal—National Park Service.	600 (McDonough 2010a, pers. comm.).	rockland hammock	Stable.
Little Torch Hammock Preserve, Little Torch Key.	Private—The Nature Conservancy.	9 to 11 adults, 100s of juveniles (Gun 2012, pers. comm.).	rockland hammock, rockland hammock-buttonwood forest ecotone.	Declining.
Key Largo	unknown	0 (Bradley and Gann 1999, p. 77).	unknown	Extirpated.
Big Pine Key	unknown	0 (Bradley and Gann 1999, p. 77).	unknown	Extirpated.
Dagny Johnson Key Largo Hammock State Botanical Park (reintroduced).	State—Florida Department of Environmental Protection.	20 to 40 juveniles (Duquesnel 2013, pers. comm.).	buttonwood forest-saltmarsh ecotone, coastal rock barren.	Declining.
Upper Sugarloaf Key (reintroduced).	State—Florida Fish and Wildlife Conservation Commission.	11 juveniles (Stiling pers. comm. 2013, p. 1).	unknown	Declining.
Dove Creek Hammock—Key Largo (reintroduced).	State—Florida Fish and Wildlife Conservation Commission.	238 juveniles (Stiling pers. comm. 2013, p. 1).	buttonwood forest, rockland hammock.	Recent reintroduction.
Saddlebunch Key (reintroduced).	State—Florida Fish and Wildlife Conservation Commission.	4 juveniles (Stiling pers. comm. 2013, p. 1).	unknown	Declining.

All of the attempted reintroductions of *Consolea corallicola* have experienced high mortality (50 to 100 percent) due to *Cactoblastis* moth predation and crown rot (Stiling 2010, pp. 2, 194–195). Significantly, no individuals have reached the size of wild adult plants over the course of 13 years. Meanwhile, plants cultivated at Key West Botanical Garden have grown to 3 m (9.8 ft) tall in just 6 years; leading Stiling (2010, pp. 2, 193–194; pers. comm. 2012) to conclude that conditions at wild sites are no longer conducive to producing large adult plants.

Harrisia aboriginum

Harrisia aboriginum (Family: Cactaceae) is a sprawling cactus, usually with multiple stems arising from a single base. The stems are erect, slender, and cylindrical. They possess 9 to 11 longitudinal ribs, and may reach 6 m (20 ft) in height. Spines are 1.0 cm (0.4 in)

long and originate in clusters of 7 to 9 spines, with up to 20 spines in a cluster at the base of the stem. Flowers are funnel-shaped, white, up to 18 cm (7.1 in) long; have a slight scent; and are nocturnal, lasting only one night. The bracts on the outside of the flower has sparse white hairs. Fruits are yellow, round in shape, and 6.1 to 7.6 cm (2.4 to 3.0 in) in diameter (Britton and Rose 1920, p. 154; Anderson 2001, p. 370; Parfitt and Gibson 2004, p. 153; Franck 2012, pp. 121–124; Franck 2012, pers. comm.).

We are not aware of any studies on the pollination biology of *Harrisia aboriginum.* Insect visitors recorded on other species of *Harrisia* include hawk moths (Nitidulidae), stingless bees (Meliponidae), and several types of beetles. *Harrisia* fruits are sweet and fleshy, suggesting that seed dispersal by birds may be important (Franck 2012, p. 107).

Taxonomy

Harrisia aboriginum was described by John Kunkel Small, after he discovered it in Manatee County in 1919 (Small in Britton and Rose 1920, p. 154). The most recent revision of the genus *Harrisia* supports *H. aboriginum* as a morphologically and genetically distinct species endemic to the west coast of Florida (Franck 2012, pp. 96, 113). Synonyms include *Cereus aboriginum* (Small ex Britton and Rose) Little, *C. gracilis* var. *aboriginum* (Small ex Britton and Rose) L. D. Benson, *Harrisia gracilis* (Mill.) Britton var. *aboriginum* (Small ex Britton and Rose) D.B. Ward, and an illegitimate name: *Harrisia donae-antoniae* Hooten (Parfitt and Gibson 2004, p. 153).

Climate

The climate of south Florida where *Harrisia aboriginum* occurs is classified as tropical savanna, as described above for *Chromolaena frustrata.*

Habitat

Harrisia aboriginum occurs in coastal berm, coastal strand, coastal grassland, and maritime hammock. It also occurs on shell mounds with a calcareous shell substrate (Bradley *et al.* 2004, pp. 4, 14). Detailed descriptions of these habitats are presented in the proposed listing rule for *Chromolaena frustrata, Consolea corallicola,* and *Harrisia aboriginum* (October 11, 2012; 77 FR 61836).

Historical Range

Harrisia aboriginum was known historically from coastal areas of southwest Florida along the Gulf coast in Manatee, Charlotte, Sarasota, and Lee Counties. The species was documented on six keys along approximately 125 km (78 mi) of Gulf of Mexico coastline. Populations reported for Delnor-Wiggins Pass State Park, San Marco Island, Fort Pierce, and ENP are considered unsubstantiated (Bradley *et al.* 2004, pp. 5–6).

Current Range

Harrisia aboriginum was extirpated sometime in the past in the northern extent of its historical range at Terra Ceia in Manatee County (Morris and Miller 1981, p. 2; Bradley *et al.* 2004, pp. 3, 8–9). Besides a few anecdotal accounts, population trends were unknown prior to 2004. A 1981 status survey reported population sizes for five occurrences (Morris and Miller 1981, p. 1–11). All of these populations declined from 1981 to 2004, when a status survey confirmed 10 extant populations along a 100-km (62-mile) stretch of coast, and reported one population extirpated at Terra Ceia (Bradley *et al.* 2004, p. 8). In 2007, eight of these sites were surveyed again, at which time three populations had declined from 2004 levels (Woodmansee *et al.* 2007, p. 87). A population on Cayo Costa has been extirpated since 2007 (Nielsen 2009, pers. comm.). Two of the ten surveyed in 2004 are now considered two populations by the Service because they are spatially separate and have different landowners. A new population was recorded at Lemon Bay in 2012 (Bender 2011, pp. 9–12). Currently 12 out of 14 sites support extant populations where the species was recorded historically. Plants occur in seven public and private conservation areas, as well as four County parcels not managed for conservation and at least three unprotected private parcels. In total, the species was represented by an estimated 300 to 500 individuals in 2007, when population sizes were last estimated (Woodmansee *et al.* 2007, p. 87). Population declines are discussed further under Factor A. Populations of *Harrisia aboriginum* are provided in table 3.

TABLE 3—POPULATIONS OF *Harrisia aboriginum*

Population	Ownership	Number of plants	Habitat	Trend
Terra Ceia Island, Madera Bickel Mound State Park.	State—Florida Department of Environmental Protection.	0 (Morris and Miller 1981, p. 2; Bradley *et al.* 2004, p. 4).	unknown	Extirpated.
Longboat Key—Water Club Preserve.	Private conservation	226 (Morris and Miller, 1981, p. 5; Bradley *et al.* 2004, p. 10); 5 (Woodmansee *et al.* 2007, p. 87).	maritime hammock	Declining.
Historic Spanish Point	Private conservation	7 (Morris and Miller 1981, p. 3); 2 (Bradley *et al.* 2004, p. 13); 5 (Woodmansee *et al.* 2007, p. 87) (new rooted fragments broken in hurricane).	shell mound	Declining.
Manasota Beach Park	Sarasota County	116 (Morris and Miller, 1981, p. 9); 50 to 75 (Woodmansee *et al.* 2007, p. 87).	coastal strand, coastal berm	Declining.
Lemon Bay Preserve	Sarasota County	3 (Bender 2011, pp. 9–12)	spoil mound	Unknown.
Manasota Key	Private	24 (Morris and Miller 1981, pp. 7, 8); 13 (Woodmansee *et al.* 2007, p. 87).	coastal strand, coastal berm, maritime hammock.	Declining.
Charlotte Harbor State Park	State—Florida Department of Environmental Protection.	39 (Bradley *et al.* 2004, pp. 20–21);	coastal berm, shell mound	Declining.

TABLE 3—POPULATIONS OF *Harrisia Aboriginum*—Continued

Population	Ownership	Number of plants	Habitat	Trend
Kitchen Key	Private and Charlotte County	27 (Woodmansee *et al.* 2007, p. 87). 21 (Morris and Miller 1981, p. 11); 2 to 10 (Bradley *et al.* 2004, pp. 10–37).	coastal berm	Declining.
Gasparilla Island Conservation and Improvement Association, Tract A.	Private Conservation	1 (Bradley *et al.* 2004, pp. 10–37).	coastal berm	Unknown.
Gasparilla Island Mosquito Control Baseyard.	Lee County	1 (Woodmansee *et al.* 2007, p. 87).	spoil mound	Stable.
Cayo Costa State Park	Lee County	0 (Nielsen 2009, pers. comm.)	coastal berm	Extirpated.
Cayo Pelau Preserve	Lee County	7 (Bradley *et al.* 2004, p. 28); (Woodmansee *et al.* 2007, p. 87).	coastal berm, shell mound	Declining.
Bocilla Preserve	Lee County	300 to 400 (Woodmansee *et al.* 2007, p. 87).	coastal berm	Stable.
Buck Key—J. 'Ding' Darling National Wildlife Refuge.	Federal—Fish and Wildlife Service.	100 to 200 (Bradley *et al.* 2004, pp. 10–37).	coastal berm	Stable.

Reproductive Biology and Genetics

There has been little research into the reproductive biology of *Harrisia aboriginum*. Flowers are produced May through September. Ripe fruits have been observed from June through October. Genetic diversity within and between populations of *H. aboriginum* has not been assessed. *Harrisia aboriginum* seeds stored for 2.5 years germinated at a rate of 84 percent and 92 percent in two separate trials, suggesting that the species can maintain a soil seed bank (Maschinski 2012, pers. comm). Seeds capable of establishing persistent seed banks are reported for *H. fragrans,* a closely related endangered species from the east coast of Florida (Goodman *et al.* 2012a, p. 1).

Summary of Factors Affecting the Species

Section 4 of the Act and its implementing regulations (50 CFR 424) set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) of the Act: (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. Listing actions may be warranted based on any of the above threat factors, singly or in combination. Each of these factors is discussed below.

Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Their Habitat or Range

Human Population Growth and Development

Destruction and modification of habitat are a threat to *Chromolaena frustrata, Consolea corallicola,* and *Harrisia aboriginum*. Terrestrial ecosystems of south Florida have been heavily impacted by humans, through widespread clearing for agricultural, residential, commercial, and infrastructure development. Extensive areas of rockland hammock, pine rockland, and other ecosystems have been lost (Solecki 2001, p. 350; Hodges and Bradley 2006, p. 6). Because of their proximity to the beach and relatively higher elevations, coastal hammocks, strands, and berms have been heavily impacted by residential and tourism development. As a result, only isolated fragments of these habitats remain (Bradley *et al.* 2004, pp. 3–4). Loss and modification of coastal habitat due to development is expected to continue and increase in the coming decades in Florida (Zwick and Carr 2006, p. 13). Species populations are more secure on public lands than on private lands, but still face the threats of habitat loss and modification through development of public facilities such as new buildings, parking lots, and other associated facilities and through recreational opportunities to support visitor services. Impacts to each of the species are discussed below.

Chromolaena frustrata

Habitat destruction and modification resulting from development are considered a major threat to *Chromolaena frustrata* throughout the species' range (Gann *et al.* 2002, p. 387). The populations on Fiesta Key, Knights Key, Key Largo, and Key West were lost due to development. Fiesta Key is completely developed as a Kampgrounds of America (KOA) campground and is devoid of native plant communities. Knights Key is almost completely developed and has no remaining suitable habitat (Bradley and Gann 2004, p. 5). Key Largo has undergone extensive disturbance and development. Although suitable coastal berm and rockland hammock habitat are still located in State and Federal conservation sites on Key Largo (Bradley and Gann 2004, p. 8), despite extensive surveys of the island *C. frustrata* has not been located (Bradley and Gann 2004, p. 5).

Two *Chromolaena frustrata* populations, including the largest population (Big Munson Island), are located on private lands (the population at Long Key Layton Hammock only partially so), which are vulnerable to further development (Bradley and Gann 2004, p. 7; Table 1). The Statewide population of *C. frustrata* was estimated at fewer than 5,000 plants in 2004, with 4,500 plants (90 percent) located at a single, privately owned, unprotected site (Bradley and Gann 2004, p. 7). The Service has no recent survey data for Big Munson Island, and the status of this population is unknown. If the uncharacteristically large population size in 2003 resulted from hurricane disruption of the tree canopy as suggested by Bradley and Gann (2004, p. 7), subsequent regrowth of the canopy in the intervening 10 years has likely reduced the size of the *C. frustrata* population. Big Munson Island, is

owned by the Boy Scouts of America (BSA) and is utilized as a Boy Scout Camp. Scout campsites have been established along the coastal berm (Hodges and Bradley 2006, p. 10), and recreation development (campsites) and possibly recreational activities (trampling) potentially remain a threat to *C. frustrata* at this site. At this time, we do not believe that this site faces threats from residential or commercial development. However, if development pressure and BSA recreational usage increase, this largest population may face threats from habitat loss and modification.

A portion of the population on Long Key at Layton Hammock is vulnerable to commercial or residential development (Bradley and Gann 2004, pp. 3–20). In addition, development remains a threat to any suitable rock barren or rockland hammock habitat on private lands within the species' historic range. Overall, the human population in Monroe County is expected to increase from 79,589 to more than 92,287 people by 2060 (Zwick and Carr 2006, p. 21). All vacant land in the Florida Keys is projected to be developed by then, including lands not currently accessible by automobile (Zwick and Carr 2006, p. 14).

Chromolaena frustrata populations in conservation areas have been impacted and may continue to be impacted by development with increased public use. Mechanical disturbances such as trail construction in coastal berms may have exacerbated nonnative plant invasions (see *Factor E* discussion, below) (Bradley and Gann 2004, p. 4). *C. frustrata* has been impacted by park development on State lands, and habitat modifications such as mowing and trail maintenance remain a threat (Gann *et al.* 2002, p. 391; Bradley and Gann 2004, p. 6; Hodges and Bradley 2006, p. 30).

Consolea corallicola

Destruction and modification of habitat from development throughout the species' range continue to be a threat to *Consolea corallicola.* Unoccupied suitable habitat throughout the species' former range is under intense development pressure. Development and road building were the causes of this species' original extirpation on Big Pine Key (Bradley and Gann 1999, p. 77; Bradley and Woodmansee 2002, p. 810). Residential and commercial development and roadway construction continue to occur throughout Miami-Dade County and the Florida Keys. Both remaining wild populations are secure from habitat destruction because they are located within private and Federal conservation areas. However, at one State-owned site where a reintroduction was attempted, all of the plants were accidentally destroyed by the expansion of a trail.

Harrisia aboriginum

Destruction and modification of habitat from development throughout the species' range continue to be a threat to *Harrisia aboriginum.* The coastal habitats of this species have been heavily impacted by development over the past 50 years (Morris and Miller 1981, pp. 1–11; Bradley *et al.* 2004, p. 3). Shell mounds created by Native Americans were among the first areas colonized by early Western Europeans because of their higher elevation and were later extensively utilized for construction material, in some cases resulting in the complete destruction of the habitat. Coastal hammocks, strands, and berms, because of their proximity to the beach and higher elevations, were also used for coastal residential construction. Only isolated fragments of suitable habitat for *H. aboriginum* remain (Bradley *et al.* 2004, p. 3).

The species was extirpated from the northern extent of its range in Manatee County by the 1970s, due to urbanization (Morris and Miller 1981, p. 2; Austin 1984, p. 2). Despite the recent downturn in residential construction, coastal development is ongoing in the habitat of *H. aboriginum.* Populations on private land or non-conservation public land are most vulnerable to habitat loss. Threats include residential development, road widening, and landscape maintenance (Morris and Miller 1981, pp. 2–11; Bradley *et al.* 2004, pp. 36–37). Suitable habitat within the species' range was recently destroyed by encroachment from a private development onto State land (FNAI 2011, pp. 207–208). The threats of habitat loss, modification, and degradation are expected to increase with increased human population, development pressure, and infrastructure needs. Sarasota, Charlotte, and Lee Counties, where this plant currently occurs, are expected to build out before 2060 (Zwick and Carr 2006, p. 13), placing further pressure on remaining natural areas.

Populations located on public lands are better protected than those on private land, but still may face the threat of habitat loss through development of park facilities such as new buildings, parking lots, and trails (Morris and Miller 1981, p. 4). Construction of new bathrooms in 2011 at a site owned by Sarasota County eliminated a portion of the coastal berm habitat, and parking lot renovations are planned at a second County site where *Harrisia aboriginum* occurs (Bender 2011, p. 11). Not all land managers are aware of the presence of *H. aboriginum* at sites under their jurisdiction; for example, managers at one site in Charlotte County were unaware of *H. aboriginum* on county lands (Bender 2011, p. 13). Nevertheless, the population has persisted, probably due to its anonymity and difficulty of access. The lack of management, however, has allowed a heavy infestation of nonnative plants, which have modified the habitat and are shading out *H. aboriginum* (Bender 2011, p. 13). Portions of at least two populations located on public land also extend onto adjacent unprotected, private lands (Bradley *et al.* 2004, pp. 16, 36).

Populations on privately owned conservation sites may have inadequate protection from habitat loss or modification as well. One such site that was declared a ''Preserve'' in 1992 as part of a residential community has no formal protection; it was partially bulldozed and landscaped with native species within the past 10 years (Bradley *et al.* 2004, p. 10). The number of plants observed at this ''Preserve'' site decreased from 226 plants in 1981 (Morris and Miller 1981, p. 5), to 5 plants in 2006 (Woodmansee *et al.* 2007, p. 87). Another site is owned by a nonprofit organization and managed for historical preservation. The site is severely disturbed from a long history of human activity and is currently open to public visitation (Woodmansee *et al.* 2007, p. 103). This population has declined over the past 30 years from 21 stems comprising 7 plants in 1981 (Morris and Miller 1981, p. 4), to only 3 plants in 2003 (Bradley *et al.* 2004, p. 13). Development of the site for public visitation likely played a role in the decline (Morris and Miller 1981, p. 4).

Conservation Efforts to Reduce Destruction, Modification, or Curtailment of Habitat or Range

Land Acquisition

The Service; National Park Service (NPS); State of Florida; Manatee, Sarasota, Charlotte, Lee, Miami-Dade, and Monroe Counties; and several local governments own and manage conservation lands within the range of *Chromolaena frustrata, Consolea corallicola,* and *Harrisia aboriginum.* The Nature Conservancy purchased Torchwood Hammock Preserve on Little Torch Key in 1988, to protect what was at the time the only known remaining population of *Consolea corallicola.*

Management Plans

The comprehensive conservation plan (CCP) for the Lower Florida Keys National Wildlife Refuges (National Key Deer Refuge, Key West National Wildlife Refuge, and Great White Heron National Wildlife Refuge) and Crocodile Lake National Wildlife Refuge promote the enhancement of wildlife populations by maintaining and enhancing a diversity and abundance of habitats for native plants and animals, especially imperiled species that are only found in the Florida Keys. This CCP provides specifically for maintaining and expanding populations of candidate plant species including *Chromolaena frustrata* and *Consolea corallicola.*

Special use permits (SUPs) are also issued by the refuges as authorized by the National Wildlife Refuge System Administration Act (16 U.S.C. 668dd–668ee) as amended, and the Refuge Recreation Act (16 U.S.C. 460k–460k–4). The SUPs cover commercial activities (commercial activities such as guiding hunters, anglers, or other outdoor users; commercial filming; agriculture; and trapping); research and monitoring by students, universities, or other non-Service organizations; and general use (woodcutting, miscellaneous events (fishing tournaments, one-time events, other special events), education activity). The Service has no information concerning the issuance of SUPs that have implications for any of the three species.

Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Overutilization (collection by hobbyists, also known as poaching) is a major threat to *Consolea corallicola* (Gann *et al.* 2002, p. 440) and *Harrisia aboriginum* (Austin *et al.* 1980, p. 2; Morris and Miller 1981, pp. 1–11; Gann *et al.* 2002, p. 481; Bradley *et al.* 2004, p. 6; Bender 2011, p. 5). Cactus poaching is an international phenomenon. Cacti are frequently impacted at sites that are known and easily accessed by poachers (Anderson 2001, pp. 73–78). The rarity of *C. corallicola* and *H. aboriginum,* coupled with their showy flowers, make these cacti particularly desirable to collectors. Seeds of *H. aboriginum* and *H. fragrans* (the fragrant prickly-apple, a federally listed endangered cactus (listed as *Cereus eriophorus* var. *fragrans*) from Florida's east coast) are currently offered for sale by online plant distributors, demonstrating that a demand exists for these cacti from collectors. The severity of the threat of poaching is exacerbated by the fact that some populations of these cacti are limited to just a few individual plants. These smaller populations could easily be extirpated by a single poaching episode.

Consolea corallicola

Collecting by cactus hobbyists is suspected to have played a part in the extirpation of *Consolea corallicola* from Big Pine Key and Key Largo in the late 1970s, and poaching remains a major threat to this species (Gann *et al.* 2002, p. 481). Other species of *Consolea* are currently offered for sale by online plant distributors. Probable evidence of poaching activity was observed at a site in Monroe County on multiple occasions, and caused the death of one *C. corallicola* plant (Slapcinsky *et al.* 2006, p. 3). Although the remaining populations are somewhat protected due to their location on conservation lands, these plants remain vulnerable to illegal collection because the sites are remote and not patrolled regularly by enforcement personnel.

Collection for scientific and recovery purposes have so far relied on the harvesting of cuttings from plants growing in botanical garden and private collections. We expect that collection for the purposes of recovery will continue and ultimately be beneficial in augmenting and reintroducing *C. corallicola* at suitable sites. We have no evidence that collection for scientific or recovery purposes is a threat to the species at this time.

Harrisia aboriginum

Poaching of *Harrisia aboriginum* is a major threat (Morris and Miller 1981, pp. 1–11; Gann *et al.* 2002, p. 440; Bradley *et al.* 2004, p. 6). Damage and evidence of *H. aboriginum* poaching was reported by Morris and Miller (1981, pp. 1–11) at several sites. Evidence of poaching was recently observed at a site in Sarasota County that has high public visitation. At that site, there was evidence that cuttings had been removed from multiple *H. aboriginum* plants at numerous different times (Bender 2011, pp. 5–6).

Collection for scientific and recovery purposes have so far relied on the harvesting of cuttings from plants growing in botanical gardens and private collections. On the other hand, we expect that collection for the purposes of recovery will continue and ultimately be beneficial in augmenting and reintroducing *C. corallicola* at suitable sites. We have no evidence that collection for scientific or recovery purposes is a threat to *Harrisia aboriginum* or *Consolea corallicola* at this time. Finally, we are not aware of any nonregulatory actions that are being conducted to ameliorate overutilization for commercial, recreational, scientific, or educational purposes.

Chromolaena frustrata

We have no evidence suggesting that overutilization for commercial, recreational, scientific, or educational purposes is a threat to *Chromolaena frustrata.* Except for its rarity, the species does not possess any attributes that would make it desirable to collectors, such as showy foliage or flowers, and there are no known medicinal, culinary, or religious uses for this species.

Factor C. Disease or Predation

Chromolaena frustrata

On Big Munson Island, much of the *Chromolaena frustrata* population was observed to suffer from severe herbivory in 2004. No insects were observed on any plants, and the endangered Key deer (*Odocoileus virginianus clavium*) was the suspected culprit (Bradley and Gann 2004, p. 4). The significance of herbivory on *C. frustrata* population dynamics is unknown. No diseases have been reported for *C. frustrata.*

Consolea corallicola

A fungal pathogen, *Fusarium oxysporum,* can infect *Consolea corallicola,* causing crown rot, a disease in which plants rot near their base (Slapcinsky *et al.* 2006, p. 2; Stiling 2010, p. 191). Cacti in the Florida Keys populations that are affected by this disease have also tested positive for a fungus, *Phomopsis* sp. (Slapcinsky *et al.* 2006, p. 3). This disease was largely responsible for the high mortality rates in some reintroduced populations in the Florida Keys (Stiling 2010, p. 193). At present, crown rot does not appear to be affecting the population at BNP.

Predation by the moth *Cactoblastis cactorum* (Lepidoptera: Pyralidae) is considered a significant threat to *Consolea corallicola* (Stiling *et al.* 2000, pp. 2, 6; Gann *et al.* 2002, p. 481; Wright and Maschinski 2004, p. 4; Grahl and Bradley 2005, pp. 2, 7; Slapcinsky *et al.* 2006, pp. 2–4). Native to South America, *Cactoblastis cactorum* was introduced to Australia in 1925, as a biological control agent for nonnative species of *Opuntia.* Adult moths deposit eggs on the branches of host species. When these eggs hatch, larvae then burrow into the cacti and feed on the inner tissue of the plant's stems. The larvae then pupate, and the cycle repeats. *Cactoblastis cactorum* was extremely effective as a biological control agent, and credited with

reclaiming 6,474,970 ha (16,000,000 ac) of land infested with *Opuntia* species in Australia alone. The moth also has been an effective control agent for *Opuntia* species in Hawaii, India, and South Africa. It was introduced to a few Caribbean islands in the 1960s and 1970s, and rapidly spread throughout the Caribbean. The effectiveness of *C. cactorum* at controlling *Opuntia* populations is described as ''rapid and spectacular'' (Habeck and Bennett 1990, p. 1). The moth had spread to Florida by 1989, prompting FDACS to issue an alert that *C. cactorum,* along with another unidentified species of moth, had the potential to adversely impact *Opuntia* populations due to the high rate of *Opuntia* infestation and mortality, as demonstrated in other localities in the Caribbean and elsewhere (Habeck and Bennett 1990. p. 1). Among local cactus species in the Florida Keys, *C. corallicola* is a preferred host (Stiling 2010, p. 190). Between 1990 and 2009, the moth infested and damaged multiple *C. corallicola* plants in the Florida Keys' wild populations, killing one plant and damaging others (TNC 2011, p. 1). Fortunately, these infestations were detected very early and controlled before *C. cactorum* could kill multiple plants and fully spread throughout the population. Planted *C. corallicola* populations in the Florida Keys fared much worse; at one planting site, 90 individuals (50 percent of those planted) were killed by *C. cactorum* over a 4-year period (Stiling 2010, p. 193). To date, *C. cactorum* has not been observed in BNP (McDonough 2010a, pers. comm.). Even if the moth has not yet reached the BNP, it likely will, based on its rapid spread in the Caribbean and Florida. This threat has the potential to cause steep declines in populations of *Consolea corallicola* if they become infested. No satisfactory method of large-scale control is known at this time (Habeck *et al.* 2009, p. 2). Potential impacts to *C. corallicola* at the population level as a result of predation by *C. cactorum* are severe. As stated above, experts are certain of the potential for the moth to cause massive mortality in populations of *C. corallicola* if they become infested and the infestation is not caught early and aggressively controlled.

Predation by the Cuban garden snail (*Zachrysia provisoria*) has been observed at one *Consolea corallicola* reintroduction site (Duquesnel 2008, pers. comm.). The population-level impact of the Cuban garden snail is not known.

Harrisia aboriginum

An as yet unidentified pathogen can attack *Harrisia aboriginum* and cause stems to rot and die within about a week (Austin 1984, p. 2; Bradley 2005, pers. comm.). However, no signs of this disease were observed at several sites visited in 2011 (Bender 2011, p. 19).

Herbivory of flowers by iguanas (*Iguana* sp.) (Bradley *et al.* 2004, p. 30) and stems by gopher tortoises (G*opherus polyphemus*) (Woodmansee *et al.* 2007, p. 108) has been noted. Scale insects have been observed in some *H. aboriginum* populations, occasionally causing severe damage to plants (Bradley 2005, pers. comm.).

Overall, evidence indicates disease and predation are relatively minor stressors to *H. aboriginum* at present, but could become threats in the future if they become more prevalent in the cacti populations.

Conservation Efforts to Reduce Disease or Predation

Cactoblastis moth (*Cactoblastic cactorum*) monitoring and hand removal efforts are underway at BNP and Torchwood Hammock Preserve in an effort to protect *Consolea corallicola.* No satisfactory method of large-scale control for the *Cactoblastis* moth is known at this time. The USDA Agricultural Research Service's Center for Medical, Agricultural, and Veterinary Entomology in Tallahassee, Florida, is developing containment methods including the use of female sex pheromone wing traps and irradiation techniques to control the spread of the *Cactoblastis* moth. These techniques have not yet been approved for widespread use (USDA 2006, p. 9).

Factor D. The Inadequacy of Existing Regulatory Mechanisms

Under this factor, we examine whether existing regulatory mechanisms are inadequate to address the threats to the species discussed under the other factors. Section 4(b)(1)(A) of the 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. . . .'' In relation to Factor D, we interpret this language to require the Service to consider relevant Federal, State, and tribal laws, plans, regulations, and other such mechanisms that may minimize any of the threats we describe in threat analyses under the other four factors, or otherwise enhance conservation of the species. We give strongest weight to statutes and their implementing regulations and to management direction that stems from those laws and regulations. An example would be State governmental actions enforced under a State statute or constitution, or Federal action under statute.

State

Chromolaena frustrata, Consolea corallicola, and *Harrisia aboriginum* are listed on the Regulated Plant Index as endangered under chapter 5B–40, Florida Administrative Code. The Regulated Plant Index also includes all federally listed endangered and threatened plant species. Florida Statutes 581.185 sections (3)(a) and (b) prohibit any person from willfully destroying or harvesting any species listed as endangered or threatened on the Regulated Plant Index, or growing such a plant on the private land of another, or on any public land, without first obtaining the written permission of the landowner and a permit from the Florida Department of Plant Industry (DPI). The statute also requires that collection permits issued for species listed under the Federal Act must be consistent with Federal standards (i.e., only the Service can issue permits to collect plants on Federal lands). The statute further provides that any person willfully destroying or harvesting; transporting, carrying, or conveying on any public road or highway; or selling or offering for sale any plant listed in the Regulated Plant Index must have a permit from the State at all times when engaged in any such activities. However, despite these regulations, recent poaching is evident, and threats to the three species (particularly the two cacti) remain. Lack of implementation or compliance with existing regulations may be a result of funding, work priorities, or staffing.

In addition, subsections (8)(a) and (b) of the statute waive State regulation for certain classes of activities for all species on the Regulated Plant Index, including the clearing or removal of regulated plants for agricultural, forestry, mining, construction (residential, commercial, or infrastructure), and fire-control activities by a private landowner or his or her agent. However, section (10) of the statute provides for consultation similar to section 7 of the Federal Act for listed species by requiring the Florida Department of Transportation to notify the FDACS and the Endangered Plant Advisory Council of planned highway construction at the time bids are first advertised, to facilitate evaluation of the project for listed plants populations, and to ''provide for the appropriate disposal of such plants'' (i.e., transplanting). The Service has no

information concerning the State of Florida's implementation of the enforcement of these regulations. However, it is clear that illegal collection and vandalism of cacti are both occurring, despite these and other regulations that specifically prohibit these activities. Implementation or enforcement of these regulations has not reduced the threats to both *Consolea corallicola* and *Harrisia aboriginum,* as they continue to decline in numbers.

Shell mounds on State land, some of which support populations of *Harrisia aboriginum,* are protected as historical resources under Florida Statute 267.13, sections (1)(a) and (b). Despite these regulations, there is a long history of utilization and excavation of shell mounds by artifact hunters in Florida, causing erosion and opening areas for invasion by invasive plants (FNAI 2010i, p. 3).

The Florida Division of Forestry (FDOF) administers Florida's outdoor burning and forest fire laws. Florida Statute 590.08 prohibits any person to willfully or carelessly burn or cause to be burned, or to set fire to or cause fire to be set to, any forest, grass, woods, wildland, or marshes not owned or controlled by such person. Despite this regulation, unauthorized bonfires have been documented at sites supporting *Harrisia aboriginum* (Woodmansee *et al.* 2007, p. 108; Bender 2011, pp. 5–6).

Federal

NPS regulations at 36 CFR 2.1 prohibit visitors from harming or removing plants, listed or otherwise, from ENP or BNP. However, the regulation does not address actions taken by NPS that cause habitat loss or modification.

The Archaeological Resources Protection Act of 1979 (ARPA) (16 U.S.C. 470aa–470mm) protects archaeological sites, including shell mounds, on Federal lands. Shell mounds are known from the area of ENP where *Chromolaena frustrata* occurs; however, the Service has no specific information regarding illegally excavated or vandalized shell mounds at ENP.

The Service has no information concerning ENP's or BNP's implementation of the enforcement of these Federal authorities protecting the plants and their habitats from harm. Implementation or enforcement may not be adequate to reduce the threat to the two species in the future if the species continue to decline in numbers.

The National Wildlife Refuge System Improvement Act of 1997 and the Fish and Wildlife Service Manual (601 FW 3, 602 FW 3) require maintaining biological integrity and diversity, planning comprehensive conservation for each refuge, and setting standards to ensure that all uses of refuges are compatible with their purposes and the Refuge System's wildlife conservation mission. The comprehensive conservation plans (CCPs) address conservation of fish, wildlife, and plant resources and their related habitats, while providing opportunities for compatible wildlife-dependent recreation uses. An overriding consideration reflected in these plans is that fish and wildlife conservation has first priority in refuge management, and that public use be allowed and encouraged as long as it is compatible with, or does not detract from, the Refuge System mission and refuge purpose(s).

The CCP for the Lower Florida Keys National Wildlife Refuges (National Key Deer Refuge, Key West National Wildlife Refuge, and Great White Heron National Wildlife Refuge) and Crocodile Lake National Wildlife Refuge provides a description of the environment and priority resource issues that were considered in developing the objectives and strategies that guide management over the next 15 years. The CCP promotes the enhancement of wildlife populations by maintaining and enhancing a diversity and abundance of habitats for native plants and animals, especially imperiled species that are only found in the Florida Keys. The CCP also provides for obtaining baseline data and monitoring indicator species to detect changes in ecosystem diversity and integrity related to climate change. The Lower Key Refuges CCP management objective number 16 provides specifically for maintaining and expanding populations of candidate plant species including *Chromolaena frustrata* and *Consolea corallicola.*

Special use permits (SUPs) are also issued by the refuges as authorized by the National Wildlife Refuge System Administration Act (16 U.S. C. 668dd–668ee) as amended, and the Refuge Recreation Act (16 U.S. C. 460k–460k–4). The SUPs cover commercial activities (commercial activities such as guiding hunters, anglers, or other outdoor users; commercial filming; agriculture; and trapping); research and monitoring by students, universities, or other non-Service organizations; and general use (woodcutting, miscellaneous events (fishing tournaments, one-time events, other special events), education activity). The Service has no information concerning the issuance of SUPs for any of the three species.

Factor E. Other Natural or Manmade Factors Affecting Their Continued Existence

Wildfire

Wildfire, whether naturally ignited or caused by unauthorized burning, such as bonfires, is a threat to *Consolea corallicola* and *Harrisia aboriginum.* In general, these plants do not survive fires, making this a severe threat to remaining populations and occupied sites. At a site in Sarasota County, a large illegal bonfire pit is located within the habitat that supports one of the larger populations of *H. aboriginum.* The bonfires occur just a few yards from the plants (Bender 2011, pp. 5–6). At least one plant was killed by an escaped fire that affected part of this site in 2006 (Woodmansee *et al.* 2007, p. 108), and should another fire escape into occupied habitat in the future, it is reasonable to conclude this could result in the loss of individuals or extirpation of populations.

Nonnative Plant Species

Nonnative, invasive plant species are a threat to all three species (Morris and Miller 1981, pp. 1–11; Bradley *et al.* 2004, pp. 6, 25; Woodmansee *et al.* 2007, p. 91; Bradley and Gann 2004, p. 8; Bradley 2007, pers. comm.; Sadle 2010, pers. comm.; McDonough 2010b, pers. comm.). They compete with native plants for space, light, water, and nutrients, and they have caused population declines in all three species.

Schinus terebinthifolius (Brazilian pepper), a nonnative, invasive tree, occurs in all of the habitats of the three species. *Schinus terebinthifolius* forms dense thickets of tangled, woody stems that completely shade out and displace native vegetation (Loflin 1991, p. 19; Langeland and Craddock-Burks 1998, p. 54). *Schinus terebinthifolius* can dramatically change the structure of rockland hammocks, coastal berms, and shell mounds, making habitat conditions unsuitable for *Chromolaena frustrata, Consolea corallicola,* and *Harrisia aboriginum,* which prefer moderate to full sun exposure. For example, at more than one site, numerous *H. aboriginum* plants occurring in the shade of *S. terebinthifolius* were observed to have died (Bradley *et al.* 2004, p. 10; Bender 2011, pp. 5, 13). By the mid-1990s, *S. terebinthifolius* had spread dramatically and had become a dominant woody species at sites known to support *H. aboriginum* (Morris and Miller 1981, pp. 5, 10; Loflin 1991, p. 19; Herwitz *et al.* 1996, pp. 705–715; Bradley *et al.* 2004, p. 7). *Schinus terebinthifolius* is a threat to populations of *Chromolaena frustrata*

along the Coastal Prairie Trail in ENP (Sadle 2010, pers. comm.) and is invading the habitat of *Consolea corallicola* (McDonough 2010b, pers. comm.).

Colubrina asiatica (lather leaf), a nonnative shrub, has invaded large areas of coastal berm and coastal berm edges (Bradley and Gann 2004, p. 4). *Colubrina asiatica* also forms dense thickets and mats, and is of particular concern in coastal hammocks (Langeland and Craddock-Burks 1998, p. 122). *Colubrina asiatica* is invading large areas of hammocks within ENP along the edge of Florida Bay (Bradley and Gann 1999, p. 37). Populations of *Chromolaena frustrata* along the Coastal Prairie Trail and habitat within ENP face threats from *Colubrina asiatica* (Sadle, pers. comm. 2010). *Colubrina asiatica* is also present in BNP in areas supporting *Consolea corallicola* (McDonough 2010b, pers. comm.).

Casuarina equisetifolia (Australian pine) invades coastal berm and is a threat to suitable habitat at most sites that could support all three species (FNAI 2010a, p. 2). *Casuarina equisetifolia* forms dense stands that exclude all other species through dense shade and a thick layer of needles that contain substances that leach out and suppress the growth of other plants. Coastal strand habitat that once supported *Harrisia aboriginum* has experienced dramatic increases in *C. equisetifolia* over the past 30 years (Loflin 1991, p. 19; Herwitz *et al.* 1996, pp. 705–715).

Other invasive plant species that are a threat to *Chromolaena frustrata, Consolea corallicola,* and *Harrisia aboriginum* include *Scaevola taccada* (beach naupaka), *Neyraudia reynaudiana* (Burma reed), *Cupaniopsis anacardioides* (carrotwood), *Thespesia populnea* (Portia tree), *Manilkara zapota* (sapodilla), *Hibiscus tiliaceus* (hau), and *Hylocereus undatus* (night blooming cactus) (FNAI 2010f, p. 4; Bradley *et al.* 2004, p. 13; McDonough 2010b, pers. comm.).

Vandalism

Vandalism is a threat to *Consolea corallicola* and *Harrisia aboriginum,* and has caused population declines in both species. For *Consolea corallicola,* vandalism has been documented twice. In 1990, branches were cut off plants at one site, but instead of being taken (as would be the case for poaching), the cut stems were left at the base of plants. In 2003, vegetative recruits and pads were damaged by unauthorized removal of protective cages from plants (Slapcinsky *et al.* 2006, p. 3). At a Sarasota County site, the Service has documented numerous *H. aboriginum* plants that have been uprooted, trampled, and hacked with sharp implements. This population is impacted by people who use the coastal berm and hammock interface to engage in a variety of recreational (including unauthorized) activities as evidenced by a very large bonfire site and vast quantities of garbage, bottles, and discarded clothing (Bender 2011, p. 5).

Due to their historic significance and possible presence of artifacts, shell mounds are susceptible to vandalism by artifact hunters. Despite regulations that protect these sites on State lands (Florida Statute 267.13), there is a long history of artifact hunters conducting unauthorized excavation of shell mounds in Florida, including some mounds where *Harrisia aboriginum* has been found, causing erosion and opening areas for invasion by nonnative plants (FNAI 2010i, p. 3).

Recreation

Recreational activities may inadvertently impact some populations of *Chromolaena frustrata.* These activities may affect some individual plants in some populations but have not likely caused significant population declines in the species. Foot traffic and campsites at Big Munson Island may be a threat to *Chromolaena frustrata.* Recreation is a threat to some populations of *Harrisia aboriginum.* Coastal berms and dunes are impacted by recreational activities that cause trampling of plants, exacerbate erosion, and facilitate invasion by nonnative plants. As noted above, in 2011, numerous plants at a Sarasota County site were observed to be intentionally uprooted, hacked, and trampled, and there was a large amount of trash deposited nearby. At the same site, there is an ongoing problem with recreational bonfires in the coastal berm habitat just a few yards from *H. aboriginum* plants (Bradley 2004, p. 16; Woodmansee *et al.* 2007, p. 108; Bender 2011, pp. 5–6). One escaped bonfire has the potential to destroy this entire population.

Hurricanes, Storm Surge, and Extreme High Tide Events

Hurricanes, storm surge, and extreme high tide events are natural events that can pose a threat to all three species. Hurricanes and tropical storms can modify habitat (e.g., through storm surge) and have the potential to destroy entire populations. Climate change may lead to increased frequency and duration of severe storms (Golladay *et al.* 2004, p. 504; McLaughlin *et al.* 2002, p. 6074; Cook *et al.* 2004, p. 1015). All three species experienced these disturbances historically, but had the benefit of more abundant and contiguous habitat to buffer them from extirpations. With most of the historical habitat having been destroyed or modified, the few remaining populations of these species could face local extirpations due to stochastic events.

The Florida Keys were impacted by three hurricanes in 2005: Katrina on August 26th, Rita on September 20th, and Wilma on October 24th. Hurricane Wilma had the largest impact, with storm surges flooding much of the landmass of the Keys. The vegetation in many areas was top-killed due to salt water inundation (Hodges and Bradley 2006, p. 9).

Chromolaena frustrata

The ecology of coastal rock barrens is poorly understood. Periodic storm events may be responsible for maintaining the community (Bradley and Gann 1999, p. 37). There is some evidence that, over the long term, hurricanes can be beneficial to the species by opening up tree canopies allowing more light to penetrate, thereby creating the necessary conditions for growth (Woodmansee *et al.* 2007, p. 115). The large population of *Chromolaena frustrata* observed at Big Munson Island in 2004 suggests that this species may respond positively to occasional hurricanes or tropical storms that thin hammock canopies, providing more light (Bradley and Gann 2004, p. 8). Populations of *C. frustrata* in ENP initially appeared to have been eliminated by storm surge during Hurricane Wilma in 2005 (Bradley 2007, pers. comm.; Duquesnel 2005, pers. comm.), and habitat was significantly altered (Maschinski 2007, pers. comm.). All communities where *C. frustrata* was found showed impacts from the 2005 hurricane season, primarily thinning of the canopy and numerous blow downs (Sadle 2007, pers. comm.). However, it appears that the species has returned to some locations (Bradley 2009, pers. comm.). The population of *C. frustrata* in ENP may have benefited from hurricanes; surveys at some sites in ENP in 2007 detected more plants than ever previously reported (Sadle 2007, pers. comm.). However, if nonnative, invasive plants are present at sites when a storm hits, they may respond similarly, becoming dominant and not allowing for a pulse in the population of native species. This may radically alter the long-term population dynamics of *C. frustrata,* keeping population sizes small or declining, until they eventually disappear (Bradley and Gann 2004, p. 8).

Consolea corallicola

Suitable habitat such as coastal rock barrens on Key Largo have been inundated with saltwater during spring and fall high tides over the past 5 to 10 years; these extreme events killed planted *Consolea corallicola* at one location (Duquesnel 2011a, pers. comm.). In the future, sea level rise could cause increases in flooding frequency or duration, prolonged or complete inundation of plants, and loss of suitable habitat (see *Climate Change and Sea Level Rise,* below, for more information).

Harrisia aboriginum

In 2004, Hurricane Charley, a Category 4 hurricane, passed within 8 km (5 miles) of seven populations of *Harrisia aboriginum* and within 29 km (18 miles) of all populations (Bradley and Woodmansee 2004, p. 1). Several populations suffered damage and loss of plants (Nielsen 2007, pers. comm.; Woodmansee *et al.* 2007, p. 85) due to fallen limbs and shock caused by the sudden increase in sun exposure when the canopy was opened. However, some plants damaged by Hurricane Charley in 2004 have since recovered and seem to be thriving (Nielsen 2009, pers. comm.).

Freezing Temperatures

Occasional freezing temperatures that occur in south Florida are a threat to *Chromolaena frustrata* (Bradley 2009, pers. comm.; Sadle 2011b, pers. comm.) and *Harrisia aboriginum* (Woodmansee *et al.* 2007, p. 91). Under normal circumstances, occasional freezing temperatures would not result in a significant impact to these species; however, the small size of some populations makes impacts from freezing more significant.

Effects of Small Population Size and Isolation

Endemic species whose populations exhibit a high degree of isolation are extremely susceptible to extinction from both random and nonrandom catastrophic natural or human-caused events. Species that are restricted to geographically limited areas are inherently more vulnerable to extinction than widespread species because of the increased risk of genetic bottlenecks, random demographic fluctuations, climate change, and localized catastrophes such as hurricanes and disease outbreaks (Mangel and Tier 1994, p. 607; Pimm *et al.* 1998, p. 757). These problems are further magnified when populations are few and restricted to a very small geographic area, and when the number of individuals is very small. Populations with these characteristics face an increased likelihood of stochastic extinction due to changes in demography, the environment, genetics, or other factors (Gilpin and Soule 1986, pp. 24–34).

Small, isolated populations often exhibit reduced levels of genetic variability, which diminishes the species' capacity to adapt and respond to environmental changes, thereby decreasing the probability of long-term persistence (e.g., Barrett and Kohn 1991, p. 4; Newman and Pilson 1997, p. 361). Very small plant populations may experience reduced reproductive vigor due to ineffective pollination or inbreeding depression. Isolated individuals have difficulty achieving natural pollen exchange, which limits the production of viable seed. The problems associated with small population size and vulnerability to random demographic fluctuations or natural catastrophes are further magnified by synergistic interactions with other threats, such as those discussed above (Factors A, B, and C).

Chromolaena frustrata

The current range of *Chromolaena frustrata* includes eight populations spread across 209 km (130 mi) between ENP and Boca Grande Key; four of eight *C. frustrata* populations consist of fewer than 100 individuals (see table 1). These populations may not be viable in the long term due to their small number of individuals. Threats exacerbated by small population size include hurricanes, storm surges, climate change, freezing temperatures, and recreation impacts.

Consolea corallicola

The two natural populations of *Consolea corallicola* are spread across 193 km (120 mi) between Biscayne Bay and Big Pine Key. One of the two remaining natural populations of *C. corallicola* consists of fewer than 20 adult plants (see table 2). Threats exacerbated by small population size include hurricanes, storm surges, and poaching. Populations can also be impacted by demographic stochasticity, where populations are skewed toward either male or female individuals by chance. This may be the case with *C. corallicola,* in which the two remaining populations do not contain any female plants. While the species may continue to reproduce indefinitely by clonal means, populations may not be viable over the long term due to a lack of genetic mixing and thus the potential to adapt to environmental changes.

Harrisia aboriginum

The current range of *Harrisia aboriginum* spans such a small geographic area (100-km (62-mi) stretch of coastline north to south) that all populations could be affected by a single event (e.g., hurricane). Six of the 12 remaining populations have 10 or fewer individual plants (see table 3). Threats exacerbated by small population size include hurricanes, storm surges, freezing temperatures, recreation impacts, wildfires, and poaching.

Chromolaena frustrata, Consolea corallicola, and *Harrisia aboriginum* have restricted geographic distributions, and few populations, some or all of which are relatively small in number and extent. Therefore, it is essential to maintain the habitats upon which they depend, which require protection from disturbance caused by development, recreational activities and facilities maintenance, nonnative species, or a combination of these. Due to ongoing and pervasive threats, the number and size of existing populations of these species are probably not sufficient to sustain them into the future.

Climate Change and Sea Level Rise

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). The term ''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 2007a, 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 2007a, p. 78).

Scientific measurements spanning several decades demonstrate that changes in climate are occurring, and that the rate of change has been faster since the 1950s. Examples include warming of the global climate system, and substantial increases in precipitation in some regions of the world and decreases in other regions. (For these and other examples, see IPCC 2007a, p. 30; and Solomon *et al.* 2007, pp. 35–54, 82–85). Results of scientific analyses presented by the IPCC show that most of the observed increase in global average temperature since the mid-20th century cannot be explained by natural variability in climate, and is

''very likely'' (defined by the IPCC as 90 percent or higher probability) due to the observed increase in greenhouse gas (GHG) concentrations in the atmosphere as a result of human activities, particularly carbon dioxide emissions from use of fossil fuels (IPCC 2007a, pp. 5–6 and figures SPM.3 and SPM.4; Solomon *et al.* 2007, pp. 21–35). Further confirmation of the role of GHGs comes from analyses by Huber and Knutti (2011, p. 4), who concluded it is extremely likely that approximately 75 percent of global warming since 1950 has been caused by human activities.

Scientists use a variety of climate models, which include consideration of natural processes and variability, as well as various scenarios of potential levels and timing of GHG emissions, to evaluate the causes of changes already observed and to project future changes in temperature and other climate conditions (e.g., Meehl *et al.* 2007, entire; Ganguly *et al.* 2009, pp. 11555, 15558; Prinn *et al.* 2011, pp. 527, 529). All combinations of models and emissions scenarios yield very similar projections of increases in the most common measure of climate change, average global surface temperature (commonly known as global warming), until about 2030. Although projections of the magnitude and rate of warming differ after about 2030, the overall trajectory of all the projections is one of increased global warming through the end of this century, even for the projections based on scenarios that assume that GHG emissions will stabilize or decline. Thus, there is strong scientific support for projections that warming will continue through the 21st century, and that the magnitude and rate of change will be influenced substantially by the extent of GHG emissions (IPCC 2007a, pp. 44–45; Meehl *et al.* 2007, pp. 760–764 and 797–811; Ganguly *et al.* 2009, pp. 15555–15558; Prinn *et al.* 2011, pp. 527, 529). (See IPCC 2007b, p. 8, for a summary of other global projections of climate-related changes, such as frequency of heat waves and changes in precipitation. Also see IPCC 2011(entire) for a summary of observations and projections of extreme climate events.).

Various changes in climate may 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 interactions of climate with other variables (e.g., habitat fragmentation) (IPCC 2007, pp. 8–14, 18–19). Identifying likely effects often involves aspects of climate change vulnerability analysis. Vulnerability refers to the degree to which a species (or system) is susceptible to, and unable to cope with, adverse effects of climate change, including climate variability and extremes. Vulnerability is a function of the type, magnitude, and rate of climate change and variation to which a species is exposed, its sensitivity, and its adaptive capacity (IPCC 2007a, p. 89; see also Glick *et al.* 2011, pp. 19–22). There is no single method for conducting such analyses that applies to all situations (Glick *et al.* 2011, p. 3). We use our expert judgment and appropriate analytical approaches to weigh relevant information, including uncertainty, in our consideration of various aspects of climate change.

As is the case with all stressors that we assess, even if we conclude that a species is currently affected or is likely to be affected in a negative way by one or more climate-related impacts, it does not necessarily follow that the species meets the definition of an ''endangered species'' or a ''threatened species'' under the Act. If a species is listed as endangered or threatened, knowledge regarding the vulnerability of the species to, and known or anticipated impacts from, climate-associated changes in environmental conditions can be used to help devise appropriate strategies for its recovery.

Global climate projections are informative, and, in some cases, the only or the best scientific information available for us to use. However, projected changes in climate and related impacts can vary substantially across and within different regions of the world (*e.g.,* IPCC 2007a, pp. 8–12). Therefore, we use ''downscaled'' projections when they are available and have been developed through appropriate scientific procedures, because such projections provide higher resolution information that is more relevant to spatial scales used for analyses of a given species (see Glick *et al.* 2011, pp. 58–61, for a discussion of downscaling).

With regard to our analysis for *Chromolaena frustrata, Consolea corallicola,* and *Harrisia aboriginum,* downscaled projections suggest that sea-level rise is the largest climate-driven challenge to low-lying coastal areas and refuges in the subtropical ecoregion of southern Florida (U.S. Climate Change Science Program (CCSP) 2008, pp. 5–31, 5–32). The three species occur in habitats near sea level in areas of south Florida where considerable habitat is projected to be lost to sea level rise by 2100 (Saha *et al* 2011, p. 81; Zhang *et al.* 2011, p. 129). Most populations are located less than 2 m (6.6 ft) above mean sea level, and the effects of sea level rise are expected to be a continual problem for these species and their habitats (Gann *et al.* 2002, pp. 391, 481; Bradley *et al.* 2004, p. 7; Sadle 2007, pers. comm.; Higgins 2007, pers. comm.; Duquesnel 2008, pers. comm.; Saha *et al.* 2011, p. 81). We acknowledge that the drivers of sea level rise (especially contributions of melting glaciers) are not completely understood, and there is uncertainty with regard to the rate and amount of sea level rise. This uncertainty increases as projections are made further into the future. For this reason, we examine threats to the species within the range of projections found in recent climate change literature.

The long-term record at Key West shows that sea level rose on average 0.224 cm (0.088 in) annually between 1913 and 2006 (National Oceanographic and Atmospheric Administration (NOAA) 2008, p. 1). This equates to approximately 22.3 cm (8.76 in) over the last 100 years (NOAA 2008, p. 1). IPCC (2008, p. 28) emphasized it is very likely that the average rate of sea level rise during the 21st century will exceed the historical rate. The IPCC Special Report on Emission Scenarios (2000) presented a range of scenarios based on the computed amount of change in the climate system due to various potential amounts of anthropogenic greenhouse gases and aerosols in 2100. Each scenario describes a future world with varying levels of atmospheric pollution leading to corresponding levels of global warming and corresponding levels of sea level rise.

Subsequent to the 2007 IPCC Report, the scientific community has continued to model sea level rise. Recent peer reviewed publications indicate a movement towards increased acceleration of sea level rise. Observed sea level rise rates are already trending along the higher end of the 2007 IPCC estimates, and it now widely held that sea level rise will exceed the levels projected by the IPCC (Rahmstorf *et al.* 2012, p. 1; Grinsted *et al.* 2010, p. 470). Taken together, these studies support the use of higher end estimates now prevalent in the scientific literature. Recent studies have estimated global mean sea level rise of 1 to 2 m (3.3 to 6.6 ft) by 2100 as follows: 0.75 m to 1.90 m (2.5 to 6.2 ft; Vermeer and Rahmstorf 2009, p. 21527), 0.8 m to 2.0 m (2.6 to 6.6 ft; Pfeffer *et al.* 2008, p. 1342), 0.8 m to 1.3 m (2.6 to 4.3 ft; Grinsted *et al.* 2010, p. 470), 0.6 m to 1.6 m (2.0 to 5.2 ft; Jevrejeva *et al.* 2010, p. 4), and 0.5 m to 1.40 m (1.6 to 4.6 ft; NRC 2012, p. 2).

Sea level rise projections from various scenarios have been downscaled by

TNC (2011; entire) and Zhang *et al.* (2011; entire) for the Florida Keys. Using the IPCC best-case, low pollution scenario, a rise of 18 cm (7 in) (a rate close to the historical average reported above) would result in the inundation of 23,796 ha (58,800 acres) or 38.2 percent of the Florida Keys upland area by the year 2100 (TNC 2011, p. 25). Under the IPCC worst case, high pollution scenario, a rise of 59 cm (23.2 in) would result in the inundation of 46,539 ha (115,000 acres) or 74.7 percent of the Florida Keys upland area by the year 2100 (TNC 2011, p. 25). Using Rahmstorf *et al.* (2007; p. 368) sea level rise projections of 100 to 140 cm, 80.5 to 92.2 percent of the Florida Keys land area would be inundated by 2100. The Zhang *et al.* (2011, p. 136) study models sea level rise up to 1.8 m (5.9 ft) for the Florida Keys, which would inundate 93.6 percent of the current land area of the Keys.

Prior to inundation, the habitats that support these species will undergo a transition to salt marshes or mangroves (Saha *et al.* 2011, pp. 81–82, 105) and be increasingly vulnerable to storm surge. Habitats for these species are restricted to relatively immobile geologic features separated by large expanses of flooded, inhospitable wetland or ocean, leading us to conclude that these habitats will likely not be able to migrate as sea level rises (Saha *et al.* 2011, pp. 103–104). Because of the extreme fragmentation of remaining habitat and isolation of remaining populations, and the accelerating rate at which sea level rise is projected to occur (Grinsted *et al.* 2010, p. 470), it will be particularly difficult for these species to disperse to suitable habitat once existing sites that support them are lost to sea level rise. Patterns of development will also likely be significant factors influencing whether natural communities can move and persist (IPCC 2008, p. 57; CCSP 2008, p. 7–6). The plant species face significant risks from coastal squeeze that occurs when habitat is pressed between rising sea levels and coastal development that prevents landward migration of species. The ultimate effect of these impacts is likely to result in reductions in reproduction and survival, and corresponding decreases in population numbers.

When analyzed using the National Oceanic and Atmospheric Administration (NOAA) Sea Level Rise and Coastal Impacts viewer, we can generalize as to the impact of a 1.8-m (5.9-ft) sea level rise (the maximum available using this tool) on the current distribution of these species. Analysis for each species at each location follow.

Chromolaena frustrata

A 1.8-m (5.9-ft) rise would inundate all existing mainland *Chromolaena frustrata* occurrences in ENP. The closest area with uplands would be at least 20 miles north near Homestead, on the slightly raised elevations provided by the Miami rock ridge. In the Florida Keys, Key Largo would be transformed into a series of smaller islands aligned with the high spine of the Key, which is mostly occupied by the U.S. 1 highway corridor. Upper Matecumbe Key would follow a similar pattern, and the existing occurrence location supporting *C. frustrata* would be inundated. The locations of existing occurrences on Lignumvitae Key would be inundated. On all of these Keys, existing buttonwood and coastal berm habitat would be lost. Effects to buttonwood forests are already observed from salinity intrusion as these forests are converting to mangroves. However, some areas that are currently rockland hammock would remain above sea level, although they may transition to other habitat types which may or may not be suitable for *C. frustrata.* Lower Matecumbe Key would lose all upland habitat. Long Key would be reduced to just two areas with elevation raised by fill. The remainder of the species' range, including Big Pine Key, Big Munson Island, and Boca Grande Key and all upland habitat and areas supporting *C. frustrata,* would be inundated by 2100. Lignumvitae Key is the only existing occupied location that could continue to support a population given a 1.8-m (5.9-ft) sea level rise.

Consolea corallicola

A 1.8-m (5.9-ft) sea level rise would completely inundate Little Torch Key and severely reduce the area of habitat remaining on Swan Key, including all areas currently supporting *C. corallicola.* In 2100, the nearest upland habitats from Little Torch Key may be as far as 100 miles north in peninsular Florida, or 100 miles south in Cuba. On Swan Key, the species may be able to disperse to the remaining higher ground, and the location could continue to support a population given a 1.8-m (5.9-ft) sea level rise.

Harrisia aboriginum

A 1.8-m (5.9-ft) rise would greatly reduce the area of all barrier islands on the Gulf Coast of Florida that support *Harrisia aboriginum,* including Longboat Key, North Manasota Key, Gasparilla Island, Cayo Costa, and Buck Key. The majority of the upland area, including all lower elevation habitats on Longboat Key and North Manasota Key would be lost to inundation, but not the relatively higher coastal berm and hardwood hammock habitats that support *H. aboriginum.* The occurrence at Charlotte Harbor Preserve on an elevated coastal berm would also remain above sea level. However, while they would not be inundated, these areas would be rendered much more susceptible to habitat loss or modification due storm surges and salinization as the elevation of these becomes nearer to sea level. Existing occurrences on Cayo Pelau, Gasparilla Island, Bokeelia Island, and Buck Key would be totally inundated. No upland habitat would remain on Cayo Pelau or Bokeelia Island, and very little would remain on Gasparilla Island or Buck Key. On the mainland, the existing occurrence at Lemon Bay Preserve would be completely inundated, while occurrences on elevated shell mounds at Historic Spanish Point and Charlotte Harbor Preserve would be relatively secure given a 1.8-m (5.9-ft) sea level rise.

In summary, the current occurrences of *Harrisia aboriginum* at Live Oak Key (1), Gasparilla Island (2), Bokeelia Island (1), Cayo Pelau (1), Lemon Bay Preserve (1), and Buck Key (1) would be inundated by a 1.8-m (5.9-ft) sea level rise, leading to the loss of these populations. Occurrences at Longboat Key (1), North Manasota Key (2–3), and on a coastal berm in Charlotte Harbor Preserve (1) would not be completely inundated, but would experience significant loss and modification of habitat, and what remains would be highly susceptible to further losses to storm surge and salinization. Two occurrences, Charlotte Harbor Preserve (1) and Historic Spanish Point (1), would be relatively secure from sea level rise through 2100, due to the higher elevation of their shell mound habitat.

Habitat Change Due to Increased Soil and Groundwater Salinity

Plant communities in coastal areas serve as early indicators of the effects of sea level rise (IPCC 2008, p. 57). These effects have been observed in the past and are presently driving changes in plant communities in coastal South Florida. Sea level rise is a threat to south Florida's low-lying coasts where plant communities are organized along a mild gradient in elevation, from mangroves at sea level to salinity-intolerant coastal hardwood hammocks on localized elevations generally less than 2 m (6.6 ft) above sea level (Saha *et al.* 2011, p. 82). Field data collected over 11 years in hardwood hammocks and coastal buttonwood forests in ENP

show that salt-tolerant plant species are replacing salt-intolerant species. It is predicted that buttonwood forests will exhibit fragmentation and decline in cover because of saltwater intrusion. A decline in the extent of coastal hardwood hammocks and buttonwood forests is predicted with the initial rise in sea level before the onset of sustained erosional inundation. Though this study focuses on ENP, it has implications for coastal forests threatened by saltwater intrusion throughout coastal South Florida (Saha *et al.* 2011, pp. 81–82, 105). Similar changes in plant communities have been observed in the Florida Keys due to saltwater intrusion (Ross *et al.* 1994, p. 144; 2009, p. 471). From the 1930s to 1950s, increased salinity of coastal waters contributed to the decline of cabbage palm forests in southwest Florida (Williams *et al.* 1999, pp. 2056–2059), expansion of mangroves into adjacent marshes in the Everglades (Ross *et al.* 2000, pp. 9, 12–13), and loss of pine rockland in the Keys (Ross *et al.* 1994, pp. 144, 151–155). The possible effects of sea level rise were noted in the 1980s, at a site supporting *Harrisia aboriginum* (Morris and Miller 1981, p. 10), and recent deaths of cabbage palms at this location suggest that this is a continuing threat (Bradley *et al.* 2004, p. 7). Furthermore, Ross *et al.* (2009, pp. 471–478) suggested that interactions between sea level rise and pulse disturbances such as storm surges can cause vegetation to change sooner than projected based on sea level alone.

Research on *Consolea corallicola* (Stiling 2010, p. 2) and other Florida cacti suggests that increased soil salinity levels can cause mortality of these plants (Goodman *et al.* 2012b, pp. 9–11). Natural populations of *Harrisia aboriginum* and *Consolea corallicola* do not occur on saturated soils (fresh or saline) and would likely be extirpated at sites affected by sea level rise. Populations of *Consolea corallicola* occur near sea level in a transitional zone between mangrove and hardwood hammock habitats. Populations at two sites have been declining for years, and this may be partially attributed to rising sea level, as most of the cacti are on the edge of the hammock and buttonwood transition zone or directly in the transition zone (Higgins 2007, pers. comm.; Duquesnel 2008, 2009, pers. comm.). At some *C. corallicola* sites, current salinity conditions appear unsuitable for plant maturation and population expansion (Duquesnel 2012, pers. comm.; Stiling 2012, pers. comm.).

Other processes expected to be affected by climate change include temperatures, rainfall (amount, seasonal timing, and distribution), and storms (frequency and intensity). Temperatures are projected to rise by 2 °C to 5 °C (35.6 °F to 41.5 °F) for North America by the end of this century (IPCC 2007, pp. 7–9, 13).

In the case of these plants, a key threat is loss and modification of the species' primary habitat to sea level rise. Habitat loss is ongoing and expected to continue through 2100, with acceleration in the rate of rise in the second half of the century. Both the amount and the quality of that habitat will be significantly reduced from historic levels over the next 50 to 100 years.

The IPCC Special Report on Emissions Scenarios projections are widely used in the assessments of future climate change and their underlying assumptions with respect to socio-economic, demographic, and technological change serve as inputs to many recent climate change vulnerability and impact assessments (IPCC 2077, p. 44). There is a tight, observed relationship between global average temperature rise and sea level rise over the recent observational record (~120 years) (Rahmstorf 2007, p. 368). Sea level rise projections through 2100 are the standard in the assessment and planning literature (IPCC 2007, p. 45; Grinsted *et al.* 2010, p. 468; Jevrejeva *et al.* 2010, p. 4; NRC 2010, p. 2; Pfeffer *et al.* 2008, p. 1340; Rahmstorf *et al.* 2012, p. 3; USACE 2011, EC 1165–2–212, p. B–11) and represent the best available science for assessing climate change threats. Therefore, we have determined the foreseeable future for *Chromolaena frustrata, Consolea corallicola,* and *Harrisia aboriginum* for climate change effects to be to the year 2100.

Conservation Efforts To Reduce Other Natural or Manmade Factors Affecting Their Continued Existence

Reintroductions

Reintroductions of *Consolea corallicola* have been implemented at several locations on State lands in the Florida Keys, but these have been largely unsuccessful due to *Cactoblastis* moth predation, crown rot, and burial of small plants by leaf litter. Reintroduction of *C. corallicola* serves multiple objectives towards the plant's conservation, including increasing the number of populations to address the threat of few, small populations; establishing populations across a wider geographic area to reduce the chance that all populations will be affected by natural disturbances, such as hurricanes and storm surge events; and establishing populations at higher elevation sites that will be less vulnerable to storm surge events and sea level rise.

Ex situ Conservation

Fairchild Tropical Botanic Garden (FTBG) has 44 seed collections of *Chromolaena frustrata* from ENP, which were provided to the National Center for Genetic Resources Preservation (NCGRP) for testing and storage, and one collection from Lignumvitae Key. They have no living specimens of *C. frustrata* at FTBG. FTBG has 11 collections of *Consolea corallicola,* representing both wild populations, each of which is represented by at least one living specimen of at FTBG, for a total of 17 living specimens. FTBG has five collections of *Harrisia aboriginum* from the Buck Key population, four of which are represented by at least one living specimen at FTBG, for a total of five living specimens (Maschinski 2013a, pers. comm.).

Key West Botanical Garden (KWBG) has one collection of *Chromolaena frustrata* from Big Munson Island. Numerous *C. frustrata* are planted on the KWBG grounds. KWBG has one collection of *Consolea corallicola* represented by several living specimens (Maschinski 2013b, pers. comm.).

Nonnative Species Control

The Service; NPS; State of Florida; Sarasota, Charlotte, Lee, Miami-Dade, and Monroe Counties; and several local governments conduct nonnative species control efforts on sites that support *Chromolaena frustrata, Consolea corallicola,* and *Harrisia aboriginum.*

Cumulative Impacts

Cumulative Effects From Factors A Through E

Cumulative Effects of Threats

Some of the threats discussed in this finding could work in concert with one another to cumulatively create situations that impact *Chromolaena frustrata, Consolea corallicola,* and *Harrisia aboriginum* beyond the scope of the combined threats that we have already analyzed. The limited distributions and small population sizes of *Chromolaena frustrata, Consolea corallicola,* and *Harrisia aboriginum* make them extremely susceptible to further habitat loss and competition from nonnative species. Poaching, vandalism, and wildfires are additional threats to *Consolea corallicola* and *Harrisia aboriginum.* Mechanisms leading to the decline of these species, as discussed above, range from local (*e.g.,* poaching, vandalism, wildfire), to regional (*e.g.,* development, nonnative species), to global (*e.g.,* climate change,

sea level rise). The synergistic (interaction of two or more components) effects of threats (such as hurricane effects on a species with a limited distribution consisting of just a few small populations) make it difficult to predict population viability. While these stressors may act in isolation, it is more probable that many stressors are acting simultaneously (or in combination) on populations of *Chromolaena frustrata, Consolea corallicola,* and *Harrisia aboriginum.*

Summary of Threats

The decline of *Chromolaena frustrata, Consolea corallicola,* and *Harrisia aboriginum* is primarily the result of habitat loss (Factor A), competition from nonnative plants, predation by nonnative herbivores (Factor C), climate change, storms, wildfire, and other anthropogenic threats (Factor E). In addition, *Consolea corallicola* and *Harrisia aboriginum* are impacted by over collection for unauthorized trade of these cacti (Factor B). Various nonnative species of plants and herbivores are firmly established in the range of *Chromolaena frustrata, Consolea corallicola,* and *Harrisia aboriginum* and continue to impact the species in localized areas (Factor C).

Current State and Federal regulatory mechanisms (Factor D) appear to be inadequate to protect *Chromolaena frustrata, Consolea corallicola,* and *Harrisia aboriginum* from collection. Other causes of decline of *Chromolaena frustrata, Consolea corallicola,* and *Harrisia aboriginum* include climate change (including sea level rise), inadvertent vandalism, wildfire, and isolated small populations, and these continue to be the threats to these species (Factor E). Although there are ongoing attempts to alleviate some of these threats at some locations, there appear to be no populations without significant threats.

Determinations

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 (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. Listing actions may be warranted based on any of the above threat factors, singly or in combination.

Determination for *Chromolaena frustrata*

We have carefully assessed the best scientific and commercial data available regarding the past, present, and future threats to *Chromolaena frustrata. Chromolaena frustrata* is, and will continue to be, affected by threats that we discussed under Factors A, C, D, and E, above. Except for ENP and Big Munson Island, all populations are small and widely separated from one another by unsuitable habitat. Small populations are more vulnerable to genetic bottlenecks, catastrophic events, and random demographic fluctuations (Factor E). *C. frustrata* is a relatively short-lived plant and often exhibits wide demographic fluctuations in response to changing habitat conditions such as canopy closure and canopy opening. The size of the Big Munson Island population is currently unknown. However, we believe it may be much reduced since the 2004 estimate due to post-hurricane canopy regrowth, herbivory, or other threats.

Of 12 historically known populations, 4 have been lost to development. Currently, one of the remaining eight populations occur on private lands and are vulnerable to development (Factor A). Visitor use of public lands is increasing, as is the pressure to provide additional visitor facilities, amenities, and recreational opportunities. While relatively secure, those populations are vulnerable to recreation impacts, facilities development, and park maintenance (Factor A).

Each of the eight remaining populations is vulnerable to habitat loss and modification from sea level rise (Factor E). Increased salinity of water tables underlying *C. frustrata* habitat, due to sea level rise, is presently driving changes in buttonwood forests in coastal south Florida. These forests are transforming into more saline plant communities with conditions unsuitable for *C. frustrata.* The effects of sea level rise are expected to be a continual threat to the species and its habitats into the foreseeable future. Seven of eight locations currently supporting *C. frustrata* will be completely inundated by the projected 1.8-m (5.8-ft) sea level rise by 2100. As habitat is fragmented by the effects of sea level rise and development, it will be difficult for the species or its habitats to overcome manmade and natural barriers to dispersal.

Additional threats to *C. frustrata* include competition from nonnative plant species, (Factor E), freezing temperatures (Factor E), and herbivory (Factor C). Stochastic events such as hurricanes, and resulting storm surge and extreme high tide events, can modify habitat and destroy entire populations (Factor E). Finally, existing regulatory mechanisms are inadequate to address current threats, and current conservation measures have not reversed population declines or habitat loss (Factor D). These threats have acted on populations of *C. frustrata* in the past, are acting on them currently, and are expected to continue to act on them in the foreseeable future. The threats described are imminent and severe, and some threats, including hurricanes, storm surge, nonnative species, and sea level rise, affect all populations.

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 find that *Chromolaena frustrata* is presently in danger of extinction throughout its entire range based on the severity and immediacy of threats currently impacting the species. Its overall range has been significantly reduced; the remaining habitat and populations are threatened by a variety of factors acting in combination to reduce the overall viability of *Chromolaena frustrata.* The risk of extinction for *Chromolaena frustrata* is high because the remaining populations are isolated, with some being small, and have limited potential for recolonization. Therefore, on the basis of the best scientific and commercial data available, we have determined that *Chromolaena frustrata* meets the definition of an endangered species in accordance with sections 3(6) and 4(a)(1) of the Act.

We find that a threatened species status is not appropriate for *Chromolaena frustrata* because of the severity of the current threats acting on the small, isolated populations where the species still persists. These threats are occurring rangewide and are not concentrated in any particular portion of the range. Due to the severity of the threats, natural recolonization of the plant's historical range is not possible; because the threats are ongoing and expected to continue into the foreseeable future, this places *Chromolaena frustrata* in danger of extinction now. Therefore, we have determined that this species meets the definition of an endangered species rather than a threatened species.

Under the Act and our implementing regulations, a species may warrant listing if it is endangered or threatened throughout all or a significant portion of its range. The threats to the survival of *Chromolaena frustrata* occur throughout the species' range and are not restricted to any particular significant portion of the range. Accordingly, our assessment and determination applies to the species throughout its entire range.

Determination for *Consolea corallicola*

We have carefully assessed the best scientific and commercial data available regarding the past, present, and future threats to *Consolea corallicola. Consolea corallicola* is, and will continue to be, affected by threats discussed under Factors A, B, C, D, and E, above.

Of four historically known populations, two were lost to development and poaching. The remaining populations that occur on public land, while relatively secure, are vulnerable to recreation impacts, facilities development, and park maintenance (Factor A). All populations are vulnerable to poaching (Factor B), predation by the *Cactoblastis* moth (Factor C), habitat modification and competition from nonnative plant species (Factor E), and habitat loss or modification from sea level rise (Factor E).

Increased salinity of water tables underlying habitat for the species from sea level rise is presently driving changes in buttonwood forests in coastal south Florida toward more saline plant communities and conditions unsuitable for *C. corallicola.* The effects of sea level rise are expected to be a continual threat to the species and its habitats into the foreseeable future. Four of the six locations currently supporting *C. corallicola* will be completely inundated by the projected 1.8-m (5.8-ft) sea level rise by 2100. As habitat is fragmented by the effects of sea level rise and development, it will be difficult for the species or its habitats to overcome manmade and natural barriers to dispersal. Hurricanes, storm surge, and extreme high tide events can modify habitat and destroy entire populations.

Of six extant populations, one wild population and three reintroduced populations are small. Small populations are more vulnerable to genetic bottlenecks, catastrophic events, and random demographic fluctuations (Factor E). Finally, existing regulatory mechanisms are inadequate to address current threats, and current conservation measures have not reversed population declines or habitat loss (Factor D). These threats have acted on populations of *C. corallicola* in the past, are acting on them currently, and will continue to act them into the foreseeable future. The threats described are imminent and severe, and some threats, including poaching, herbivory, hurricanes, storm surge, nonnative species, and sea level rise, affect all populations.

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 find that *Consolea corallicola* is presently in danger of extinction throughout its entire range based on the severity and immediacy of threats currently impacting the species. Its overall range has been significantly reduced; the remaining habitat and populations are threatened by a variety of factors acting in combination to reduce the overall viability of *Consolea corallicola.* The risk of extinction for *Consolea corallicola* is high because the remaining populations are isolated and small, and all populations are vulnerable to poaching (Factor B), predation by the *Cactoblastis* moth (Factor C), habitat modification and competition form nonnative plant species (Factor E), and habitat loss or modification from sea level rise (Factor E). Threats are acting synergistically, and all contribute to this species being in danger of extinction at the present time. Therefore, on the basis of the best scientific and commercial data available, we have determined that *Consolea corallicola* meets the definition of an endangered species in accordance with sections 3(6) and 4(a)(1) of the Act.

We find that a threatened species status is not appropriate for *Consolea corallicola* because of the severity of the current threats acting on the remaining small populations that are isolated from one another. The threats acting on this species are occurring rangewide and are not concentrated in any particular portion of the range. Due to the severity of the threats, natural recolonization of the plant's historical range is not possible; because the threats are ongoing and expected to continue into the foreseeable future, this places *Consolea corallicola* in danger of extinction now. Therefore, we have determined that this species meets the definition of an endangered species rather than a threatened species.

Under the Act and our implementing regulations, a species may warrant listing if it is endangered or threatened throughout all or a significant portion of its range. The threats to the survival of *Consolea corallicola* occur throughout the species' range and are not restricted to any particular significant portion of the range. Accordingly, our assessment and determination applies to the species throughout its entire range.

Determination for *Harrisia aboriginum*

We have carefully assessed the best scientific and commercial data available regarding the past, present, and future threats to *Harrisia aboriginum. Harrisia aboriginum* is and will continue to be affected by threats discussed under Factors A, B, C, D, and E, above.

Of 14 known populations, 2 have been extirpated, and most others have experienced steep declines historically due to habitat loss (Factor A) and poaching (Factor B). Three of the populations that are on private land are presently vulnerable to development. Populations on public land, while relatively secure, are vulnerable to recreation impacts, facilities development, and park maintenance (Factor A). All populations are vulnerable to poaching, nonnative plant species, vandalism, wildfire, and habitat loss or modification from sea level rise.

Increased salinity of water tables underlying habitat for the species from sea level rise is presently driving changes in coastal ecosystems in coastal south Florida toward more saline plant communities and conditions unsuitable for *H. aboriginum.* The effects of sea level rise are expected to be a continual threat to the species and its habitats into the foreseeable future. Six of the 12 locations currently supporting *H. aboriginum* will be completely inundated by the projected 1.8-m (5.8-ft) sea level rise by 2100. As habitat is fragmented by the effects of sea level rise and development, it will be difficult for the species or its habitats to overcome manmade and natural barriers to dispersal. Stochastic events such as hurricanes, and resulting storm surge and extreme high tide events, can modify habitat and destroy entire populations.

Of 12 extant populations, all but 2 have fewer than 100 plants. Small populations are more vulnerable to genetic bottlenecks, catastrophic events, and random demographic fluctuations (Factor E). Finally, existing regulatory mechanisms are inadequate to address current threats, and current conservation measures have not reversed population declines or habitat loss (Factor D). These threats have acted on populations of *H. aboriginum* in the

past, are acting on them currently, and will continue to act them into the foreseeable future. The threats described are imminent and severe, and some threats, including poaching, hurricanes, storm surge, nonnative species, and sea level rise, affect all populations.

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 find that *Harrisia aboriginum* is presently in danger of extinction throughout its entire range based on the severity and immediacy of threats currently impacting the species. Its overall range has been significantly reduced; the remaining habitat and populations are threatened by a variety of factors acting in combination to reduce the overall viability of *Harrisia aboriginum.* The risk of extinction for *Harrisia aboriginum* is high because the remaining populations are isolated and small, and all populations are vulnerable to poaching, hurricanes, storm surge, nonnative species, and sea level rise. Threats are acting synergistically, and all contribute to this species being in danger of extinction at the present time. Therefore, on the basis of the best scientific and commercial data available, we have determined that *Harrisia aboriginum* meets the definition of an endangered species in accordance with sections 3(6) and 4(a)(1) of the Act.

We find that a threatened species status is not appropriate for *Harrisia aboriginum* because of the severity of the current threats acting on the remaining small populations that are isolated from one another. The threats acting on this species are occurring rangewide and are not concentrated in any particular portion of the range. Due to the severity of the threats, natural recolonization of the plant's historical range is not possible; because the threats are ongoing and expected to continue into the foreseeable future, this places *Harrisia aboriginum* in danger of extinction now. Therefore, we have determined that this species meets the definition of an endangered species rather than a threatened species.

Under the Act and our implementing regulations, a species may warrant listing if it is endangered or threatened throughout all or a significant portion of its range. The threats to the survival of *Harrisia aboriginum* occur throughout the species' range and are not restricted to any particular significant portion of the range. Accordingly, our assessment and determination applies to the species throughout its entire range.

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 and preparation of a draft and final recovery plan. The recovery outline guides the immediate implementation of urgent recovery actions and describes the process to be used to develop a recovery plan. Revisions of the plan may be done to address continuing or new threats to the species, as new substantive information becomes available. The recovery plan identifies site-specific management actions that set a trigger for review of the five factors that control whether a species remains endangered or may be downlisted or delisted, and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Recovery teams (composed 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 South Florida Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribes, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (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.

When this rule is effective (see **DATES**), funding for recovery actions will be available from a variety of sources, including Federal budgets, State programs, and cost share grants for non-Federal landowners, the academic community, and nongovernmental organizations. In addition, pursuant to section 6 of the Act, the State of Florida will be eligible for Federal funds to implement management actions that promote the protection or recovery of *Chromolaena frustrata, Consolea corallicola,* and *Harrisia aboriginum.* Information on our grant programs that are available to aid species recovery can be found at *http://www.fws.gov/grants.*

Please let us know if you are interested in participating in recovery efforts for any or all three of these species. Additionally, we invite you to submit any new information on this 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 an endangered or threatened species 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' habitat 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 Department of Defense, NPS, Fish and Wildlife Service, and U.S. Forest Service; the issuance of Federal permits under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) 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; and construction and maintenance of roads or highways by the Federal Highway Administration.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to endangered plants. All prohibitions of section 9(a)(2) of the Act, implemented by 50 CFR 17.61, apply. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to import or export, transport in interstate or foreign commerce in the course of a commercial activity, sell or offer for sale in interstate or foreign commerce, or remove and reduce the species to possession from areas under Federal jurisdiction. In addition, for plants listed as endangered, the Act prohibits the malicious damage or destruction on areas under Federal jurisdiction and the removal, cutting, digging up, or damaging or destroying of such plants in knowing violation of any State law or regulation, including State criminal trespass law. Certain exceptions to the prohibitions apply to agents of the Service and State conservation agencies.

Preservation of native flora of Florida (Florida Statutes 581.185) sections (3)(a) and (b) provide limited protection to species listed in the State of Florida Regulated Plant Index, including *Chromolaena frustrata, Consolea corallicola,* and *Harrisia aboriginum.* Federal listing increases protection for these species by making violations of section 3 of the Florida Statute punishable as a Federal offense under section 9 of the Act. This provides increased protection from unauthorized collecting and vandalism for the plants on State and private lands, where they might not otherwise be protected by the Act, and increases the severity of the penalty for unauthorized collection, vandalism, or trade in these species.

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 listing on proposed and ongoing activities within the range of listed species. The following activities could potentially result in a violation of section 9 of the Act; this list is not comprehensive:

(1) Import of any of the three plant species into, or export of any such species from, the United States without authorization;

(2) Remove and reduce to possession any of the three plant species from areas under Federal jurisdiction; maliciously damage or destroy any of the species on any such area; or remove, cut, dig up, or damage or destroy any of the species on any other area in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law;

(3) Deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(4) Sell or offer for sale in interstate or foreign commerce any of the three species;

(5) Introduce any unauthorized nonnative wildlife or plant species to the State of Florida that compete with or prey upon *Chromolaena frustrata, Consolea corallicola,* or *Harrisia aboriginum;*

(6) Release any unauthorized biological control agents that attack any life stage of *Chromolaena frustrata, Consolea corallicola,* or *Harrisia aboriginum;*

(7) Modify the habitat of *Chromolaena frustrata, Consolea corallicola,* or *Harrisia aboriginum* on Federal lands without authorization or coverage under the Act for impacts to these species.

Questions regarding whether specific activities would constitute a violation of section 9 of the Act should be directed to the Field Supervisor of the Service's South Florida Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**).

Critical Habitat

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided 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.

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.

Chromolaena frustrata

We found that designation of critical habitat for *Chromolaena frustrata* is prudent, and made a finding that critical habitat is determinable for the species. For further discussion, see the proposed listing rule (October 11, 2012; 77 FR 61836) in which we also proposed to designate critical habitat for *Chromolaena frustrata.* As discussed above, the public has already had an opportunity to comment on the proposed designation. Our final designation of critical habitat for *Chromolaena frustrata* will be published in the near future.

Consolea corallicola and Harrisia aboriginum

Critical Habitat Prudency

We found that designation of critical habitat was not prudent for *Consolea corallicola* and *Harrisia aboriginum* in our October 11, 2012 proposed rule (77 FR 61836). We based this finding on a determination that the designation of critical habitat would increase the threat to *Consolea corallicola* and *Harrisia aboriginum* from unauthorized collection and trade, and may further facilitate inadvertent or purposeful disturbance and vandalism to the cacti's habitat. We stated that designation of occupied critical habitat is likely to confer only an educational benefit to these cacti beyond that provided by listing. Alternatively, the designation of unoccupied critical habitat for either species could provide an educational and at least some regulatory benefit for each species. However, we stated that the risk of increasing significant threats to the species by publishing more specific location information in a critical habitat designation greatly outweighed the benefits of designating critical habitat.

We received numerous comments from private and Federal entities stating that the locations of *Consolea corallicola* and *Harrisia aboriginum* are already available in scientific journals, online databases, and documents published by the Service, which led us to reconsider the prudency determination for these species. Given that our original determination rested on the increased risk of poaching resulting from publicizing the locations of *Consolea corallicola* and *Harrisia aboriginum* through maps of critical habitat in the **Federal Register**, and in light of the received during the public comment period we now believe critical habitat is prudent for *Consolea corallicola* and *Harrisia aboriginum.* Our rationale is outlined below.

The principal benefit of including an area in critical habitat is the requirement for agencies to ensure actions they fund, authorize, or carry out are not likely to result in the destruction or adverse modification of any designated critical habitat, the regulatory standard of section 7(a)(2) of the Act under which consultation is completed. Critical habitat provides protections only where there is a Federal nexus, that is, those actions that come under the purview of section 7 of the Act. Critical habitat designation has no application to actions that do not have a Federal nexus. Section 7(a)(2) of the Act mandates that Federal agencies, in consultation with the Service, evaluate the effects of its their proposed actions on any designated critical habitat. Similar to the Act's requirement that a Federal agency action not jeopardize the continued existence of listed species, Federal agencies have the responsibility not to implement actions that would destroy or adversely modify designated critical habitat.

Federal actions affecting the species even in the absence of designated critical habitat areas would still benefit from consultation pursuant under to section 7(a)(2) of the Act and may still result in jeopardy findings. However, the analysis of effects of a proposed project on critical habitat is separate and distinct from that of the effects of a proposed project on the species itself. The jeopardy analysis evaluates the action's impact to survival and recovery of the species, while the destruction or adverse modification analysis evaluates the action's effects to the designated habitat's contribution to conservation of the species. Therefore, the difference in outcomes of these two analyses represents the regulatory benefit of critical habitat. This would, in some instances, lead to different results and different regulatory requirements. Thus, critical habitat designations may provide greater benefits to the recovery of a species than would listing alone.

Rare cacti are valuable to collectors and the threat of poaching remains imminent (Factor B) for *Consolea corallicola* and *Harrisia aboriginum.* There is evidence that the designation of critical habitat could result in an increased threat from taking, specifically collection, for both butterflies, through publication of maps and a narrative description of specific critical habitat units in the **Federal Register**. However, such information on locations of extant *Consolea corallicola* and *Harrisia aboriginum* populations is already widely available to the public through many outlets as noted above. Therefore, identification and mapping of critical habitat is not expected increase the degree of such threat. In the comments we received on the proposed listing and critical habitat designation, we were alerted to the existing availability of many, if not all, populations or locations of *Consolea corallicola* and *Harrisia aboriginum.*

Critical Habitat Determinability

Having determined that designation of critical habitat is prudent for *Consolea corallicola* and *Harrisia aboriginum* under section 4(a)(3) of the Act, we must find whether critical habitat is determinable for the species. Our regulations at 50 CFR 424.12(a)(2) state that critical habitat is not determinable when one or both of the following situations exist:

(i) Information sufficient to perform required analyses of the impacts of the designation is lacking; or

(ii) The biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat.

We reviewed the available information pertaining to the biological needs of *Consolea corallicola* and *Harrisia aboriginum* and habitat characteristics where the species are located. This and other information represent the best scientific data available and have led us to conclude that the designation of critical habitat is

determinable for *Consolea corallicola* and *Harrisia aboriginum.* Therefore, we will also propose designation of critical habitat for *Consolea corallicola* and *Harrisia aboriginum* under the Act in the near future.

Required Determinations

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, 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 all references cited is available on the Internet at *http://www.regulations.gov* and upon request from the South Florida Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this final rule are the staff members of the South Florida Ecological Services Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as follows:

PART 17—[AMENDED]

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; 4201–4245; unless otherwise noted.

■ 2. Amend § 17.12(h) by adding entries for *Chromolaena frustrata, Consolea corallicola,* and *Harrisia aboriginum,* in alphabetical order under FLOWERING PLANTS, to the List of Endangered and Threatened Plants, to read as follows:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Species		Historic range	Family	Status	When listed	Critical habitat	Special rules
Scientific name	Common name						
FLOWERING PLANTS							
*	*	*	*	*	*	*	
Chromolaena frustrata.	Thoroughwort, Cape Sable.	U.S.A. (FL)	Asteraceae	E	826	NA	NA
*	*	*	*	*	*	*	
Consolea corallicola	Cactus, Florida semaphore.	U.S.A. (FL)	Cactaceae	E	826	NA	NA
*	*	*	*	*	*	*	
Harrisia aboriginum	Prickly-apple, aboriginal.	U.S.A. (FL)	Cactaceae	E	826	NA	NA
*	*	*	*	*	*	*	

* * * * *

Dated: September 25, 2013.

Rowan W. Gould,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2013–24177 Filed 10–23–13; 8:45 am]

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Federal Register

Vol. 78, No. 206

Thursday, October 24, 2013

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FEDERAL REGISTER PAGES AND DATE, OCTOBER

CFR PARTS AFFECTED DURING OCTOBER

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

9 CFR

Proposed Rules:
2.....63408
3.....63408

10 CFR

72.....63375
429.....62970
430.....62970, 62988
431.....62970, 62988
Proposed Rules:
72.....63375
429.....62472
430 .....62488, 62494, 63410
431.....62472

12 CFR

3.....62018
5.....62018
6.....62018
165.....62018
167.....62018
208.....62018
217.....62018
225.....62018
324.....62417
Ch. VI.....63380
610.....63379
1002.....60382
1024.....60382, 62993
1026.....60382, 62993
1227.....63007

13 CFR

121.....61114
124.....61114
125.....61114
126.....61114
127.....61114

14 CFR

34.....63015, 63017
39 .....60182, 60185, 60186, 60188, 60656, 60658, 60660, 60667, 60670, 60673, 60676, 60679, 60681, 61161, 61164, 61168, 61171, 61173, 61177
45.....63015, 63017
71 .....60683, 61179, 63380
Proposed Rules:
25.....62495
39 .....60798, 60800, 60804, 60807, 61220, 63130, 63132, 63135, 63429, 63431
71 .....60235, 60236, 60237, 62498
73.....60238

15 CFR

730.....61744
732.....61744
734.....61744, 61874
736.....61744
738.....61744, 61874
740.....61744, 61874
742.....61744, 61874
743.....61744
744.....61744
746.....61744
748.....61744, 61874
750.....61744, 61874
756.....61744
758.....61744
762.....61744
764.....61744
770.....61744
772.....61744, 61874
774.....61744, 61874

16 CFR

1112.....63019
1218.....63019

17 CFR

232.....60684
Proposed Rules:
229.....60560
230.....61222
239.....61222
249.....60560

18 CFR

40.....63036

19 CFR

10.....60191, 63052
24.....60191, 63052
162.....60191, 63052
163.....60191, 63052
178.....60191, 63052
351.....62417
354.....62417
356.....62417
Proposed Rules:
351.....60240

20 CFR

718.....60686
725.....60686

21 CFR

Proposed Rules:
1308.....61991, 62500

22 CFR

120.....61750
121.....61750
123.....61750
126.....61750

24 CFR

903.....63748
905.....63748
941.....63748
968.....63748
969.....63748
3282.....60193

26 CFR

1.....62418, 62426

27 CFR

9 .....60686, 60690, 60693

29 CFR

552.....60454
4022.....62426

30 CFR

250.....60208

31 CFR

Ch. 11.....60695

32 CFR

199.....62427
236.....62430
706.....62438
Proposed Rules:
199.....62506

33 CFR

100.....62329
117.....61180, 62439
165 .....60216, 60218, 60220, 60222, 60698, 61183, 61185, 61937, 62293, 63381
Proposed Rules:
117.....63136
165.....61223

36 CFR

7.....63069

37 CFR

Ch. I.....61185
1.....62368
3.....62368
11.....62368

38 CFR

17.....62441
Proposed Rules:
12.....63139
17.....63143

39 CFR

Proposed Rules:
20.....63433, 63434

40 CFR

9.....62443
49.....60700
51.....62451
52 .....60225, 60704, 61188, 62455, 62459, 63093, 63383, 63388, 63394
80.....62462
81.....60704, 62459
180 .....60707, 60709, 60715, 60720
300.....60721, 63099
721.....62443
Proposed Rules:
49.....62509
52 .....62523, 63145, 63148, 63435, 63436, 63437
300.....60809

42 CFR

412.....61191, 61197
413.....61202
424.....61202
482.....61197
485.....61197
489.....61197
Proposed Rules:
121.....60810

44 CFR

Proposed Rules:
206.....61227

47 CFR

87.....61203
Proposed Rules:
64.....61250, 63152
73.....61251

49 CFR

107.....60726, 60745
109.....60755
130.....60745
171.....60745
172.....60745
173 .....60745, 60763, 60766
174.....60745
177.....60745
178.....60745
179.....60745
180.....60745
350.....60226
381.....60226
383.....60226
384.....60226
385.....60226
386.....60226
387.....60226
390.....63100
392.....60226
Proposed Rules:
Ch. VI.....61251
821.....63438

50 CFR

17 .....60608, 60766, 61004, 61208, 61452, 61506, 63100, 63796
217.....63396
229.....61821
622 .....61826, 61827, 61939, 61989
648 .....61828, 61838, 62331, 62471, 63405, 63406
679.....61990, 62005
Proposed Rules:
17 .....60813, 61046, 61082, 61273, 61293, 61622, 61764, 62523, 62529, 62560, 63574, 63625
223.....63439
622.....62579

LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws**.

Last List October 18, 2013

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